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Case No: LC-2023-622

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00BE/LSC/2021/0375

17 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BUILDING SAFETY – LEASEHOLDER PROTECTION – qualifying lease – contribution condition – replacement of insulation and installation of fire stopping – whether cladding remediation – whether relevant measures – ss.119, 120, 122 and Sch, 8, Building Safety Act 2022 – appeal allowed

BETWEEN:

MR MARKUS LEHNER

Appellant

-and-

LANT STREET MANAGEMENT COMPANY LIMITED

Respondent

Flat 44, 4 Sanctuary Street,
Borough,
London SE1

Martin Rodger KC, Deputy Chamber President and Peter D McCrea FRICS FCIArb

25 March 2024

Dr Alfred Lehner represented the appellant
Ashley Pratt, instructed by Rradar, Solicitors, represented the respondent

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The following cases are referred to in this decision:

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2023] UKUT 271 (LC)

The Dunelm (1884) 9 PD 164

Triathlon Homes LLP v Stratford Village Development Partnership [2024] UKFTT 26 (PC); LON/00BB/HYI/2022/0018-22

1.

Introduction

1. This appeal is about the leaseholder protections provided by Schedule 8 of the Building Safety Act 2022.

2. Section 122 and Schedule 8 of the 2022 Act contain provisions designed to protect leaseholders under "qualifying leases" from liability to pay some or all of the service charges which would otherwise be due from them as their contribution towards costs connected with "relevant defects". The most comprehensive of these protections protects all leaseholders from liability to contribute towards the cost of "relevant measures" if their landlord was "responsible for" the relevant defect. Where the landlord satisfies a "contribution condition", "qualifying" leaseholders are protected from all liability to contribute towards the cost of relevant measures. Where the contribution condition is not satisfied, the qualifying leaseholder's liability is nevertheless limited to a permitted maximum. Qualifying leaseholders also have protection from any liability to contribute towards "cladding remediation" costs, and in respect of the cost of certain legal or other professional services

3. In this case the appellant, Mr Markus Lehner, owns the lease of Flat 44, at 4 Sanctuary Street, London SE1. The appeal concerns his liability, as leaseholder, to contribute towards the cost of removing and replacing combustible insulation and installing additional fire stopping in the cavities between the interior and exterior surfaces of the walls of certain parts of the building.

4. In a decision given on 12 April 2023, the First-tier Tribunal, Property Chamber ("the FTT"), determined that Mr Lehner was liable to pay £1,244.85 demanded on 8 February 2021 as a service charge contribution towards the cost of the insulation and fire-stopping work intended to be undertaken to the walls of the building. Mr Lehner's appeal against that decision is brought with the permission of this Tribunal; he was represented by his father, Dr Alfred Lehner, at the hearing of the appeal as he had been before the FTT.

5. The respondent to the appeal is Lant Street Management Co Ltd ("LSMC"), which was responsible for commissioning the works and is entitled to collect any service charges due. It is Mr Lehner's immediate landlord, although the capacity in which it originally joined in the lease of his flat was as the management company for the building. It was as management company that Mr Lehner named it as respondent to his application to the FTT for a determination under section 27A, Landlord and Tenant Act 1985, of his liability to contribute towards the costs of the proposed works. At the hearing of the appeal the respondent was represented by counsel, Mr Ashley Pratt, who did not appear before the FTT. Mr Veneik of the respondent's managing agents, Houston Lawrence, who had previously represented the company also attended the appeal.

Basic facts

6. Flat 44 is in Block A, 4 Sanctuary Street ("the Block"), one of three built by Wimpey in the early 2000's. The others are Block B, known as Isaac Way, and Block C, known as Gaitskell Way. The five-storey block is of concrete framed construction with flat roofs

and projecting concrete balconies. The main elevations are faced with brick, but in part, largely at the back of the balconies, include areas of cladding.

7. Mr Lehner purchased the long leasehold interest in Flat 44 on 26 July 2019. His lease was dated 23 June 2004, and had originally been granted by Wimpey to Gavin Fox and Iain Bryan Perry, with LSMC participating as management company. The term was 125 years less seven days from 1 January 2003 at an annual rent of £150. We have not seen a complete copy of the lease, but we assume that it adopted a conventional tri-partite structure, with LSMC covenanting to keep the building in repair in return for a service charge payable by the leaseholders.

8. On 28 September 2007, Wimpey granted an intermediate lease of the block to LSMC, for a term of 125 years from 1 January 2003. Shortly afterwards, on 5 October 2007, Damgate Freeholds Limited ("Damgate"), who we understand originally sold the land to Wimpey, exercised an option to reacquire the freehold interest in the block.

9. Following the Grenfell Tower fire of 14 June 2017 the safety of all modern high-rise buildings came under scrutiny. On 21 February 2018 the respondent obtained a fire risk assessment report, which assessed the Block's fire risk as low, but in October 2019 a further report recommended that the cladding and balconies be inspected by a specialist contractor. This was put in hand, and on 26 November 2019 Efectis UK/Ireland Ltd ("Efectis") recommended the replacement of the insulation behind the vertical cladding panels on the exterior of the Block and the addition of vertical cavity barriers between each flat.

10. In January 2020, the Ministry of Housing Communities & Local Government ("MHCLG") issued a document titled Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings (since withdrawn). After considering it, LSMC wrote to the leaseholders on 14 February 2020 indicating that it intended to carry out works to ensure the blocks complied with the MHCLG advice, and to ensure that the flats were mortgageable. The actions proposed involved (i) the appointment of a contractor to open up the cladding; (ii) a review of the base wall and fixtures by an engineer; (iii) the agreement of a suitable and compliant outline scope of works; (iv) to address identified breaches in respect of the cladding, insulation and party wall and fire breaks; and (v) to prepare a specification of the required works.

11. These works were put out to tender, and on 5 February 2021 leaseholders were notified that the total cost would be £211,119, of which £61,119 would be met from reserves. The amount due to be collected from the leaseholders was therefore £150,000.

12. On 8 February 2021, Mr Lehner received a demand for his contribution of £1,244.85. The demand included a statement for the purposes of sections 47 and 48, Landlord and Tenant Act 1987 that his landlord was Damgate Freeholds Limited.

13. By its decision of 12 April 2023, the FTT determined that Mr Lehner was liable to pay the sum demanded. He applied for permission to appeal but was refused by the FTT. Permission was subsequently granted by this Tribunal.

The Building Safety Act 2022

14. The 2022 Act is in six Parts which, as section 1(1) explains, contain provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings. Only Part 5 is concerned with leaseholder protections. Part 5 is supplemented by The Building Safety (Leaseholder Protections) (England) Regulations 2022 (as amended) ("the Leaseholder Protections Regulations").

15. Part 5 begins at section 116 which introduces sections 117 to 125 by explaining that, together with Schedule 8, they "make provision in connection with the remediation of relevant defects in relevant buildings".

16. Before looking at these complex provisions in detail we draw attention to the fact that in a number of places in Part 5 and in the regulations made under it, Parliament has made use of "deeming" provisions, or presumptions, by which particular facts are assumed to be true unless some condition is satisfied. Usually the relevant condition requires the landlord to take the initiative in providing relevant information, or in requesting that leaseholders provide relevant information known to them. The presumptions operate where the landlord has failed to take the required step, and generally have the effect that information which has not been supplied or requested is assumed to be favourable to leaseholders. Another way of looking at these presumptions is to see them as tools for displacing the usual burden of proof in relation to specific matters; ordinarily the person who wishes to rely on a particular fact is required to prove it, but where one of the presumptions applies certain facts will be assumed in favour of the leaseholder unless the landlord has taken the steps required to oust the presumption. We draw specific attention to this device because these provisions are a trap for unwary parties and decision makers, as this case will illustrate.

Key definitions

17. A "relevant building" is defined in section 117 and includes any self-contained building in England containing at least two dwellings which is at least 11 metres high or contains at least 5 storeys.

18. A "relevant defect" is defined in section 120(2), as follows:

> '"Relevant defect", in relation to a building, means a defect as regards the building that—
>
> (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
>
> (b) causes a building safety risk."

19. "Relevant works" are defined in section 120(3) and include works relating to the construction or conversion of the building concerned, provided it was completed in the "relevant period", that being the period of 30 years ending with the commencement of the section (on 28 June 2022).

20. A "building safety risk" is defined in section 120(5). In relation to a building, it means a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it.

21. In summary, therefore, any defect in a residential building over 11 metres or 5 storeys high, constructed between 1992 and 2022 which arises out of the original construction and causes a risk from the spread of fire or building collapse is likely to be a relevant defect for the purpose of the Part 5 leaseholder protections. Those protections are described in Schedule 8. They are detailed and complex so, after focusing on those which are relevant to this appeal, we will provide a suggested route through them which parties and decision makers may find useful in seeking to apply them.

22. Section 122 introduces Schedule 8, as follows:

> "122. Remediation costs under qualifying leases etc
>
> Schedule 8 —
>
> (a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and
>
> (b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it)."

23. Schedule 8 is titled "Remediation costs under qualifying leases etc" and most of its provisions apply only to service charges payable under a "qualifying lease". That expression is defined in section 119(2) as follows:

> "A lease is a qualifying lease if –
>
> (a) it is a long lease of a single dwelling in a relevant building,
>
> (b) the tenant under the lease is liable to pay a service charge,
>
> (c) the lease was granted before 14 February 2022, and
>
> (d) at the beginning of 14 February 2022 ("the qualifying time") –
>
> (i) the dwelling was a relevant tenant's only or principal home,
>
> (ii) a relevant tenant did not have owned any other dwelling in the United Kingdom, or
>
> (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease."

24. By paragraph 13 of Schedule 8 a lease which satisfies the conditions in paragraphs (a), (b) and (c) of section 119(2) will be treated as a qualifying lease unless the landlord has taken all reasonable steps to obtain a "qualifying lease certificate" from a tenant under the lease and no certificate has been provided. This is the first of the "deeming" provisions to which we have previously referred.

25. A qualifying lease certificate is one certifying that the condition in section 119(2)(d) was met in relation to the lease on 14 February 2022.

26. Schedule 8 affords protection to qualifying leaseholders against charges in respect of any "relevant measure" relating to a relevant defect. The definition of "relevant measure", an expression repeated throughout the leaseholder protections, is found in paragraph 1(1) of Schedule 8, as follows:

> ""relevant measure", in relation to a relevant defect, means a measure taken –
>
> (a) to remedy the relevant defect, or
>
> (b) for the purpose of –
>
> (i) preventing a relevant risk from materialising, or
>
> (ii) reducing the severity of any incident resulting from a relevant risk materialising;
>
> "relevant risk" here means a building safety risk that arises as a result of the relevant defect."

In summary, therefore, a measure will be a relevant measure if it is taken to remedy a relevant defect, or to diminish the harm which it might cause.

The paragraph 2 protection

27. The first of the protections provided by paragraph 2 of Schedule 8 is an exception to the general rule that the leaseholder protections are available only to the owners of qualifying leases. Paragraph 2 applies "in relation to a lease of any premises in a relevant building". It provides that no service charge is payable under such a lease in respect of a "relevant measure" relating to a relevant defect if the landlord under the lease on 22 February 2022 (the "qualifying time") or a superior landlord was "responsible for the relevant defect" or was "associated with" a person responsible for the relevant defect (paragraph 2(2)).

28. For the purpose of paragraph 2 a person will be taken to be "responsible for" a relevant defect (i.e. one arising out of the original construction or conversion of the building which creates a building safety risk) if they were the developer or undertook or commissioned the construction or conversion of the building, or they were in a joint venture with the developer (paragraph 2(3)). A "joint venture" includes a partnership (paragraph 1(1)), and a "developer" means "a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it" (paragraph 2(4)).

29. The circumstances in which one person will be "associated with" another person for the purpose of the 2022 Act are explained in section 121(2) to (5). It is not necessary to consider these provisions in detail in this appeal.

30. In summary, paragraph 2 of Schedule 8 provides for all leaseholders of premises in self-contained residential buildings of at least 11 metres or 5 storeys to have full protection from liability to pay service charges if their landlord or superior landlord on 22 February 2022 was the original developer of the building (or an associate) and the service charge

is payable for work to remedy or mitigate a defect in the building which gives rise to a risk from fire.

31. The paragraph 2 protection is the subject of another important deeming provision. Paragraph 14(2) permits the Secretary of State to make regulations providing that (in some or all cases) the condition in paragraph 2(2) is to be treated as being met unless the landlord under the lease provides a certificate to the leaseholder that complies with prescribed requirements.

32. Regulation 6 of the Leaseholder Protections Regulations is made pursuant to the power in paragraph 14(2). It makes provision for the contents of a certificate, referred to as a "landlord's certificate", which the current landlord is required to provide to leaseholders in specified circumstances. Those circumstances include when the current landlord becomes aware of a relevant defect not covered by a previous landlord's certificate. Regulation 6(1)(c) requires that the landlord's certificate be provided within four weeks of the landlord acquiring that knowledge.

33. The landlord's certificate is required to be in the form set out in Schedule 1 of the Leaseholder Protections Regulations and it must contain the detailed information and relevant documents identified in regulation 6. The consequence of a current landlord not providing a certificate in the prescribed form is specified in regulation 6(7) and is that "the condition in paragraph 2(2) of Schedule 8 to the Act is to be treated as met in accordance with paragraph 14(2) of Schedule 8 to the Act". In other words, if the current landlord has not complied with the requirement to provide a landlord's certificate, it is taken to be responsible for the defect for the purpose of paragraph 2, with the result that no service charges will be payable in respect of relevant measures.

34. The Leaseholder Protections Regulations came into force on 20 July 2022, 17 months after the demand for the disputed service charge in this case but 9 months before the FTT made its decision that the charge was payable. A landlord's certificate was first provided to Mr Lehner a few days before the hearing of this appeal.

The paragraph 3 protection

35. The first of the protections available only to qualifying leaseholders is provided by paragraph 3 of Schedule 8. By paragraph 3(1), no service charge is payable under a qualifying lease in respect of a relevant measure relating to any relevant defect if the landlord under the lease on 14 February 2022 ("the qualifying time") met the "contribution condition". The contribution condition is that the landlord group's net worth at the qualifying time was more than N x £2m, where N is the number of relevant buildings of which the landlord or a member of the landlord group was, at the qualifying time, a landlord (paragraph 3(2)).

36. The contribution condition is also subject to an important evidential presumption. By paragraph 14(1) of Schedule 8, the contribution condition is to be treated as having been met by the person who was the landlord at the qualifying time (the "relevant landlord") unless the landlord under the lease provides the tenant with a certificate, complying with any prescribed requirements, and stating that the relevant landlord did not meet the

condition. The landlord's certificate provided for by regulation 6 of the Leaseholder Protections Regulations is required to deal with this issue and to include confirmation whether or not the relevant landlord met the contribution condition.

37. In this appeal the parties disagree over a fundamental question as to the identity of the relevant landlord on 14 February 2022. We will return to that issue shortly.

The paragraph 4 protection - low value leases

38. No service charge is payable under a qualifying lease in respect of relevant measures relating to any relevant defect if the value of the lease on 14 February 2022 (determined in accordance with paragraph 6 of Schedule 8 and any regulations made under the power it confers) fell below certain limits (those limits are £325,000 if the premises are in Greater London and £175,000 if they are elsewhere.

The paragraph 8 protection – cladding remediation

39. Paragraph 8 of Schedule 8 says this:

> "8. No service charge payable for cladding remediation
>
> (1) No service charge is payable under a qualifying lease in respect of cladding remediation.
>
> (2) In this paragraph "cladding remediation" means the removal or replacement of any part of a cladding system that—
>
> (a) forms the outer wall of an external wall system, and
>
> (b) is unsafe."

40. This further protection is afforded only to qualifying leaseholders and applies only to the cost of cladding remediation, as defined in paragraph 8(2). In this case the FTT decided that it did not apply to the work carried out by LSMC because it did not involve "cladding remediation". Whether that conclusion was correct is the subject of one of Mr Lehner's grounds of appeal.

The paragraph 9 protection – legal or professional services

41. Paragraph 9 of Schedule 8 provides protection against service charges which would otherwise be payable in respect of legal or other professional services relating to the liability or potential liability of any person incurred as a result of a relevant defect (including the cost of obtaining legal advice, or in connection with proceedings before a court or tribunal, arbitration or mediation). This protection has already been considered by the Tribunal in the first appeal determined under the 2022 Act, *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC).

Protections in other cases – paragraphs 5, 6 and 7

42. Where none of the other protections apply, paragraphs 5, 6 and 7 of Schedule 8 provide a degree of protection from service charges otherwise payable in respect of relevant measures relating to relevant defects. These protections are in the form of a limit on the total payable in respect of charges over a period beginning up to five years before a disputed demand and, separately, an annual limit. Each limit is determined by reference to a permitted maximum which varies according to the value of the qualifying lease on 14 February 2022. If the value of the lease was less than £1 million, the permitted maximum is £15,000 where the premises are in Greater London and £10,000 if they are elsewhere. If the value of the lease (wherever the premises are located) was between £1 million and £2 million, the permitted maximum is £50,000, or if greater than £2 million, £100,000. Paragraph 6 confers a power to make regulations concerning the determination of value and also deals with shared ownership leases.

Leaseholder protection – a suggested approach

43. The complexity of the new statutory provisions is obvious, but it is essential that they be grappled with in any case where liability to pay a service charge relating to building safety defects is in issue. It was suggested by Mr Pratt that the FTT had not been required to consider any issue under the Act which had not specifically been raised by Mr Lehner, but that is a misunderstanding of the role of the FTT, which was to determine the amount of the service charge payable. It is incumbent on the FTT to consider whether there is some statutory provision (of which the parties may be unaware) which affects the answer to that question. That responsibility is particularly engaged where the parties' rights may be affected by new or complex legislation, such as the 2022 Act.

44. It may assist in other cases if we suggest a sequence of questions which a decision maker should address when determining whether service charges are payable in respect of work to which the leaseholder protections may apply. We identify the headline issues below and provide a fuller list of the questions and sub-questions which may arise in the appendix to this decision. The headline list addresses the issues in this appeal and additional questions may need to be considered in other cases.

45. The headline questions in this appeal seem to us to be these:

<u>Step 1 – preliminary conditions</u>

1. Is the building a relevant building (section 117)?
2. Does the disputed service charge relate to a relevant defect (section 120)?
3. Is the disputed service charge a charge in respect of a relevant measure relating to the relevant defect (paragraph 1(1), Schedule 8)?

<u>Step 2 – paragraph 2 protection</u>

4. Did the disputed service charge become payable after 20 July 2022?

5. If so, did any of the circumstances listed in regulation 6(1), Leaseholder Protections Regulations occur between 20 July 2022 and the date the disputed service charge became payable?

6. If so, did the current landlord provide a landlord's certificate which complied with regulation 6? If not, regulation 6(7) applies, the paragraph 2(2) condition is taken to be satisfied and the service charge is not payable.

7. If the current landlord provided a landlord's certificate, or if the disputed service charge became payable before 20 July 2022, was the landlord or any superior landlord on 14 February 2022 responsible for the relevant defect, or associated with a person responsible for the relevant defect? If so, the paragraph 2(2) condition is satisfied, and the service charge is not payable. If the landlord or any superior landlord or an associate was not responsible for the defect, the paragraph 2 protection does not apply.

<u>Step 3 – qualifying lease</u>

8. Does the lease satisfy the conditions in section 119(2)(a) to (c)?

9. If so, has the landlord taken all reasonable to obtain a qualifying lease certificate from the tenant for the purpose of paragraph 13 of Schedule 8? If not, the lease is to be treated as a qualifying lease and the protections in paragraphs 3 to 9 of Schedule 8 may apply.

10. If the landlord has taken all reasonable steps to obtain a qualifying lease certificate, and either no certificate has been provided, or the leaseholder has certified that the conditions in section 119(2)(d) were met, were those conditions in fact met? If so, the lease is a qualifying lease and the protections in paragraphs 3 to 9 may apply. If not, none of those protections apply.

<u>Step 4 – paragraph 3 protection – the contribution condition</u>

11. Has the landlord provided a certificate to the leaseholder that the person who was the landlord on 14 February 2022 (the relevant landlord) did not meet the contribution condition? If not, the contribution condition is taken to be satisfied and no service charge is payable (paragraph 14(2) and regulation 6(7)).

12. If the landlord did provide such a certificate, did the relevant landlord in fact meet the contribution condition on 14 February 2022? If so, no service charge is payable (paragraph 3(1)).

<u>Step 5 – paragraph 4 protection - low value leases</u>

13. On 14 February 2022 was the value of the qualifying lease less than £325,000 (Greater London) or less than £175,000 (elsewhere)? If so, no service charge is payable.

Step 6 – paragraph 8 protection – cladding remediation

14. Do the relevant measures in respect of which the service charge is claimed comprise the removal or replacement of any part of a cladding system?

15. If so, (a) does the cladding system form the outer wall of an external wall system, and (b) was the cladding system unsafe? If so the paragraph 8 protection applies, and no service charge is payable in respect of the removal or replacement works.

Step 7 – paragraphs 5, 6 and 7 – other protections

16. If after considering the previous steps the FTT is satisfied that a service charge is payable in respect of relevant measures, is that sum capped because it exceeds the maximum payable under a qualifying lease permitted by paragraph 5 and 6 of Schedule 8, or the annual limit permitted by paragraph 7?

The FTT's decision

47. The FTT was required to determine applications by Mr Lehner and by the leaseholders of another flat in the development, Mr Pechev and Mrs Pecheva. It determined that the Pechevs were liable to pay £1,562.85 and that Mr Lehner was liable to pay £1,244.85 towards the cost of the work recommended by LSMC's building safety consultant, Efectis. Mr Lehner was partially successful in his application, in that he was found not to be liable to contribute an additional sum as an administration charge and obtained an order under section 20C, Landlord and Tenant Act 1985 providing protection against any service charge liability relating to the costs of the proceedings. Both Mr Lehner and the Pechevs applied for permission to appeal, but only Mr Lehner complied with conditions set by the Tribunal and only he became entitled to pursue this appeal against the FTT's decision.

48. The FTT recorded in its decision that both when giving procedural directions and at the hearing it had suggested to Mr Lehner and the Pechevs that, because of the complexity of the 2022 Act, it may be preferable for them not to rely on its provisions but effectively to reserve their position until another occasion. It was said that adopting that approach would not prejudice their right to rely on the leaseholder protections at a later stage. We do not consider that to have been correct advice, and we do not see how it would have been open to Mr Lehner to rely on those protections at a later date to defeat a claim for service charges which the FTT had already decided he was liable to pay (we express no view on the effect of a determination of liability under section 27A, Landlord and Tenant Act 1987 on a subsequent claim for a remediation contribution order under section 124, 2022 Act).

49. The FTT was quite right to warn of the complexity of the 2022 Act and prudent to suggest that the leaseholders seek legal advice, but such advice is not always available at proportionate expense. It is for the FTT to determine in every case whether the leaseholder protections apply, and the burden on it is particularly heavy where one or both of the parties is unrepresented.

50. The FTT identified seven issues, only the last of which concerned the impact of the 2022 Act. In addressing one of the earlier issues it quoted what it referred to as "the best description of the works", taken from an email from the managing agents of 14 February 2020. According to that description the works involved:

> "(i) The removal of the cladding and insulation, replacing the insulation with material that meets current standards. It seems that there was no need to replace the cladding which was reinstated after the insulation had been upgraded.
>
> (ii) The inspection of the current cavity barrier to establish if any are in place and install a safety barrier (if required) between each dwelling. It seems that it was necessary to install these safety barriers."

Although the FTT did not explain what it meant by a "cavity barrier" or a "safety barrier", we understand those terms to refer to the same building component, namely an intumescent strip installed in the gap between the cladding system and the concrete face of the building which is either a 'closed state' cavity barrier, which forms a tight seal between cavities within the cladding system, or an 'open state' barrier which allows ventilation and drainage but is designed to expand on exposure to heat and thereby to seal that gap and prevent the passage of fire between floors and apartments.

51. Having decided that the leaseholders were liable under the terms of their leases to contribute towards the cost of the work, and that LSMC had complied with its obligation to consult on the works, the FTT arrived finally at the issue with which this appeal is concerned. It recorded the first submission of counsel for LSMC as being that the protections in paragraphs 3, 4 and 8 of Schedule 8 apply only to "qualifying leases". The leaseholders were said to have adduced no evidence that their leases were qualifying leases. It was also asserted that neither LSMC nor Damgate was a developer, nor were they associated with the developer (Wimpey) on the relevant date of 14 February 2022. It is not clear to us whether there was any evidence about these matters, or whether they simply asserted by counsel (but in at least one respect they are inconsistent with the landlord's certificate served by LSMC just before the hearing of the appeal).

52. At paragraph 94 of its decision the FTT addressed the contribution condition in paragraph 3 of Schedule 8, as to which it said this:

> "A landlord meets a "contribution condition" when the landlord's net worth exceeds £2 million in respect of each of the buildings of which it is landlord. The ground rents of Sanctuary Street are £150 per annum. The Tribunal therefore accepts that it is highly unlikely that the Respondent [LSMC] meets the criteria of £2 million per year."

The FTT did not refer to paragraph 14(2) of Schedule 8 or to the potential significance of the fact that no landlord's certificate complying with regulation 6 of the Leaseholders Protections Regulations had been served.

53. The FTT next quoted paragraph 8 of Schedule 8 and noted that cladding remediation involved the removal or replacement of part of cladding system which forms the outer

wall of an external wall system, and which is unsafe. At paragraph [97] it recorded and agreed with LSMC's submission that neither of these requirements was satisfied, as follows:

> "(i) The fire remedial works did not involve the "removal or replacement" of any part of a cladding system. The works rather involved the replacement of the insulation and the addition of a cavity barrier. The cladding system itself was neither removed nor replaced. We accept this argument.
>
> (ii) The cladding system was not itself unsafe. The Efectis Report rather identified the lack of cavity barriers behind the aluminium cladding system as unsafe. This did not require any removal or replacement of part of the cladding system and was therefore not "cladding remediation" for the purposes of this paragraph. Again, we accept this argument."

54. Finally, in paragraph [98] the FTT said that it agreed with LSMC that none of the Schedule 8 protections applied and added, for good measure:

> "Neither have the Applicants established that their leases are "qualifying leases" for the purposes of paragraphs 3, 4 and 8."

In making that observation, the FTT did not refer to paragraph 13 of Schedule 8 or to the potential significance of the fact that no landlord's certificate had been served.

Additional facts concerning a landlord's certificate and responsibility for the defects

55. Until a few days before the hearing of the appeal, Mr Lehner was unaware of the grant of the intermediate lease of the Block by Wimpey to LSMC in 2007 and understood that his immediate landlord was the freeholder of the Block, Damgate, and that LSMC was the management company. The disputed service charge demand of 8 February 2021, and all other demands which Mr Lehner has received, appeared to confirm that understanding. They each referred to sections 47 and 48, Landlord and Tenant Act 1987 and gave the address of Damgate as the address at which notices in proceedings may be served on the landlord. Section 47 requires that demands served on a tenant must include the name and address of the landlord.

56. A landlord's certificate under regulation 6 of the Leaseholder Protections Regulations is required to confirm whether the landlord under the lease on 14 February 2022 met the contribution condition. The earliest occasion on which any landlord's certificate was served on Mr Lehner was shortly before the hearing of the appeal. The facts stated in that certificate are different from those stated in the service charge demand.

57. The certificate is in the form prescribed by the Leaseholder Protections Regulations. It was given by LSMC and signed by its director, Mr Meads, on 20 March 2024. It begins by identifying the lease to which it relates, which is Mr Lehner's lease of Flat 44. It then states that LMSC was the landlord on 14 February 2022 (and therefore the "relevant landlord") and that it is the current landlord. Damgate is stated to have been a superior

landlord on 14 February 2022. The certificate also explains that Wimpey had granted an intermediate lease to LSMC in 2007, and that Damgate had then exercised its option and completed the purchase of the freehold on 5 October 2007 and has held it ever since.

58. The second part of the certificate is concerned with the "developer criteria" and is directly relevant to the paragraph 2 protection. It begins by identifying the relevant defect to which the information provided relates, as "the installation of cavity barriers and fire stops in the metal cladding and glazing systems at the building"**.** The prescribed form then contains four statements about the relevant defect, only one of which has been completed in this certificate. It states:

> "On 14th February 2022 at least one superior landlord was responsible for the relevant defect or was associated with a person responsible for a relevant defect.
>
> The superior landlords responsible for the defect are Damgate Freeholds Limited ("DFL")"

59. The prescribed form does not ask for an explanation of the statement of responsibility, but in this case LSMC chose to add information justifying its conclusion that Damgate is a person responsible for the defects. It described Damgate as responsible on the basis that it may have been in a joint venture with the developer or may itself have been a developer. Thus, Damgate "may have sold the site" to Wimpey for the purpose of the development and been granted an option to reacquire the freehold reversion at a predetermined price once all of the flats had been sold. LSMC stated that it did not have copies of the relevant documents, but that if its "beliefs" were correct, it considered the question to be determined would be whether Damgate "participated in the undertaking or commissioning of the development".

60. During the hearing of the appeal we were shown an official copy of the register of title for the leasehold interest in the Block created by the intermediate lease, showing the state of the Land Register on 1 December 2022. This confirmed that LSMC has been the landlord of the occupational leaseholders of the flats in the building since 2007, including on 8 February 2021 when the disputed service charge demand was made. Dr Lehner disputed the suggestion that LSMC could be his son's landlord, but the documents which we were shown (but which, it appears, were not provided to the FTT) establish that that is the case.

61. The demand of 8 February 2021 naming Damgate as Mr Lehner's landlord was therefore inaccurate. Section 47(2), Landlord and Tenant Act 1987, provides that where the information concerning the name and address of the landlord required by section 47(1) is not contained in a written demand given to a tenant, any part of the amount demanded which consists of a service charge or an administration charge is treated as not being due from the tenant at any time until the required information is provided by the landlord. It follows that the sum of £1,244.85 demanded on behalf of LSMC was not payable. Nor will it be payable (if at all) until a demand correctly identifying the landlord is provided to Mr Lehner (the landlord certificate is not such a demand).

62. LSMC's status as landlord at the date of the service charge demand is established by credible evidence (in the form of the official copy of the register of title) which it has produced for the first time at the hearing of the appeal and relies on. There is no reason why we should not take account of that material.

63. LSMC's failure to comply with section 47(1), 1987 Act is enough to dispose of the appeal. It enables us to make a determination under section 27A, Landlord and Tenant Act 1985 at this stage of the analysis that nothing is currently payable in respect of the works to the building which gave rise to the disputed demand of 8 February 2021 in which Damgate was wrongly identified as landlord. But, as LSMC remains entitled to serve a compliant demand, it is appropriate for us to consider the other issues in the appeal.

64. We can now consider how the 2022 Act applies on the facts of this case.

Applying the suggested steps to the facts of this appeal

Step 1 – preliminary conditions

65. *Relevant building (section 117)* - It is not disputed that 4 Sanctuary Street is a relevant building (the possibility that the development may comprise more than one building was alluded to by Mr Pratt but not developed in argument). It is self-contained, contains at least two dwellings, and is both at least 11 metres high and has at least five storeys above ground level.

66. *Relevant works and relevant defect (section 120)* - The disputed service charge is claimed in respect of the works found by the FTT to comprise the removal of the cladding and insulation, the replacement of the insulation with material meeting current standards, and the reinstatement of the cladding using the original panels. While the cladding was off the building the exposed structure was inspected to establish if cavity safety barriers were in place between each dwelling and barriers were installed where they had not originally been provided.

67. The insulation which was replaced dated from the original construction of the Block, and the risks associated with its use therefore arose as a result of something used in connection with the original construction; the risks associated with the absence of cavity barriers arose as a result of things not done at the same time. All of those works were completed within the period of 30 years ending on 14 February 2022 and they were therefore relevant works within the meaning of section 120(3)(a).

68. The leaseholders did not contest the LSMC's justification for the works, which was that the absence of cavity barriers in the original construction, combined with insulation of the type originally employed, gave rise to an unacceptable building safety risk, namely the risk to the safety of people from the spread of fire. The defects to which the disputed service charges relate are therefore relevant defects for the purpose of sections 122 to 125 and Schedule 8, as defined in section 120.

69. *Relevant measure (paragraph 1(1), Schedule 8)* – The purpose of the works was to remedy the relevant defects, and the works were therefore relevant measures for the purpose of Schedule 8.

Step 2 – paragraph 2 protection

70. The paragraph 2 protection applies if the relevant landlord (i.e. the landlord or any superior landlord on 14 February 2022) was responsible for the defects or was associated with a person responsible for the defects. The starting point in considering whether that condition is met is paragraph 14(2) of Schedule 8, and regulation 6(7) of the Leaseholder Protections Regulations made pursuant to it, by which any person who was a relevant landlord on 14 February 2022 is to be treated as having been responsible for the relevant defect if they have not provided a landlord's certificate which complies with regulation 6.

71. The Leaseholder Protections Regulations, and the obligation to provide a landlord's certificate, came into force on 20 July 2022. The obligation does not apply in all circumstances, but only in those identified in regulation 6(1)(a) to (e). Regulation 6(1)(a) creates the obligation "when the current landlord makes a demand to a leaseholder for the payment of a remediation service charge". The demand relied on by LSMC in this case was dated 8 February 2021, before the Regulations came into force, so there was no requirement on it to have given a landlord's certificate within four weeks of making that demand. It does not appear to us to be possible to treat the condition in paragraph 2(2) of Schedule 8 as being satisfied on account of a failure to provide a landlord's certificate, unless the obligation to provide such a certificate was in force when the relevant demand was made.

72. It was not argued before us that, after the Leaseholder Protections Regulations came into force, a relevant landlord then came under an obligation to serve a landlord's certificate in respect of any demand which had been made before that date. Regulation 6(1)(a) would not appear to have that effect, but it could be argued that regulation 6(1)(c) might. That requires that the current landlord must provide a certificate within four weeks of becoming aware of a relevant defect not covered by a previous landlord's certificate. Our provisional view is that the language is not apt to impose a duty to provide a certificate on a landlord who was already aware of a defect at a time, before the Regulations took effect, when the demand was made. We prefer to express no concluded view on that point, because it was not argued and because (as will become apparent) it will not be determinative, and to leave it open for future consideration if it arises.

73. Subject to the possibility of an argument based on regulation 6(1)(c), service charges demanded before 20 July 2022 would appear therefore to be outside the scope of the deeming effect of regulation 6(7) unless one of the other circumstances in regulation 6(1) giving rise to the duty to provide a landlord's certificate was satisfied after that date. Regulation 6(1)(b) and (d) respectively require a certificate within four weeks of the landlord (b) receiving notification from the leaseholder that the lease is to be sold, or (d) being requested to provide one. Neither of those conditions was satisfied in this case after the Regulations took effect.

74. We therefore conclude that, when the matter came before the FTT, regulation 6(7) was not engaged and the absence of a landlord's certificate did not affect the availability of the paragraph 2 protection in relation to the demand made on 8 February 2021.

75. Having decided that the condition in paragraph 2(2) cannot be treated as being satisfied by virtue of any deeming effect of regulation 6(7), it is next necessary to consider whether it was established on the facts (independently of any statutory presumption) that the landlord on 14 February 2022 was responsible for the defects or was associated with a person responsible for the defects; if so, the paragraph 2(2) condition will be satisfied and no service charges will be payable in respect of the remediation of relevant defects.

76. Where one is required, the absence of a certificate stating whether or not the relevant landlord was responsible for the relevant defect or was associated with a person who was responsible, gives rise to a presumption of fact, but the certificate itself is not proof of the facts which it certifies. Where a compliant certificate has been provided the presumption that the contribution condition is met is dispensed with, but the facts remain to be determined if they are in dispute. If a leaseholder challenges statements made in an apparently compliant certificate, it is for them to demonstrate that the relevant landlord or an associate was responsible for the relevant defect.

77. Similarly, if there was no obligation to provide a certificate at the time a service charge became payable the absence of a certificate will not give rise to any presumption that the paragraph 2(2) condition is satisfied. But the absence of the presumption will not prevent a leaseholder from proving that the landlord or a superior landlord or their associate was in fact responsible for the relevant defect.

78. Nor do we think a leaseholder who contests a service charge demanded before the Leaseholder Protections Regulations came into force on 20 July 2022 is prevented from requesting a certificate under regulation 6(1)(d), which may lead to the presumption being engaged if the certificate is not supplied. The Tribunal determined in *Hippersley Point* (at [119] to [170]) that the paragraph 9 leaseholder protection applied to service charges demanded before the commencement of the 2022 Act liability for which was determined after commencement. In *Triathlon Homes LLP v Stratford Village Development Partnership* [2024] UKFTT 26 (PC), the First-tier Tribunal concluded that a remediation contribution order under section 124, 2022 Act could be made in respect of costs incurred before the commencement of the Act. Similarly, in principle, we consider that the other leaseholder protections are available in respect of costs incurred before the commencement of the 2022 Act.

79. Since the FTT made its decision LSMC has provided a landlord's certificate in which it has stated that the freeholder, Damgate, is, or may be, "responsible for" the relevant defects by virtue of its original contract of sale with Wimpey and the related option to reacquire the freehold reversion at a predetermined price once all of the flats had been sold. Wimpey was the developer and was therefore responsible for the relevant defects by virtue of paragraph 2(3)(a), but for this purpose Damgate could also be responsible for the same defects on one of two alternative grounds: it will itself have been the "developer" within the meaning in paragraph 2(4) if it "commissioned the construction or conversion of the building … with a view to granting or disposing of interests in the

building or parts of it"; it will also be responsible under paragraph 3(2)(a) if its arrangement with Wimpey amounted to a "joint venture".

80. The material is not available to enable us to make a determination whether Damgate was a developer or whether its relationship with Wimpey was a "joint venture" but we are satisfied that it is not necessary for us to consider those questions. This is an appeal against the decision of the FTT and falls to be determined on the evidence provided to it. No application has been made to admit additional evidence, and the certificate itself is not evidence of the arrangements to which it refers. For the reasons already given concerning section 47, 1987 Act, this issue will not be determinative of the appeal. We therefore say nothing more about the effect of the landlord's certificate provided by LSMC shortly before the appeal.

81. On the material provided to the FTT it was entitled to find, at paragraph 93, that neither LSMC nor Damgate was a developer of the Block, or associated with the developer, Wimpey. On that basis it was therefore correct to conclude that the paragraph 2 protection was not available to Mr Lehner.

Step 3 – qualifying lease

82. Mr Lehner's lease was granted before 14 February 2022 for a term of more than 21 years and includes a service charge. It therefore satisfies the first three of the four conditions in section 119(2) and may be a qualifying lease and eligible for the remaining leaseholder protections. Whether it is or not will depend on the fourth condition, section 119(2)(d), which concerns the relationship between the leaseholder and the flat and the extent of the leaseholder's other property interests. The text of section 119(2)(d) has already been reproduced above (at paragraph 23). It requires either that the dwelling must have been the leaseholder's only or principal home on 14 February 2022, or that on the same date the leaseholder did not own any other dwelling in the UK or owned no more than two dwellings in the UK apart from under the lease in question. These conditions are not as clear as they might be but they allow for three alternative conditions, any one of which may be satisfied to secure the status of qualifying lease (although, the second alternative seems to be entirely included within the third and would appear to be redundant).

83. The FTT dealt with the question of whether Mr Lehner's lease was a qualifying lease by accepting the submission of LMSC's counsel that he had produced no evidence to support a finding that it was. That was an important conclusion because, if it was correct, it would mean that none of the leaseholder protections from paragraph 3 onwards would be available to him.

84. The FTT's approach to this issue was clearly wrong and Mr Pratt conceded that it should have determined that the lease was a qualifying lease. That concession was correctly made. From the copy of Mr Lehner's lease it was apparent that the conditions in section 119(2)((a), (b) and (c) were satisfied (i.e. the lease was a long lease of a single dwelling which included a service charge and had been granted before 14 February 2022). Paragraph 13 of Schedule 8 therefore applied, and the lease was to be treated as a qualifying lease unless the landlord "has taken all reasonable steps (and any prescribed

steps) to obtain a qualifying lease certificate from a tenant under the lease, and … no such certificate had been provided" (paragraph 13(2)).

85. Once again, we think it irrelevant that the demand relied on by LSMC was dated 8 February 2021, before the 2022 Act came into force. For the reasons explained in *Hippersley Point* and *Triathlon,* the leaseholder protections have effect in relation to service charges which became payable before the commencement of the Act. It was therefore necessary for the FTT to consider whether LSMC had taken reasonable steps to obtain a qualifying lease certificate from Mr Lehner. Had it done so it would have discovered that no such steps had been taken and it should therefore have concluded, in accordance with paragraph 13(2), that Mr Lehner's lease must be treated as a qualifying lease.

86. We would add that there is now evidence before this Tribunal, which was not provided to the FTT, that Mr Lehner owns no other property in the UK, and that his lease is a qualifying lease by virtue of satisfying the section 119(1) conditions, and not simply by virtue of paragraph 13(2) of Schedule 8. Mr Lehner had authorised his father, Dr Lehner, to speak on his behalf at the FTT hearing, and it is surprising that the FTT did not ask him whether his son lived at the flat. The documents which were before the FTT showed that LSMC communicated with Mr Lehner at the flat.

<u>Step 4 – paragraph 3 protection – the contribution condition</u>

87. The effect of paragraph 3 of Schedule 8 is that no service charge is payable under a qualifying lease in respect of a relevant measure where the landlord at the qualifying time met the contribution condition. The first step in determining whether this protection is available is to consider whether the presumption that the condition is met in paragraph 14(1) applies. The presumption applies unless the landlord provides a certificate to the tenant, complying with any prescribed requirements, that the person who was the landlord on 14 February 2022 (the relevant landlord) did not meet the contribution condition. If the presumption applies, it is not necessary to consider whether the qualifying condition was in fact met.

88. The FTT's treatment of the contribution condition was comprised in paragraph 94 of its decision, which we have quoted above, and its conclusion that LSMC did not meet the condition was based entirely on the fact that the ground rents of each individual flat was only £150 a year. It did not consider the effect of the paragraph 14(1) presumption.

89. Whether the paragraph 14(1) presumption applies in this case is an issue on which we did not receive detailed argument. We have explained (at paragraph 71 above) that we do not consider that a landlord can be said to have failed to provide a landlord's certificate for the purpose of paragraph 14(2) when the Leaseholder Protections Regulations were not in force at the time the relevant demand was made. That is because the requirement to provide a certificate within four weeks of a demand was created by regulation 6(1)(a) and cannot be said to have been breached when the regulation was not yet in force. But the paragraph 14(1) presumption is expressed in different terms and does not depend on the making of any regulation. It may be that the making of a regulation which requires a landlord's certificate dealing with the

contribution condition only when one of the circumstances described in regulation 6(1) has occurred, and the reference in paragraph 14(1) to a certificate "complying with any prescribed requirements", means that the presumption only applies where the demand was made after the prescribed requirement came into force. But we are not satisfied that an alternative interpretation could not properly be given to paragraph 14(2), requiring a certificate dealing with the contribution condition notwithstanding that there was no occasion to serve a landlord's certificate because none of the conditions in regulation 6(1) had occurred since the Leaseholder Protections Regulations came into force.

90. Because the contribution condition is not determinative of the appeal, and because the issue is a tricky one on which we have not heard proper argument, we prefer to say nothing further about it.

91. Had the FTT found that the lease was a qualifying lease and that the paragraph 14(1) assumption was engaged so that the contribution condition must be taken to have been satisfied, the proper conclusion would have been that the paragraph 3 protection applied and that no the disputed service charge was not payable (because it was in respect of relevant measures relating to relevant defects). If the presumption did not apply the FTT would have been entitled to conclude that the contribution condition was not satisfied and that the paragraph 3 protection did not apply.

<u>Step 5 – paragraph 4 protection - low value leases</u>

92. It was not suggested by Dr Lehner that the value of his son's lease on 14 February 2022 was less than £325,000 and it is clear that the paragraph 4 protection is not available in this case.

<u>Step 6 – paragraph 8 protection – cladding remediation</u>

93. By paragraph 8 of Schedule 8, no service charge is payable under a qualifying lease in respect of "cladding remediation". The provision is quoted in full at paragraph 39 above and gives rise to the question whether the service charge is claimed in respect of the removal or replacement of any part of a "cladding system" which formed "the outer wall of an external wall system", and which was unsafe? If so, the service charge is not payable in respect of the removal or replacement works. To the extent that the relevant measures comprise work other than the removal or replacement of any part of the cladding system, the protections in paragraphs 5, 6 and 7 may apply to the cost of that part of the work.

94. The FTT's conclusion on this issue was that the removal of the external cladding panels, the stripping out of the original insulation, its replacement with new insulation, the installation of fire safety barriers where these were missing, and the reinstatement of the original cladding panels, was not "cladding remediation". It accepted the submission on behalf of LSMC that although the works "involved the replacement of the insulation and the addition of a cavity barrier [t]he cladding system itself was neither removed nor replaced". Its approach therefore involved distinguishing between the "cladding system" on the one hand, and the insulation and cavity barriers behind the external skin on the other.

95. From the photographs and drawings we were shown we understand that most of the façade of the Block comprises brickwork panels and glazed windows, with only a few areas on each floor, mostly around balconies and above and between some of the windows, being fitted with cladding. Houston Lawrence Professional Services, who prepared the tender documents for the remediation works, included a diagram illustrating the current construction of the façade of the building. From that diagram we understand that in those locations where cladding was present, it was fitted into openings in the façade, rather than being fitted on to a continuous structural component, or as a facing on a concrete panel or beam. The fixing arrangement is not clear from the material we were shown, but the composition of the cladding in these parts of the Block is. It comprised ten layers in all, namely, from its outer face, a 2mm aluminium cladding panel, behind which were layers successively comprising an air gap of 37mm, a 6mm sheet of fibre board, an air gap of 33mm, a first 25mm Kingspan xps insulation board, a 10mm air gap, a second 25mm Kingspan xps insulation board, a 12.5mm sheet of plasterboard, an air gap of 100mm, and a final 12.5mm sheet of plasterboard, the internal face of which formed part of the interior wall of the adjacent room to which we assume one or more finishing coats of plaster or other coating would be applied.

96. In addition to the installation of fire-stopping, the remedial works undertaken to the Block removed and replaced some of these layers, reducing the original ten to eight. The aluminium cladding panel was taken off, the fibre board was removed and replaced with 6mm Magply board, and the two layers of xps insulation were removed and replaced with 75mm of Rockwall slab. The aluminium cladding panel was then reinstalled.

97. Dr Lehner submitted that the "cladding system" comprised the whole of the original construction between the external face of the aluminium cladding panel and the internal surface of the last layer of plasterboard. It therefore included the Kingspan insulation boards with the result that the replacement of that insulation was "cladding remediation" and was within the scope of the paragraph 8 protection.

98. Mr Pratt submitted that the "cladding system" comprised only the 2mm aluminium cladding sheet which formed the outermost skin of the Block in these locations. Alternatively, even if the insulation and other components behind the aluminium cladding could be considered part of a "cladding system", they did not form the "outer wall" of that system and so their replacement was not "cladding remediation" within the meaning of paragraph 8(2).

99. We understand "cladding" to refer to material attached to the structure of a building to provide a protective or decorative outer skin. But the expression with which we are concerned is not "cladding", but "cladding system".

100. The 2022 Act contains no definition of a "cladding system", but we have no doubt that the FTT's narrow interpretation of that expression was wrong. We have reached that conclusion for the following reasons.

101. First, the reference to a "cladding system" is clearly not intended to be limited simply to a single building component such as the final layer of cladding panels visible on the

facade of a building. Any "system" has a number of components, and each component is within the scope of paragraph 8(2): cladding remediation comprises the removal of replacement of "any part of a cladding system".

102. Secondly, where an expression is used in a statute dealing with a technical subject, such as fire safety, it is legitimate to consider how that expression is usually understood in that context. In *The Dunelm* (1884) 9 PD 164, at 171, Brett MR said:

> "My view of an Act of Parliament which is made applicable to a large trade or business is that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing."

103. We are aware that the expression "cladding system" is often used in technical literature concerned with fire safety in a way which includes the layers of insulation commonly found behind the outermost sheet of cladding material. For example, in the prospectus for the Building Safety Fund published by the Department for Levelling Up, Housing and Communities in May 2021, a footnote on page 11 explains that:

> "A cladding system includes the components that are attached to the primary structure of a building to form a non-structural external surface. The cladding system includes the weather-exposed outer layer or 'screen', fillers. Insulation, membranes, brackets, cavity barriers, flashing, fixings, gaskets, and sealants."

104. On 1 May 2024 the RICS updated its guidance to surveyors engaged to certify that the safety of a building's external wall system has been assessed. The publication addresses the question 'What is an external wall system?' and advises that 'The external wall system (EWS) is made up of the outside wall of a residential building, including cladding, insulation, fire break systems, etc."[1]

105. The RICS guidance also makes reference to the British Standards Institution code of practice BSI PAS9980:2022 – *Assessing the external wall fire risk in multi-occupied residential buildings*. This defines "cladding" at paragraph 3.1.4, and includes an explanation of a cladding system:

> "cladding
>
> system of one or more components that are attached to, and might form part of the weatherproof covering of, the exterior of a building
>
> *NOTE Such systems are normally attached to the primary structure of a building to form non-structural, non-loadbearing external surfaces and can comprise a range of facing materials/cladding panels, including metal composite panels or non-loadbearing masonry, along with insulating materials, rendered insulation systems (ETICS) and insulated core sandwich*

[1] https://www.rics.org/news-insights/current-topics-campaigns/fire-safety/cladding-external-wall-system-ews-faqs

panels, which are attached to a substrate. Combinations of, for example, cladding panels and insulation form cladding systems and such systems might include cavities, which can be ventilated or non-ventilated. The cladding system also encompasses the supporting rails and bracketry, as applicable, to attach the cladding to the building, and cavity barriers where applicable. Systems that constitute the entire thickness of the external wall, by definition, cease to be cladding systems and are the external wall, e.g. curtain walling."

(our emphasis)

106. Annex M to BSI PAS9980:2022 also explains:

"External cladding systems involve the combination of several different components, including cladding panels, ventilated cavities, thermal insulation, breather membranes, cavity/fire barriers and support systems."

107. These examples shed light on the meaning of a "cladding system" and support the conclusion that the ordinary meaning of that expression includes materials installed behind the external screen. This usage is consistent with the definition of "cladding system" relied on by Dr Lehner, which he attributed to the National Fire Chiefs' Council (but without a specific source citation).

108. Finally, where the expression "cladding system" is used elsewhere in the 2022 Act, it appears to us to support the conclusion we have reached about its meaning. Section 149 is concerned with liability for past defaults relating to "cladding products". A "cladding product" is defined as "a cladding system or any component of a cladding system" (section 149(12)). One condition of liability for cladding products includes that the "the cladding product is attached to, or included in, the external wall of a relevant building" (section 149(3)). No attempt has been made by Parliament to distinguish between different building components which might be attached to or included in the external wall of a building; that seems to us to invite a wider, rather than a narrower, interpretation of "cladding product" and "cladding system".

109. We therefore conclude that the FTT was wrong to dismiss Mr Lehner's reliance on the paragraph 8 protection on the basis that the insulation was not "part of a cladding system".

110. The work done to the Block comprised the removal of the original two sheets of insulation and their replacement with a new single sheet of a different material with improved fire-resistant properties. We are satisfied that this part of the work involved the removal and replacement of part of the cladding system. The work also included the installation of cavity barriers where these had previously been omitted. The FTT said that the installation of these new components was not the removal or replacement of part of a cladding system, but we consider that in this respect also it took too narrow a view of the scope of paragraph 8. The original insulation was part of the cladding system; it was removed and replaced as part of a single package of works with new insulation and new cavity barriers. The fact that the original construction of the cladding system may not have included cavity barriers, or that cavity barriers which were originally included were defectively installed and had to be replaced (the evidence does not show which was

the case), does not prevent the whole package of work from being viewed as the replacement of part of a cladding system. The replacement was not on a strictly like for like basis and included both materials of an improved specification and materials which had been absent or poorly fitted, but in our judgment the whole of the work nonetheless comprised the replacement of part of the cladding system. The replacement of the insulation panels with a less flammable substitute would not in itself make the building compliant – the introduction, where absent, or the improvement, where defective, of cavity barriers constituted an important element of making the building safe.

111. We do not consider that paragraph 8 can sensibly be interpreted as covering only the removal of part of a cladding system and its replacement with an identical component, and we see no reason either as a matter of language, or having regard to the policy of the Act, why the replacement of part of a cladding system with something quite different, or additional, should not fall within the paragraph 8 protection. "Replacement" need not mean replacement with something identical. The policy of the Act of providing leaseholders with protection against the cost of putting cladding systems into a safe condition would be frustrated if it was necessary to divide essential remedial work into those parts which involved the replacement of components which were there before and those which involved the introduction of something new. We therefore regard the whole of the work done to the Block as comprising the removal or replacement of part of a cladding system.

112. The definition of "cladding remediation" in paragraph 8(2) gives rise to two further issues of interpretation. Both questions concern the conditions in sub-paragraphs (a) and (b) of paragraph 8(2). The first is, what is meant by the expression "the outer wall of an external wall system"? The second is: is it the cladding system as a whole which must form the outer wall of an external wall system, and which must be unsafe? Or is it the part of the cladding system that is being removed or replaced which must do so?

113. Cladding remediation involves the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system. Modern buildings are complex structures and the use of the expression "the outer wall of an external wall system" reflects that complexity. The first characteristic of a cladding system which is covered by paragraph 8 is that it is part of an "external wall system". We received no detailed submissions on the meaning of this expression, but as currently advised we interpret it as signifying that paragraph 8 is only concerned with the external walls of a building, and not with internal walls, separating different areas within a building. Plasterboard or other coverings applied to internal dividing walls are not within the scope of paragraph 8.

114. The other requirement of paragraph 8 is that the cladding system must form the "outer wall" of the external wall system. Paragraph 8 is not concerned with a cladding system which forms the inner wall of an external wall system. If an external wall comprised an outer wall and an inner wall, with a cavity between them, only a cladding system which formed the outer wall would be covered by paragraph 8.

115. On the relatively limited information available in this case we consider that the outer wall of the external wall system includes the aluminium rainscreen panel, the framework on which it is supported, the insulation behind it and the newly installed cavity barriers;

we do not consider that the two internal plasterboard sheets, separated by a small cavity, are part of the outer wall of the external wall system.

116. As to the second question, we consider that the conditions in paragraph 8(2)(a) and (b) must be satisfied by the cladding system as a whole, and not simply by the parts of the system which are to be removed or replaced. That seems to us to be the natural consequence of the reference to the removal or replacement of "*any* part" of a cladding system that forms the outer wall of an external wall system. If the intention had been to confine the scope of paragraph 8 to the removal or replacement of the outer wall of an external wall system, the reference to "any part" of the system would be both redundant and misleading. The appropriate way to express the narrower intention would be to refer to "so much of" or "such part of" a cladding system as forms the outer wall of an external wall system.

117. We also consider that it is the cladding system as a whole which must be unsafe, and not simply the part which is to be removed or replaced. It is difficult to imagine circumstances in which the use of a building component which is itself unsafe will not also render the system of which the component is part unsafe. In this case the FTT did not take a different view, but it nevertheless decided that the cladding system was not unsafe. It explained at paragraph 97(ii) that the Efectis report had "identified the lack of cavity barriers behind the aluminium cladding system as unsafe" and reasoned that "this did not require any removal or replacement of part of the cladding system" and was therefore not cladding remediation. We read that finding as being a consequence of the narrow view the FTT took of the meaning of "cladding system", which we have already rejected.

118. There is no doubt that the cladding system was "unsafe" in the sense that it failed to meet the standards required to comply with Government's Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings issued in January 2020. It lacked adequate cavity barriers and, without them, the increased risk of a fire spreading meant that the form of insulation which had been employed in the cladding system was inadequate and failed to meet the appropriate safety standard.

119. In our judgment the FTT was wrong to conclude that the works were not covered by the paragraph 8 protection. We are satisfied that the works in their entirety were cladding remediation. That conclusion provides an additional reason why no service charge is payable in respect of the works by Mr Lehner or any other qualifying leaseholder.

120. In view of this conclusion it is unnecessary for us to consider whether the protections in paragraphs 5, 6 or 7 apply.

Conclusion

121. Our conclusion is that the service charge of £1,244.85 demanded on 8 February 2021, was not payable by Mr Lehner, and will not be payable even if a proper demand is made for it in future. That is for two reasons. First, because the 2021 demand failed to state the name and address of the landlord (referring to Dangate rather than to LCMS) so that section 47 of the Landlord and Tenant Act 1987 meant that the amount demanded was

not due. And second, because the work in respect of which the demand was made was "cladding remediation" and, as the owner of a qualifying lease, Mr Lehner has the benefit of the paragraph 8 protection and is not liable to pay such a charge.

122. For these reasons we allow the appeal, set aside the FTT's decision of 12 April 2023, and substitute a determination that no service charge is payable by Mr Lehner in respect of the works.

Martin Rodger KC, Peter D McCrea FRICS FCIArb

Deputy Chamber President

17 May 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appendix

Step 1 – preliminary conditions

1. Is the building a relevant building (s.117)?

   - Is it self-contained (i.e. structurally detached) or a self-contained part (as defined by s.117(5)) of a building in England?
   - Does it contain at least two dwellings?
   - Is it at least 11 metres high (from the ground to the finished surface of the top floor), or has at least five storeys above ground level?
   - Does it fall outside each of the excluded categories in s.117(3)?

   If all of these questions are answered affirmatively the building is a relevant building.

2. Does the disputed service charge relate to a relevant defect (s.120)?

- Did the defect arise as a result of anything done (or not done) or anything used (or not used) in connection either with the construction or conversion of the building, or with works undertaken or commissioned by a landlord or management company?

- If so, were the construction or conversion of the building or the works by the landlord or management company from which the defect arose completed between 14 February 1992 and 14 February 2022?

- If so, does the defect cause a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it (a building safety risk)?

If all of these questions are answered affirmatively the defect is a relevant defect.

3. Is the disputed service charge a charge in respect of a relevant measure relating to the relevant defect (para 1(1), Sch.8)?

    - Was the measure taken to remedy the relevant defect, or for the purpose of preventing a building safety risk that arises as a result of the defect from materialising, or for the purpose of reducing the severity of any incident resulting from the risk materialising?

<u>Step 2 – paragraph 2 protection</u>

4. Did the disputed service charge become payable before or after 20 July 2022?

5. If so, had any of the circumstances listed in regulation 6(1), LP Regulations occurred between 20 July 2022 and the date the disputed service charge became payable?

6. If so, has the current landlord provided a landlord's certificate which complies with regulation 6? If not, regulation 6(7) applies, the paragraph 2(2) condition is taken to be satisfied and the service charge is not payable.

7. If the current landlord has provided a landlord's certificate, or if the disputed service charge became payable before 20 July 2022, was the landlord or any superior landlord on 14 February 2022 responsible for the relevant defect, or associated with a person responsible for the relevant defect? If so, the paragraph 2(2) condition is satisfied, and the service charge is not payable. If the landlord or any superior landlord or an associate was not responsible for the defect, the paragraph 2 protection does not apply.

<u>Step 3 – qualifying lease</u>

8. Does the lease satisfy all three conditions in section 119(2)?

    - Was it granted for a term of more than 21 years?
    - Does it includes a service charge?
    - Was it granted before 14 February 2022?

9. If so, has the landlord taken all reasonable or prescribed steps to obtain a qualifying lease certificate from the tenant (i.e. has the landlord asked the tenant if, on 14 February 2022, the dwelling was their only or principal home, whether they owned any other dwelling in the UK, and whether they owned not more than two other dwellings in the UK apart from the lease)? If not, the lease is to be treated as a qualifying lease.

10. If the landlord has taken all reasonable/prescribed steps to obtain a qualifying lease certificate, and either no certificate has been provided, or the tenant has certified that the conditions in section 119(2)(d) were met, were those conditions in fact met i.e. on 14 February 2022, was the dwelling the tenant's only or principal home, did they own no other dwelling in the UK, or did they owned not more than two other dwellings in the UK apart from the lease? If any of the conditions is satisfied, the lease is a qualifying lease and the protections in paragraphs 3 to 9 of Schedule 8 are applicable. If not, none of those protections are applicable.

<u>Step 4 – paragraph 3 protection – the contribution condition</u>

11. Has the landlord provided a certificate to the tenant that the relevant landlord did not meet the contribution condition on 14 February 2022? If not, the contribution condition is taken to be satisfied and no service charge is payable.

12. If so, did the landlord in fact meet the contribution condition on 14 February 2022? If so, no service charge is payable.

<u>Step 5 – paragraph 4 protection - low value leases</u>

13. On 14 February 2022 was the value of the qualifying lease less than £325,000 (Greater London) or less than £175,000 (elsewhere)? If so, no service charge is payable.

<u>Step 6 – paragraph 8 protection – cladding remediation</u>

14. Do the relevant measures in respect of which the service charge is claimed comprise the removal or replacement of any part of a cladding system?

15. If so, (a) does the cladding system form the outer wall of an external wall system, and (b) was the cladding system unsafe? If so the paragraph 8 protection applies and no service charge is payable in respect of the removal or replacement works. To the extent that the relevant measures comprise work other than the removal or replacement of any part of the cladding system, the protections in paragraphs 5, 6 and 7 will apply to the cost of that part of the work.

<u>Step 7 – paragraph 9 protection – legal or professional services</u>

16. Is the disputed charge in respect of legal or other professional services (including obtaining legal advice, proceedings before a court or tribunal, or ADR) relating to the liability or potential liability incurred as a result of a relevant defect? If so that element of the service charge is not payable.

Step 8 – paragraphs 5, 6 and 7 – other limits

17. What was the value of the qualifying lease on 14 February 2022?

18. What is the 'permitted maximum' as defined in paragraph 6 of Schedule 8?

19. When did the person who was the tenant on 28 June 2022 become the tenant under the qualifying lease?

20. What is the pre-commencement period (i.e. the period beginning on 28 June 2017 or, if later, on the day the tenant on 28 June 2022 became the tenant under the qualifying lease, and ending on 28 June 2022)?

21. What was the aggregate of the service charges in respect of relevant measures relating to any relevant defect which fell due under the lease during the pre-commencement period and which fell due after 28 June 2022 but before the disputed charge fell due (the relevant service charge)?

22. Does the sum of the disputed service charge and the relevant service charge exceed the permitted maximum? If so, the excess over the permitted maximum is not payable (paragraph 5, Schedule 8).

23. Does the sum of the disputed service charge and the total service charges in respect of relevant measures relating to any relevant defect which fell due in the period of 12 months ending with the day on which the disputed service charge fell due, exceed one tenth of the permitted maximum? If so, the excess over one tenth of the permitted maximum is not payable (paragraph 7, Schedule 8).