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Case No: LC-2024-352

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Ref: LON/00AG/LSC/2023/0012

Rolls Building, Fetter Lane, London, EC4A 1NL

16 September 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CATCHWORDS – BUILDING SAFETY – LEASEHOLDER PROTECTION – Sch 8, paragraph 8, Building Safety Act 2022 – relevant defect – cladding and cladding system – meaning of unsafe – qualifying lease – appeal dismissed

BETWEEN:

ALMACANTAR CENTRE POINT NOMINEE NO.1 LTD (1)
ALMACANTAR CENTRE POINT NOMINEE NO.2 LTD (2)

Appellants

and-

PENELOPE DE VALK AND 12 OTHERS
(LISTED IN ANNEX 1)

Respondents

Centre Point House,
15A St Giles
High Street,
London,
WC2H 8LW

Judge Siobhan McGrath and Mrs D Martin TD MRICS FAAV
15-17 July 2025

Martin Hutchings KC and *Harriet Holmes* for the appellant, instructed by Bryan Cave Leighton Paisner LLP
Justin Bates KC and *Mattie Green* for respondents 1 – 10, instructed by Howard Kennedy LLP
Samir Amin for respondents 11 and 12, instructed by direct access
Simon Allison KC for respondent 13, instructed by Forsters LLP

The following cases are referred to in this decision:

Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856
BDW Trading Ltd v URS Corporation Ltd [2025] UKSC 21
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586
Irvine's Estate v Moran (1992) 24 H.L.R. 1
Lehner v Lant Street Management Co Ltd [2024] UKUT 0135
McNutt v Transport for London [2019] EWHC 365
R (on the application of Maugham v Senior Coroner for Oxfordshire [2020] UKSC 46
R (on the application of N) v Walsall Metropolitan Borough Council [2014] EWHC 1918
R (The Good Law Project) v Electoral Commission [2018] EWHC 414 (Admin)
Rhine Shipping DMCC v Vitol SA [2024] EWCA 580
Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (the FTT) dated 25 March 2024 where it determined on an application under section 27A(3) of the Landlord and Tenant Act 1985 that no service charges would be payable by a number of respondent lessees in respect of proposed works to the façade of the subject property known as Centre Point House (CPH). The issue for the Tribunal concerns the provisions of the Building Safety Act 2022.

2. The Building Safety Act (BSA) has recently been considered by both the Supreme Court and the Court of Appeal, and further reference will be made to those cases during the course of this judgement. In each of the cases the context of the BSA was considered. In *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 Lord Hamblen described the origin of the BSA as follows:

> "1. On 14 June 2017 a fire broke out at Grenfell Tower in London leading to the tragic death of 72 residents of the 24-storey tower block. It later transpired that the main reason why the fire engulfed Grenfell Tower so quickly was the use of unsafe cladding around the outside of the building, which did not comply with relevant building regulations.
>
> 2. Investigations carried out following the fire led to the discovery that a number of high-rise residential buildings across the country were subject to serious safety defects. Aside from unsafe cladding, other issues were identified, including other fire safety concerns, such as lack of compartmentation and flammable balconies, and serious structural defects that gave rise to risks of buildings (or parts of buildings) collapsing.
>
> 3. The Government encouraged developers to investigate medium or high-rise developments for which they were responsible and to carry out any necessary remedial work for safety defects discovered. In 2022 this encouragement was reinforced by legal responsibilities imposed on developers and contractors under the Building Safety Act (the "BSA")."

3. The points in issue in this appeal have not been specifically considered previously. The case is therefore of importance.

4. The appeal was heard over three days, having been adjourned from December 2024 on an application to amend the grounds of appeal. On the first day of the hearing, the Tribunal inspected CPH. The appellants are Almacantar Centre Point Nominees (Almacantar) who are the freeholders of CPH. At the hearing of the appeal Almacantar was represented by Martin Hutchings KC and Harriet Holmes of counsel. Although there is a total of 36 flats at CPH only those who own the leases of 18 of the flats are respondents to the appeal. A number of flats are owned by Almacantar, and others are not owned by "qualifying" leaseholders. The respondent lessees are specified at the end of this decision. At the hearing R13 was represented by Simon Allison KC, Rs 11 & 12 were represented by Samir Amin of counsel and the remaining respondents were represented by Justin Bates KC and Mattie Green of counsel.

5. On 8 May 2024 the FTT gave Almacantar permission to appeal on Grounds 1-4 of their application but refused permission on Ground 5. We deal with Ground 5 at the end of this decision. On 27 January 2025, this Tribunal gave the appellants permission to appeal a new Ground 1A. The following are the Grounds on which permission has been granted:

> Ground 1 - the FTT erred in concluding that paragraph 8 of schedule 8 to the BSA applies to the Proposed Scheme of remediation.
>
> Ground 1A - for the avoidance of doubt, the FTT erred in concluding that paragraph 8 of schedule 8 to the BSA applies to the Proposed Scheme of remediation not only by misconstruing the requirements of paragraph 8 itself, but also by concluding that, the fact that the Proposed Scheme did not involve remediating a "relevant defect" did not matter and that, despite this, paragraph 8 of Schedule 8 was still in principle engaged.
>
> Ground 2 – the FTT was wrong to conclude that each and every part of the Proposed Scheme was caught by paragraph 8 of schedule 8 to the BSA.
>
> Ground 3 – The FTT erred in concluding (in light of the approach it took in relation to grounds 1 and 2) that the façade at CPH comprised a "cladding system" that "forms the outer wall of an external wall system" and which "is unsafe" within the meaning of and for the purposes of paragraph 8 of schedule 8 to the BSA.
>
> Ground 4 – In the result, the FTT erred in concluding that the façade at CPH "comprises an unsafe cladding system to which paragraph 8 of schedule 8 [to the BSA] applies" and accordingly, that no service charge or reserve fund is recoverable in respect of the Proposed Scheme or under the QLTA from any lessee who holds a "qualifying lease".

Centre Point House

6. We adopt the description of CPH from the decision of the FTT:

> *"1. Centre Point Tower, sitting at the intersection of New Oxford Street, Charing Cross Road and St Giles High Street in WC2H and at the crossroads of Oxford Street and Tottenham Court Road, was commissioned by millionaire property tycoon Harry Hyams during the commercial rents boom of the early 1960s. It was one of the first London skyscrapers to be developed. It was a controversial development. Many questioned how permission was granted by the local authority for the 34-storey Tower in the then-relatively low-rise London skyline on a busy traffic junction. It was designed by Richard Seifert and Partners, engineered by Pell Frischmann, and constructed by Wimpey during 1963 – 1966.*
>
> *2. Mr Hyams was determined that it would be occupied by a single commercial tenant, and it remained empty until 1975. In 1974, it was unlawfully occupied for a*

short period by housing activists, including Jim Radford, Ron Bailey, and the late Mr John Eugene Joseph Dromey (known as Jack; later to become an MP who continued in the campaign for housing), in protest over the vast space remaining unoccupied while a housing crisis deepened, and people slept rough at its doorstep. The charity Centrepoint, set up by Reverend Ken Leech in the basement of St Anne's church in Soho in the shadow of the Tower, took its name from the building, calling it an "affront to homelessness". In 1995 it, and its neighbouring buildings in the estate, were given Grade II listing status.

3. This case is about its humbler but no less experimental neighbour, Centre Point House, 15A St Giles High Street, London WC2H 8LW ('CPH'). Little is known about why it was constructed or Mr Hyams' intentions in respect of it. It is thought by the experts in this case that perhaps CPH was intended also to be leased by whichever single wealthy commercial occupant Mr Hyams had in mind, possibly to offer on-site overnight accommodation for its employees. It too appears to have lain empty for a very substantial period. It is believed that in or around 1987 the substantial part of CPH was finally converted to residential leasehold flats.

……..

5. CPH is connected with Centre Point Tower by a 'link' building, which is also commercial/retail/restaurant space. Within the six residential storeys are situated 36 duplex flats, which interlock with each other 'Tetris'-like in a stepped-L pattern. There is no number 13, and so the numbers run from 1 at the lowest storey to 37 at the upper. Entrance corridors are on the 3rd, 5th and 7th floors only, onto north and south stair cores (which form no part of this application). We understand that 10 flats are retained in the ownership of Almacantar Group Limited. The remainder are in residential occupation by their owners or sub-tenants.

6. Each of the flats has a projecting balcony. The east and west elevations comprise timber framed glazing and a spandrel glazing 'wrap' around the projecting balconies (accessed by a timber sliding door set into the glazed screen), formed by an internal timber ladder frame, with external aluminium pressure plates, glazing panels, and window lights."

7. The hardwood timber-framed window façade has deteriorated over a number of years. To understand that deterioration it is necessary to know a little more about CPH's construction. The FTT found that:

" 7. The framing system is unusual, in that the dominant structural element is at the horizontal instead of the vertical… The upper horizontal frame sits on a metal bracket… Mortise and tenon joints join the vertical members into the structure. The horizontal members are only fixed back to the building at the ends, by metal restraint fixings designed to take wind load.

8. ……Where the glazed façade passes between party walls or floor slabs, glazed back-painted annealed glass spandrel panels have been inserted. Behind each of the spandrel panels is a thin layer of polystyrene insulation, and then a gap before the dwarf blockwork or concrete wall, behind and onto which the window lights are fixed.

……..

10. The glazing was constructed by pressing glazing tape against the timber frames, pressing the glass panels onto the tape, and then applying two layers of glazing tape to aluminium clamp strips which are aligned with the frame and pressed to the outside of the glass. Fixing screws are then driven in and tightened to ensure that the clamp strip is fixed tight against the nosing of timber at the front edge of the frame. Joints are then sealed with mastic."

8. In consequence the FTT said that:

"*11. The difficulty with this construction is that small gaps between the pressure plates to allow for movement between adjunct frames will result in water ingress, as do any screw holes in respect of which the sealant has failed. Once water is in the system, there is limited ability for it to evaporate off (as it would in a normal timber system), as it is sealed in by the impervious aluminium clamp strip, glass and glazing tape. It therefore remains in the timber, forming interstitial condensation which in turn leads to degradation and (eventually) rot of the timber members. Further over-sealing the system will only keep such water as has made its way past the gaps in the system, exacerbating the problem and promoting further decay.*"

9. As a result the FTT found at paragraph 138 that "…. *The façade at CPH is not in good and substantial repair and condition, has been inherently defective from the date it was completed and its physical condition has deteriorated over time as a consequence.*"

10. The scheme to address the deterioration is referred to as "the Proposed Scheme" which was described by the FTT as follows:

"13. It is proposed by the Applicants that in order to resolve this problem a steel stick curtain wall system including bespoke steel hollow section frames with integrated double glazed vision panels and opaque insulated spandrel panels be superimposed on the existing timbers and fixed to the concrete structural frame, rendering those timbers non-structural ('the Proposed Scheme')".

11. The FTT's decision is based on its findings about the state of repair of the façade to the building and its construction of the occupational lease terms. The application before the FTT was made by Almacantar under section 27A(3) of the Landlord and Tenant Act 1985 (the 1985 Act). In the proceedings Almacantar sought a determination of the payability of the cost of proposed works to remedy the defective façade. The FTT determination dealt with a number of issues which are not relevant to the appeal. The FTT's decision is comprehensive, clear and carefully reasoned.

12. At first instance, a key issue for determination was the assertion by a number of the lessees at CPH that Almacantar had no right under their leases to carry out the proposed work to the defective façade and accordingly that no service charges would be payable for the work. The FTT's decision was that the works did fall within the landlord's repairing obligations and that the lessees would be liable under the service charge provisions to contribute to the cost. However, the FTT also found that a number of lessees were entitled to rely on Part 5 of the BSA and by reason of the "leaseholder protections" afforded by the

legislation were not required to pay any part of the service charge attributable to "cladding remediation." The question of whether the FTT were correct in reaching this conclusion is the subject of this appeal.

The Building Safety Act 2022

13. The purpose of the BSA is "to make provision about the safety of people in or about buildings and the standard of buildings…." The BSA is substantial and wide ranging. It is in 6 Parts which *inter alia* establish a building safety regulator (Part 2), amend the Building Act 1984 (Part 3), make specific provision in respect of the management and maintenance of "higher risk buildings" (Part 4). Part 5 includes provisions about remediation and redress, a new homes ombudsman, construction products, fire safety, the regulation of architects and about housing complaints.

14. We are concerned with the earlier provisions of Part 5, namely sections 116 – 124 and *S*chedule 8. An overview of this part of BSA was given by the Court of Appeal in *Triathlon Homes LLP v Stratford Village Development Partnership* [2025] EWCA Civ 846 and *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 where Lord Justice Newey said as follows:

> "13. The BSA's long title identifies one of the purposes of BSA as "to make provision about the safety of people in or about buildings and the standard of buildings". Part 5 of the BSA, comprising sections 116-160, contains, as its heading states, "Other provision about safety, standards etc". Section 116(1) explains that sections 117-124 and schedule 8 "make provision in connection with the remediation of relevant defects in relevant buildings".
>
> 14. Schedule 8 to the BSA is introduced by section 122 . As section 122 states, 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)."
>
> Subject to certain exceptions, a "relevant building" is "a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and (a) is at least 11 metres high, or (b) has at least 5 storeys": see section 117(2) . "Relevant defect" is defined by section 120(2) to refer to "a defect … 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". By respectively section 120(5) and section 120(3) , "building safety risk" is "a risk to the safety of people in or about the building arising from (a) the spread of fire, or (b) the collapse of the building or any part of it" and "relevant works" means any of the following:
>
> > "(a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;
> >
> > (b) works undertaken or commissioned by or on behalf of a relevant

landlord or management company, if the works were completed in the relevant period;

(c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph)."

The "relevant period" is specified as the period of 30 years preceding the coming into force of section 120: see section 120(3).

15. Paragraph 2 of schedule 8 to the BSA provides that no service charge "is payable" under a lease of premises in a relevant building in respect of a "relevant measure" (i.e. a measure taken to remedy a defect or a "relevant step" taken in relation to a defect) relating to a relevant defect if the landlord or any superior landlord at the beginning of 14 February 2022 "(a) is responsible for the relevant defect, or (b) is associated with a person responsible for a relevant defect". For the purposes of paragraph 2, a person is "responsible for" a defect if:

"(a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;

(b) in any other case, the person undertook or commissioned works relating to the defect."

16. Unlike paragraph 2, paragraphs 3-9 of schedule 8 to the BSA apply only in relation to "qualifying leases". By section 119(2) , 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 … —

(i) the dwelling was a relevant tenant's only or principal home,

(ii) a relevant tenant did not own 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.'

A "relevant tenant" is a person who was a tenant under such a lease at the beginning of 14 February 2022: see section 119(4)(c) . Where, however, a dwelling was at that point let under two or more leases to which subsection (2)(a) and (b) apply, "any of those leases which is superior to any of the other leases is not a 'qualifying lease'": see section 119(3) . (For completeness, I should mention that a new section, section 119A , was added by the Levelling-up and Regeneration Act 2023 to extend the protection for leaseholders where a "qualifying lease" has been extended, varied or replaced by a new lease.)

> 17. Paragraphs 3-9 of schedule 8 to the BSA all serve to relieve tenants with "qualifying leases" from liability for service charges. By paragraph 3 , no service charge "is payable" under a qualifying lease in respect of a relevant measure relating to a relevant defect if the net worth of the landlord's group at the beginning of 14 February 2022 was more than a specified multiple of £2 million (the "contribution condition"). By paragraph 4 , no service charge "is payable" under a qualifying lease in respect of a relevant measure relating to a relevant defect if the value of the qualifying lease at the beginning of 14 February 2022 was less than either £325,000 (in the case of property in London) or £175,000 (elsewhere). By paragraph 5 , a service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect "is payable" only in so far as service charges over a period extending back five years have not exceeded the "permitted maximum" set by paragraph 6 . By paragraph 7 , a service charge which would otherwise be payable under a qualifying lease "is payable" only in so far as service charges over the previous 12 months have not exceeded the "permitted maximum". By paragraph 8 , no service charge "is payable" under a qualifying lease in respect of the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system, and is unsafe."

15. Thus, section 122 and schedule 8 to the BSA provide a scheme where lessees are protected from the burden of paying service charge costs to a greater or lesser extent depending on which of the various protections in schedule 8 they are entitled to rely upon.

16. Paragraphs 2, 3 and 4 of schedule 8 are all stated to be intended to mitigate the costs of remediation by the taking of "relevant measures" to address "relevant defects." The cap in paragraph 5 only applies to such measures.

17. Paragraph 8 is also confined to qualifying leaseholders but makes no mention of "relevant measures" or "relevant defect." It states:

> "8(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."

18. Against that background the primary issue in this case can be more easily understood. Put simply the question is whether paragraph 8 of schedule 8 applies to defective cladding which is not also a "relevant defect" and if so, are the works that are proposed to the façade of CPH "cladding remediation" within the meaning of paragraph 8?

19. As already noted, the FTT had found that the defects to the façade of CPH originated in its original design and construction which took place between 1963 and 1966. By section 120 a "relevant defect" is a defect that, as a result of "relevant works," causes a building safety risk. By section 120(3) relevant works must have been carried out within the "relevant period" being 30 years ending with the date the section came into effect which was 28th

June 2022. The works proposed to CPH cannot therefore be "relevant measures" to address "relevant defects."

20. In respect of the first question, namely whether the ambit of paragraph 8 extends to cladding works which are not necessarily "relevant defects" the FTT found that: "*220. We are satisfied that the ordinary and clear meaning to be given to the words of paragraph 8 is that cladding remediation is to be treated as a distinct protection outside of the waterfall, not contingent on there being a 'relevant defect' and therefore not incorporating the requirement that the cladding in question needs to have been put on the building within the relevant period - the 30 years preceding 14 February 2022 - as section 120 is not engaged…..*"

And observed that as a result: "*Primarily….. no qualifying leaseholder will ever have to pay for unsafe cladding remediation. That is neither unclear or ambiguous and does not lead to absurdity. It accords with the schema of the 2022 Act.*"

21. The background to sections 116-124 of the BSA is described in *Adriatic* as follows:

> "28. The Bill which became the BSA was introduced to Parliament on 5 July 2021. At that stage, the principal purpose of the Bill was to give legal effect to recommendations which had been made in a 2018 report by Dame Judith Hackitt on building regulations and fire safety. The Bill also included (to quote Mr Murphy):
>
> *"some measures to protect leaseholders and improve redress in respect of historical building safety defects, namely by retrospectively extending the limitation period under section 1 of the Defective Premises Act 1972 claims from six to 15 years (so that leaseholders would be better able to recover the costs of putting work right from those who caused the problem) and by requiring landlords to explore alternative cost recovery before passing costs on to leaseholders."*
>
> 29. On 10 January 2022, the Government announced that it had "reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis". Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced for the first time what became sections 116-125 of the BSA and schedule 8 to it …."

Statutory Construction

22. It is the appellants' case that paragraph 8 must be read in the context of the whole of schedule 8 and that "relevant works" and therefore "relevant defects" are key to its construction and must be taken to apply to paragraph 8 as to all other paragraphs. To do otherwise, it is contended, would lead to extraordinary and significant consequences for landlords.

23. On behalf of the respondents, it is said that the words of paragraph 8 are clear and unambiguous and that the difference between that paragraph and the other material provisions of Part 5 is deliberate and accords with the legislative purpose of the BSA.

24. On behalf of Almacantar, Mr Hutchings submitted that the plain intention of the legislation was to prevent qualifying leaseholders from having to pay for remediating "unsafe cladding" in buildings constructed or worked on after 1992. In particular, he said there was no intention to prevent landlords from recovering the costs of anything else. On behalf of the respondents, Mr Bates disagreed asserting that the BSA represented a radical intervention by Parliament in response to a number of overlapping crises including Grenfell, the wider building safety crisis culture of building, construction and management industries and the likelihood of leaseholders facing ruinous costs and that Parliament had decided that leaseholders should be protected against the costs of remediating historical building safety defects that they had no part in creating.

25. All parties agreed that broadly the primary source for statutory construction must be the precise words of the statute in question read in context and that the role of external aids is secondary, see for example *R (The Good Law Project) v Electoral Commission* [2018] EWHC 414 (Admin) and in construing an enactment, the court should aim to give effect to the legislative purpose: *Bennion, Bailey & Norbury on Statutory Interpretation* (Eighth edition) at 12.2] (*Bennion*).

26. The court can only have regard to ministerial statements about the purpose or meaning of legislation if three conditions are satisfied:

    a. the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity;
    b. the material must be or include one or more statements by a minister or promoter of the Bill; and
    c. the statement must be clear and unequivocal on the point of interpretation that the court is considering.

27. The status of explanatory notes was considered by the Court of Appeal in *Adriatic* where it was decided that where explanatory notes in respect of a statute did not exist when it was being passed, they may show what the Department which promoted the BSA understands it to mean, and possibly what it wished it to mean, although they cannot have informed Parliamentary decision-making and accordingly, where explanatory notes have been published only after a statute has already been enacted, the notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.

28. The court's duty is to arrive at the legal meaning of the enactment. The legal meaning of an enactment is the meaning that conveys the legislative intention. However, "the search for legislative intention is not a search for the actual subjective intention of a particular group of politicians, but an objective search for the intention that must be imputed to the legislature by reference to the meaning of the words used and the context in which they are used": *McNutt v Transport for London* [2019] EWHC 365 per Knowles J at [27].

29. Mr Bates additionally made reference to *R (on the application of N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 at [65] in support of the following proposition: "When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. … In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort."

30. If it is maintained that Parliament has made an error, he said, the court must be mindful of its proper constitutional role. As Lord Nicholls explained in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (p.592):

> *"A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words that Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …"*

Relevant Defect - Argument

31. The words of paragraph 8 are indeed clear: "No service charge is payable under a qualifying lease in respect of cladding remediation." And cladding remediation means the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system and is "unsafe." No reference is made to "relevant defect." However, Mr Hutchings contends that the context of and the remaining parts of schedule 8 and sections 116-124 undermine that clarity.

32. Firstly, he referred to section 116(1) which provides that sections 117 to 124 and schedule 8 "make provision in connection with the remediation of *relevant defects* in relevant buildings." Secondly, he referred to section 122 which introduces schedule 8 as follows:

> "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)"

The clear import of both sections and the purpose of schedule 8 is, he said, to deal with relevant defects and nothing else. Whilst the key words of paragraph 8(1) do not refer

specifically to relevant defects they do not need to as, he argued, it is obvious from sections 116 and 122 as well as each of the other paragraphs of schedule 8, that its scope is confined to relevant measures in relation to relevant defects. He contended that a section providing an overview of what is intended to be covered by the BSA or part of an Act is admissible and relevant as regards interpreting particular, succeeding sections (or schedules) even if it contains no substantive content (*Bennion* p.451) He submitted that what paragraph 8 is dealing with is a specific *type* of relevant defect.

33. In support of that submission he said that whilst schedules to Acts should be read as far as possible consistently with their 'introducing' sections they are nevertheless subsidiary to sections of Acts: 'It is desirable to include in a schedule matters of detail; it is improper to put in a schedule matters of principle. The drawing [of] the proper line of demarcation between the two classes of matters is often difficult. All that can be said is that nothing should be placed in a schedule to which the attention of Parliament should be particularly directed….' (Lord Thring, Practical Legislation (1877), approved in *R (on the application of Maugham v Senior Coroner for Oxfordshire* [2020] UKSC 46 at [44] per Lady Arden).

34. Furthermore, he contended, that interpretation sits with the overall policy underlying the leaseholder protections as expressed in the Explanatory Notes which, although published after the commencement of the BSA still provide supportive commentary. Paragraph 957 is as follows:

> *957. The leaseholder protections deal only with historical building safety defects; they are backward-looking only. They are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings. The protections afforded only apply to defects created in the 30-year period prior to commencement of the provision, so in practice between mid-1992 and mid-2022. A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years."*

Paragraphs 984 and 985 state:

> *"984. Schedule 8 makes provision for service charge payments in respect of relevant defects not to be payable by leaseholders in certain circumstances. By limiting or preventing altogether the amounts that are payable in respect of these defects from being passed on to the leaseholders through the service charge, leaseholders are protected from the costs associated with their remediation.*
>
> *985. Schedule 8 removes the existing legal presumption under most leases that leaseholders are liable in full for the costs associated with remediating relevant defects. The Schedule and powers contained within it make provision for liability to sit in the first instance with landlords who are deemed to be responsible for the*

creation of those defects, and then with landlords that can afford to meet the costs in full. Where neither of these circumstances applies in respect of any relevant landlord, the Schedule provides for an equitable spread of costs, commensurate with a party's likely ability to contribute to costs…."

35. Mr Hutchings argued that paragraphs other than 2 to 7 in Schedule 8 were also indicative of Parliament's intention to provide a coherent structure to deal with relevant defects. He drew our attention to paragraph 9 which provides that "No service charge is payable under a qualifying lease 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*" He said that it cannot have been the intention of Parliament not to afford this protection against legal costs to cladding litigation that did not also qualify as costs to remediate relevant defects.

36. He also cited paragraph 12 which allows the Secretary of State to make provision for the recovery by relevant landlords of a contribution towards costs from other prescribed landlords. That power was exercised in *The Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2023* but only in respect of relevant defects. Again, Mr Hutchings submitted that Parliament could not have intended landlords to be excluded from the ability to seek a contribution to costs from others for paragraph 8 cladding costs that did not also qualify as costs to remediate relevant defects.

37. He pointed out that the structure of sections 116-124 had a coherence which was underpinned by the concept of relevant measures to address relevant defects. He placed particular reliance on sections 123 and 124 of the BSA which give interested persons, including leaseholders, the right to apply to the FTT for Remediation Orders requiring relevant landlords to remediate relevant defects and Remediation Contribution Orders requiring contributions to the costs of remediating relevant defects to be made by specified companies and partnerships. Neither remedy would be available to lessees or indeed landlords in respect of non-relevant defect costs under paragraph 8. He submitted that the overall structure of the BSA and the way that the material is divided up in the BSA, is relevant as an indication of legislative intention: *Bennion* 455-456.

38. Finally on structure, Mr Hutchings referred to the position of paragraph 8 within the schedule pointing out that it comes after a series of paragraphs specifically dealing with relevant defects and before paragraph 9 which is also confined to relevant defects.

39. Overall, Mr Hutchings submitted that it would be illogical given the Explanatory Notes and the other provisions of schedule 8 and the background to the BSA, if paragraph 8 were to operate as a wholly "time-unlimited" provision, in circumstances where all the other paragraphs of schedule 8 are timeframe limited by reference to a "relevant defect." In his submission had this alteration to the common law position been intended Parliament would have been bound to make any such alteration clear in the statutory wording and in truth, only "historical" defects which fall within the 30 year window were intended to be caught by the remediation provisions.

40. Finally, Mr Hutchings placed reliance on the decision of the Upper Tribunal in *Lehner v Lant Street Management Co Ltd* [2024] UKUT 0135 (which was decided after permission to appeal had been granted in this case). In an appendix to the decision a series of eight

"steps" are suggested as a helpful future guide for those grappling with the complexities of the leaseholder protections. The steps propose a series of questions, the answers to which are intended to be a guide to the applicability of the various protections afforded by schedule 8. The question in relation to paragraph 8 is:

> "*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?*"

As has already been seen "relevant measures" directly relate to "relevant defects." Additionally, Mr Hutchings said that *Lant Street* is clear as regards the scope of schedule 8 and supports the case that there must be a "relevant defect" in order for paragraph 8 to be engaged. He contended that we ought not to depart from *Lant Street* and that accordingly the protections afforded by schedule 8 are inapplicable to the works at CPH.

41. On behalf of the respondents, Mr Bates submitted that the words of paragraph 8 are clear and unambiguous and the difference between paragraph 8 and paragraphs 2 to 4 should be taken to be intentional. Parliament could easily have chosen to use the words "relevant defect" and/or "relevant measure" but did not do so.

42. He argued that this interpretation accords with the legislative purpose of the BSA, to secure the safety of those in and around buildings and to give radical protection to the leaseholders specifically in respect of cladding remediation. He said that the distinction between "cladding" and "relevant defects" had been recognised by the Court of Appeal in *Adriatic* and *Triathlon* where reference was made to the Explanatory Notes published in April 2022 in connection with the amendments to the Bill which had recently been made. At paragraph 33(iii) of *Adriatic* Lord Justice Newey referred to the following extract from those notes:

> "In respect of what became schedule 8 to the BSA:
>
> *'Lords Amendment 184 inserts a new schedule which outlines the conditions under which the service charge is not payable in respect of relevant defects. No service charge is payable under a qualifying lease in relation to relevant defects for which landlord or associate is responsible or if a landlord meets the contribution condition. No service charge is payable for cladding remediation.*'

43. And in paragraphs 170 to 172 of *Adriatic*, Lord Justice Newey noted the differences between paragraphs 8 and 9 of schedule 8 when compared with earlier provisions as follows:

> *"170. Next, leaseholders with qualifying leases do not have to pay any service charges in respect of cladding remediation. This is the effect of paragraph 8 of schedule 8, which provides that "No service charge is payable" under a qualifying lease in respect of cladding remediation (as defined). It applies even if the landlord does not meet the contribution condition. This can be seen to have implemented the Secretary of State's announcement that no leaseholder living in their own flat "would pay a penny to fix dangerous cladding".*
>
> *171. Similarly the effect of paragraph 9 of schedule 8 is that "No service charge is*

payable" under a qualifying lease in respect of certain legal or other professional services. This is of course the provision with which we are directly concerned. Again, it applies even if the landlord does not meet the contribution condition.

172. Taken together paragraphs 8 and 9 show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs."

44. So far as section 122 is concerned, Mr Bates contended that since the substance of the leaseholder protections is set out entirely in the schedule, section 122 must be read as subject to the schedule rather than the other way round (*Bennion* at 16.9) and the wording of paragraph 8 of schedule 8 should be afforded more weight than the wording in section 122.

45. Mr Bates said that any suggestion by Almacantar that unless paragraph 8 is limited to "relevant defects", the decision might open the floodgates in preventing landlords from recovering service charges in respect of buildings like CPH, of significant age, where the exterior is simply life-expired and in need of repair or replacement, ignores the requirement in paragraph 8 that the cladding system is "unsafe."

46. Finally, Mr Bates contended that reliance should not be placed on *Lant Street* as support for the proposition that paragraph 8 is only engaged if there is a relevant defect since the point was not at issue in the case and there was simply no argument on the matter and as a result, this is not a binding decision on the point.

47. Both Mr Allison and Mr Amin endorsed the submissions made by Mr Bates. Mr Allison also made a number of additional points. Firstly, that the wording of paragraph 8 differs in important respects from paragraphs 2-4 and if it had been intended that the protection should be limited to cladding which was in a condition amounting to a "relevant defect" there would have been no need to include the limiting condition "unsafe."

48. He contended that the even if the cladding remediation in question did not engage the remediation order provisions of section 123, this did not mean that the leaseholders would be without remedy. They would still be entitled to seek specific performance of repairing covenants. And further that a broad interpretation of paragraph 8 did not mean that a landlord of an older building with (as in CPH) deteriorating components would necessarily be in a worse position than previously as older leases were less likely than modern leases to give landlords the right to recover rebuilding or substantial refurbishment costs in any event.

49. Finally, Mr Allison submitted that although the policy generally underlying the leaseholder protections in sections 116-124 and schedule 8 contain "bright lines" between those leaseholders who benefit and those who do not, that was not sufficient to displace the clear words and policy underpinning paragraph 8 which provided a limited exception from those "bright lines."

Consideration

50. For the following reasons, in our view, the benefit of paragraph 8 is not limited by reference to "relevant defect" and no qualification is to be imported to that effect.

51. The words of paragraph 8 are clear and unambiguous, and accord with the underlying policy of the BSA and reflect the clear ministerial statement that "*no leaseholder living in their own flat 'would pay a penny to fix dangerous cladding.'*"

52. We reject the submission that such a conclusion is anomalous, and that the interpretation is out of kilter with the structure of sections 116-124 and the remainder of schedule 8. Paragraph 8 provides a different protection for a limited group of qualifying leaseholders where the relevant building has "unsafe cladding." There is no reason for imposing a restriction on the right to resist payment of the cost of remediation of unsafe cladding.

53. We agree that overall, the leaseholder protections provide a package of coherent measures both to achieve remediation and to absolve leaseholders from any responsibility for the cost of that remediation. We acknowledge that largely the package is limited to the 30 years referred to in the explanatory notes as follows:

> *"A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years."*

54. This part of the notes discloses twin reasons for the choice of that 30-year limit: firstly, the evidence that the period captures the majority of buildings affected and secondly, the agreement with the major residential property developers that they would carry out remediation in respect of that 30 year period.

55. Paragraph 8 does not fall within that package of remediation. It is concerned only with who will pay the cost of making unsafe cladding safe. The bright line for the cut-off of the leaseholder protections means that those whose properties were built or refurbished before 28th June 1992 are deprived of those benefits even if those works were completed just a week before the cut-off date. Paragraph 8 mitigates that impact in respect of unsafe cladding in accordance with the ministerial statement.

56. Looked at in this way, the consequence that landlords are prevented from seeking a Remediation Contribution Order or from serving a landlords notice under *The Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2023* is explicable. Where a building has unsafe cladding which is not also a relevant defect both leaseholders and landlords are impacted. Leaseholders cannot seek a Remediation Order and landlords cannot seek a Remediation Contribution Order since work to remediate unsafe cladding is simply outside of the main leaseholder protection scheme.

57. In our view the wording of paragraph 8 requires no addition or substitution of other words. Lord Nicholls' test in *Inco Europe Ltd v First Choice Distribution* has not been met.

Paragraph 8 has its own integrity and in our view cannot be criticised as being the result of inadvertence or careless drafting. The paragraph specifies that it applies only to a service charge under a "qualifying lease," which indicates that its ambit was deliberately intended to be restricted. It also only applies to a part of a cladding system that is "unsafe" which is a further restriction. That word "unsafe" is not used in relation to "relevant defect" and must be taken to have a meaning.

58. The definition of "relevant defect" has more than one component: firstly, it must arise as a result of anything done (or not done) or anything used (or not used) in connection with relevant works (as defined), and secondly it must cause a "building safety risk" (as defined). This is very different from the criterion of "unsafe."

59. We do not consider that the descriptive words in either section 116 or 120 assist in our interpretation of paragraph 8. We do not consider that they restrict the way in which schedule 8 should be read as a whole or in respect of paragraph 8. They are general and not definitive. Nor do we consider that the position of paragraph 8 within the schedule detracts from our conclusion. That position is equally explicable by reference to Lord Justice Newey's analysis that paragraphs 8 and 9 *"*show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs".

60. Finally, we are not persuaded that the guidance in *Lant Street* (which we say more about later) was intended to be binding and we are clear that it is not. That guidance was helpfully given to assist FTTs and others in navigating the complexities of schedule 8 in respect of difficult legislation and developing jurisprudence. The question was not in issue in the case and no argument was directed to the point.

61. Accordingly, we dismiss Ground 1A of the appeal.

Cladding and Cladding System – Argument

62. It is therefore necessary for us to go on to consider whether or not the FTT was correct to decide that the service charges in question were in respect of "cladding remediation" within paragraph 8.

63. The first point made on behalf of Almacantar is that there is no "cladding" at CPH which could form part of any "cladding system" which is something either attached to an external wall or forms part of it but is not the external wall itself. In the appellants' submission the façade at CPH is not an outer skin, instead it forms the exterior of the building itself.

64. No definition of "cladding" is provided in the BSA. The FTT dealt with this point at paragraphs 255 to 257 of their decision:

> "255. Insofar as there is a starting point for a definition, the Oxford Dictionary of Construction, Surveying and Civil Engineering's definition of cladding ('the ODC'),

on which the Applicants rely, is that cladding is *"the non-load-bearing external envelope or skin of a building that provides shelter from the elements. It is designed to carry its own weight plus the loads imposed on it by snow, wind and during maintenance. It is most commonly used in conjunction with a structural framework."*

256. In their Skeleton Argument, the Applicants contended that cladding *"refers to the outer skin, applied to a high-rise building, to increase thermal efficiency or improve aesthetics, while not adversely affecting weather resistance. The cladding element is not load-bearing, which means it is not structurally integral to the building itself"*. That is said to derive from the RICS Advice and Guidance Article dated 21 June 2022 contained in the Applicants' authorities bundle.

257. The RICS Guidance appears at [AAB 516]. The remainder of the quotation that follows is:

"Cladding can be either retrofitted to an existing building or incorporated into the design of a new building…..

There are many different types of cladding systems available, ranging from traditional looking brickwork or rendered systems to more modern looking metallic rainscreen systems or curtain walls made from glass. Cladding systems can be complicated constructions with voids, breather membranes, cavity barriers etc but the two main cladding materials are the thermal insulation and front facade panel...

Facade panels can be made from a wide variety of materials including wood, metal, brick or vinyl, and are often made from composite materials. Two types of composite which have been highlighted in the news are ACM and HPL."

65. The FTT concluded that CPH meets those definitions. They said:

"259……There is an underlying structural framework – the concrete building. Onto that framework have been fixed the timber ladders, in preassembled blocks one storey x 3 metres into which the glazing has been inserted. The facade has then been built up, by inserting a wall or blockwork that has taken some of the weight of the fenestration (whether by accident or design). After that blockwork is a gap, an insulation panel, and spandrel inserts. Onto the glazing have been screwed aluminium clamp strips, which have been over-sealed. The ladder frame system is tied back to the concrete frame with metal ties. That makes up the building 'envelope' at the east and west elevations. The function served by the whole is to keep the elements out. The design is to transfer wind load to the concrete structure, not to support that concrete structure. The dwarf walls do not provide structural support to the building as a whole, though may provide some support to the envelope. The metal ties tying back the timber ladders to the concrete are also not providing structural support, but do help to transfer wind-load. That design, it seems to us, is apt to meet the description of cladding."

66. On behalf of Almacantar, Mr Hutchings contended that the FTT was wrong to find that

there is cladding at CPH that could form part of a "cladding system". In making his submissions he acknowledged that it was not open to the appellants to challenge the underlying findings of fact made by the FTT.

67. Firstly, he said that we should have regard to other provisions of the BSA and in particular section 149 which deals with past defaults relating to cladding products which he says underline the fact that "cladding" is recognised as being something which is either attached to an external wall or perhaps forms part of it but is not the external wall itself. Secondly, he relied on the OED definition of cladding as being "*A coating or covering applied to the surface of an object, a building etc; the application of such a coating.*" This, he said shows that cladding connotes something which is applied to the outside of a building as a covering or coating rather than forming the structure of the building. For the same point, Mr Hutchings relied on PAS9980:2022 (the British Standard Institution code of practice) and commentary within the UT decision in *Lant Street* which referred to a note to the code as follows:

> *"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...and insulated core sandwich panels, which are attached to the substrate. Combinations of, for example, cladding panels and insulation foam 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."*

68. In Mr Hutchings' submission it is inapt to describe the make-up of CPH's façade as incorporating cladding. He contended that the façade forms the exterior of the building consisting of vision and opaque glass and conventional timber window frames, set into the timber ladder frame. He referred us to *Irvine's Estate v Moran* (1992) 24 H.L.R. 1 at first instance where it was held for the purposes of section 11 of the 1985 Act, that the structure and exterior could extend to windows and found that the structure did not need to be limited to load-bearing elements.

69. It is our view that the question of whether a building includes cladding is one of fact. In this case, the FTT had regard to the technical definitions of cladding and had heard evidence over a period of five days, including evidence from experts, and had carried out a site view. The FTT's clear conclusion was that the façade at CPH was "cladding" for the purposes of the BSA. We do not consider that *Irvine v Moran* takes the matter any further. It was concerned with different legislation and was not intended to set out wide-reaching and final principles.

70. There is no justification at all for us to depart from the FTT's finding; it was clearly an assessment that it was entitled to make. It found that there was an underlying structure to which the cladding was attached. The findings are consistent with PAS9980:2022 and so far as this appeal is concerned are unassailable.

71. The next question is whether the Proposed Scheme involves "cladding remediation" for the purposes of paragraph 8. Paragraph 8(2) provides that 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."

72. On behalf of Almacantar it is said that the legislation clearly contemplates that there are two systems: the cladding system and the external wall system and that there is a distinction between them. It is pointed out that PAS9980:2022 states:

> "*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*."

73. Mr Hutchings says that what is specifically not regarded as cladding, or components which form a cladding system, is the entire external wall itself. Furthermore, he says, if there is no inner wall then there cannot be an outer wall. In summary it is said that the façade at CPH is not a separate system but one composite system. It constitutes the entire thickness of the entire wall and there is no outer wall in what might be regarded as an "external wall system."

74. On behalf of the respondents it is said that the meaning of "cladding system" within paragraph 8 was considered by the UT in *Lant Street* where the meaning of "outer wall" of an external wall system was described at paragraph 144 as follows:

> "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."

It is submitted that this makes it clear that paragraph 8 does not require two systems. Rather, if an external wall system contains an inner wall and an outer wall within an external wall system, only the outer wall could be within the definition.

75. We adopt that analysis and consider that the FTT was correct in finding that the façade at CPH comprises "the outer wall of an external wall system." We reiterate that the finding is a finding of fact. There is no justification for limiting the applicability of paragraph 8 to structures with two separate systems and the clear words in paragraph 8 do not require there to be two separate systems. We agree that if there had been only one composite wall, the requirement would not be met but that is not what the FTT found.

Meaning of Unsafe - Argument

76. Mr Hutchings argued that the term "unsafe" in paragraph 8 should be narrowly construed

to mean inherently unsafe cladding posing a fire risk, not general degradation or structural decay over time. He said that it was quite obvious that "unsafe" in this context means "posing a fire risk" or something which is inherently unsafe due to "historic problems which came to light following the Grenfell Tower fire".

77. In the appellants' submission the use of the word "unsafe" is intended to impute a more narrow interpretation than the wider "building safety risk". Furthermore it was said that "unsafe cladding" within the context of the BSA is concerned with safety for those in occupation and is primarily if not exclusively cladding which is inherently defective upon installation because it creates a fire risk. In context, it was argued, "unsafe" is not directed towards a generic concept of "unsafeness", or even a "building safety risk" and in particular it should not be taken to include something which may become unsafe by reason of slow degradation.

78. The appellants submit that the consequences of a wider reading would be extraordinary and that it cannot have been Parliament's intention to encompass any "cladding" on older buildings that would be caught by the paragraph.

79. In response, Mr Bates pointed to section 1(1) of the BSA which states that the provisions of the BSA are *"intended to secure the safety of people in or about buildings and to improve the standard of buildings"*. He pointed out that nowhere in schedule 8 are the words "fire safety issue" used and that there is no rational basis for reading such a limitation. He pointed out that the FTT found that the façade at CPH poses a risk of fatality to passers-by and was evidently correct to find that the cladding system was unsafe.

80. The FTT decided that 'unsafe' means something more than simply out of repair and that "It is sufficiently wide a term to encompass a range of threats to the safety of the building or to its residents or nearby members of the public. That is a plain and straightforward interpretation of the language used and no external sources are needed for it. It is consistent with the wide drafting of the 2022 Act and its stated purposes." In respect of CPH it found that:

> "300. On the basis of the very clear evidence from Dr Harris as to the serious degradation of the condition of the façade including the serious risk to the health and safety of the residents and the public if more of the windows detached because of the detachment of the clamp strip and failure of screws (or indeed one of the annealed (i.e. not safety) glass spandrel panels was to be sucked out by wind force) due to degradation in the timbers or failure of external seals due to the water being let and kept in, we are satisfied that the cladding system at CPH is unsafe."

Consideration

81. In our view the FTT was correct in its construction of the word "unsafe." There is no justification for limiting the ambit of paragraph 8. The words used are clear and unambiguous and no limitation is included relating to "fire risk". As we have already observed, the definition of "relevant defect" includes a number of conditions which relate to works done or not done and which result in a "building safety risk" as defined. Those

restrictions have not been applied to paragraph 8 and we consider that the word "unsafe" must be given its ordinary and natural meaning.

82. So far as the suggestion that the resulting impact on landlords would be extraordinary we adopt Mr Bates' submission that this simply accords with the policy of the BSA and as observed in *Adriatic* in the Upper Tribunal "what might be seen as unfair results are… simply a reflection of life in the new world of the 2022 Act."

83. Accordingly we dismiss Grounds 1 to 4 of the appeal.

Ground 5

84. We turn now to Ground 5 where permission to appeal was refused by the FTT and this Tribunal directed that permission should be decided as part of the substantive hearing and if granted, the Ground considered and decided.

85. This ground concerns the term "qualifying lease" as defined in section 119 of the BSA and a presumption found in paragraph 13 of Schedule 8. As we have seen section 119(2) provides that:

> "(2) 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 … —
>
> (i) the dwelling was a relevant tenant's only or principal home,
>
> (ii) a relevant tenant did not own 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.'"

86. So far as is relevant, paragraph 13 of Schedule 8 provides:

> "13 (1) This paragraph applies in relation to a lease that meets the conditions in paragraphs (a) to (c) of section 119(2)
>
> (2) The lease is to be treated for the purposes of this Schedule as a qualifying lease unless –
>
> (a) the landlord under the lease has taken all reasonable steps (and any prescribed steps) to obtain a qualifying lease certificate from a tenant under the lease, and
>
> (b) no such certificate has been provided to the landlord.
>
> (3) In this paragraph "qualifying lease certificate" means a certificate, complying with any prescribed requirements, that the condition in section 119(2)(d) was met in

relation to the lease at the qualifying time."

87. In the FTT the issue of whether the paragraph 13 presumption applied to a number of leaseholders fell for consideration. The FTT found that:

> "(3)(b) The presumption in paragraph 13(2) of schedule 8 applies to flat numbers 5, 15, 17, 18, 19, 22, 28, 29, 31, 33, 34 and 35 ('those flats') that they are held under qualifying leases"

The appellant contends that the FTT was wrong to find and/or conclude that the effect of the presumption is that no service charge or reserve fund is recoverable from those lessees in respect of the Proposed Scheme of works and associated costs under the qualifying long term agreement (under section 20 of the 1985 Act).

88. The basis of the contention is not that the FTT was wrong or had no jurisdiction to determine which of the respondents were, as at the date of its determination, presumed to hold a "qualifying lease" pending the landlord obtaining any qualifying lease certificate which rebutted the presumption. The point taken is that it is said they appeared to have made an unqualified finding of fact as to who holds a qualifying lease and thus, from whom services charges would (and would not) be recoverable.

89. The question of whether any finding on the presumption was final for all purposes was not raised by the appellants or the respondents before the FTT. However on receipt of the decision, Almacantar sought clarification of the import of the decision and asked the FTT to review its decision which it declined to do stating:

> "15. Paragraph 4 of the 'Summary of Reasons' [for appeal] is the first time this argument was properly put before the Tribunal (it should be noted that the first time this argument was raised was in a letter purporting to seek clerical corrections to the Tribunal's determination dated 26 March 2024). The Applicants did not make this argument in their pleadings, at the hearing, or by their Skeleton Argument.
>
> 16. In light of that, in order to review its decision, the Tribunal would need to reopen submissions from all sides. We do not consider it proportionate or fair to do so.
>
> 17. Contrary to paragraph 4(3) of the Applicants' reasons, the relevant question is not when (or indeed whether) the Respondents provided a list of their asserted qualifying status. That complaint places the burden on the wrong party. As paragraph 13(2) makes amply clear, it is for the Landlord to take positive steps, failing which the presumption applies.
>
> 18. The requirement for the Applicants to take all reasonable steps to obtain a qualifying lease certificate in order to rebut the presumption was raised by the Tribunal itself both at the Pre-Trial Review in November 2023, and the emergency CMH a week before the hearing.
>
> 19. It cannot be a correct proposition of law that a landlord who chooses to fail to engage with the positive steps required of him to rebut a presumption, in a case in which the question is clearly in issue, thereby deprives the Tribunal of the ability to

make a finding that the presumption applies to particular qualifying leases. What otherwise is the point of a presumption?

……..

21. The opportunity to rebut the presumption is and always was the Applicants' burden, of which it ought to have been aware and actively taking steps from the date that the paragraph 8 argument was notified by the Respondents' statement of case, i.e. 28 April 2023. Having taken no steps, the presumption applies. That is the effect of the legislation.

22. That is not to say that in the future, the question whether or not one of the flats holds a qualifying lease could change, whether by a change of use or portfolio. The Applicants go too far when they interpret our finding as a 'finding forever'; our finding is a finding 'for now'. We have made it clear in paragraph 193 of the Decision that our finding is on the basis of no steps having been taken to rebut the presumption. It remains the Applicants' burden to rebut the presumption if, at a later date, it asserts a change in circumstances."

90. At the substantive hearing of this appeal we gave permission to Almacantar to pursue Ground 5. The reason that we did so was that although the meaning of the FTT's decision was tolerably clear, we were concerned by the FTT's observation in paragraph 22 of the refusal of the permission to appeal to the effect that the question whether or not one of the flats is subject to a qualifying lease "could change, whether by a change or use or portfolio." That statement cannot be correct as the status of "qualifying lease" is fixed as at 14th February 2022. Any change following that date would be immaterial. That concern was sufficient to persuade us that there was a reasonable prospect of the Ground being successful.

91. However, having heard further argument made by Ms Holmes on behalf of Almacantar we decided that the Ground of appeal should not succeed.

92. Ms Holmes contended that where the FTT went wrong was to seemingly make an unqualified determination that particular leaseholders hold a "qualifying lease". In oral submissions she went further and said that the FTT must have gone beyond the paragraph 13 presumption and made findings of fact about the lease status.

93. Although Ms Holmes said that the appellants merely seek clarification that such a determination only applies unless or until the presumption is rebutted, her difficulty is that the point was not argued either way at first instance. She said that the finding had already caused difficulties in enforcement proceedings.

94. The main argument on behalf of the respondents was led by Mr Amin. He contended that Ground 5 ought to be refused. He said that the respondent leaseholders were entitled to know where they stood in the proceedings and that Almacantar had avoided the question of whether a lease was a qualifying lease (other than under the presumption) throughout the proceedings. He contended they should be able to rely on the FTT's finding as the final word.

95. It is certainly the case that no reasonable steps had been taken to obtain a certificate and in questioning from the Tribunal Ms Holmes seemed unable to provide an answer to the

question whether Almacantar was seeking to avoid a FTT determination on the issue. However, the fact remains that no evidence or argument was led on the issue before the FTT.

96. Mr Amin referred us to the case of *Rhine Shipping DMCC v Vitol SA* [2024] EWCA 580, in support of the proposition that we should not allow the point to be taken. In particular he said that had the point been raised prior to trial, the respondents would have conducted their case differently and would have provided witness and documentary evidence and also that the FTT would have made findings of fact which it did not need to make given the deeming effect of paragraph 13. He submitted that this Tribunal should endorse the FTT's finding.

97. In our view it would be inappropriate for us to decide whether or not the finding of the FTT is binding or whether it may be rebutted. The issue was not raised and was not decided. We are satisfied that the FTT did not make any determination on evidence, it simply applied the presumption.

98. Ground 5 is dismissed on the basis that it is a new point which we will not admit on this appeal. Although we were initially swayed by the wording of the FTT's refusal of permission to appeal, that does not form part of its decision and is not under appeal. It also does not influence our determination.

99. Accordingly Ground 5 is dismissed.

Judge Siobhan McGrath Mrs D Martin TD MRICS FAAV

16 September 2025

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.

ANNEX 1

LIST OF RESPONDENTS

1. Penelope Claire Devalk (Flat 5)
2. Laura Stedman (Flat 11)
3. Chia Yen Huang (Flat 15)
4. Innes Gordon Catto (Flat 17)
5. Caroline Mary Weeks (Flat 18)
6. Derek Savage (Flats 2,7,8,9,16 and 28)
7. Edward Charles Alexander Laws (Flat 31)
8. Stella Meadows (Flat 33)
9. Ingeborg Annie Woolf (Flat 34)
10. Taeg Hee Oh (Flat 35)
11. Ginger Global (UK) 2021 Limited (Flat 19)
12. Xavier Property Management (UK) 2021 Limited (Flat 22)
13. Sean Michael Doran (Flat 29)