Almacantar Centre Point Nominee No.1 Ltd & Ors -V- Penelope De Valk & Ors [2025] UT 298 (LC)

In this Judgment, the Upper Tribunal ("UT") provided clarification on the meaning of the terms "cladding remediation", "cladding" and "unsafe" in paragraph 8 of schedule 8 of the BSA (which sets out leaseholder protections from service charges). Most significantly, the UT upheld the FTT's decision that "cladding remediation" is not limited to works that are a "relevant measure" relating to a "relevant defect".

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The Decision of the FTT

The freeholder had made an application under section 27A(3) of the Landlord and Tenant Act 1985 seeking a determination that a proposed scheme of works to the defective façade at Centre Point House ("CPH") could be recovered from the respondent leaseholders under the service charge provisions in their leases.

The FTT held that no service charge would be payable by a number of Respondent lessees in respect of the Proposed Scheme as they were entitled to rely on paragraph 8 of Schedule 8 of the BSA which stated:

"(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 the cladding system that –

(a) forms the outer wall of an external wall system, and

(b) is unsafe."

Arguments on Appeal

The arguments on appeal were as follows:

1. Whether paragraph 8 of Schedule 8 was limited to cladding remediation which was a relevant measure addressing a relevant defect?

2. Whether the external façade at CPH was "*cladding*" – i.e. an "*outer skin*", or whether it formed the exterior of the building itself – or a "*cladding system*"?

3. Whether the term "*unsafe*" in paragraph 8 was limited to inherently unsafe cladding posing a fire risk?

The Decision of the UT

On the primary question, the UT upheld the FTT's decision that the benefit of paragraph 8 of schedule 8 is not limited by reference to a "*relevant defect*" and no qualification is to be imported to that effect. This was for the following reasons:

1. Paragraph 8 is clear and unambiguous and accords with the underlying policy of the BSA and reflects the clear ministerial statement that "*no leaseholder in their own flat 'would pay a penny to fix dangerous cladding'*". [51]

2. This interpretation is not out of kilter with the structure of sections 116 to 124 of the BSA 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*". [52]

3. The defects to the façade at CPH originated from the original design and construction of the building, which occurred between 1963 and 1966 and therefore fell outside the scope of section 120. Accordingly, the Proposed Scheme was not a "*relevant measure*" to remedy a "*relevant defect*". However, paragraph 8 does not fall foul of this bright line cut-off within the package of remediation offered by paragraphs 2 to 5. It is only concerned with making unsafe cladding safe. [53-55]

4. The definition of "*relevant defect*" has more than one component. This is very different from the criterion of "*unsafe*". [58]

On the second question, the UT held that, where there was no definition of "*cladding*" in the BSA, the question of whether a building includes cladding is one of fact. The FTT had regard to the technical definitions and heard evidence, including from experts on the matter.

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Accordingly, the UT found there was no justification to depart from the FTT's findings: see [69-70].

As to whether there was a "*cladding system*", the UT rejected the Appellants' argument that a "*cladding system*" required two systems. The UT held that there was no justification for limiting paragraph 8 to a structure with two separate systems, it could therefore apply to the composite system at CPH: see [74].

As to whether the cladding system was "*unsafe*", the UT rejected the Appellants' argument that "*unsafe*" should be interpreted more narrowly than the wider "*building safety risk*" such that it should be limited to something posing a fire risk and excluded something which may become unsafe by reason of slow degradation. The UT upheld the FTT's construction of "*unsafe*", namely that it is something more than simply out of repair and is a sufficiently wide term to encompass a range of threats to the safety of the building or to its residents or nearby members of the public. The words are clear and unambiguous and there is no limitation to "*fire risk*". [81]

Commentary

The UTT's decision on the second and third question is straightforward and relatively unsurprising. However, the UTT's determination of the first question is less so. Whilst the UTT may be correct that on a proper interpretation paragraph 8 of schedule 8 it is not limited to "*relevant defects*", this interpretation may nonetheless give rise to practical problems that cast doubt on whether this is what parliament intended. In particular, the UTT's interpretation introduces potential inconsistencies with other parts of the BSA, particularly in relation to RCOs. RCOs are designed to offer freeholders alternative mechanisms for financing remediation works that would otherwise be covered by service charges. However, RCOs are restricted to addressing "*relevant defects*", whereas the UTT's decision confirms that the cladding exemption under paragraph 8 of schedule 8 applies more broadly. Accordingly, RCOs would not be available for cladding remediation works under paragraph 8 of schedule 8. This may result in practical challenges for certain freeholders, who could face difficulties in securing funding for cladding remediation works.