Service charges and the Building Safety Act 2022

On 13 November 2023 the Upper Tribunal (Lands Chamber) allowed an appeal against an First Tier Tribunal (**FTT**) decision concerning the costs of proceedings relating to the remediation of certain fire safety defects (The Lands Tribunal (tribunals.gov.uk). The decision is of wider significance for those involved in providing advice under the Building Safety Act 2022 (the **Act**).

Background

For the cost of significant work to be passed to the owners of long residential leases through the service charge the landlord has to first undertake a consultation exercise. A failure to do so would, in the absence of dispensation, prevent the landlord from recovering anything other than a nominal contribution to the work. An application for dispensation must be made to the FTT.

In the case of Hippersley Point (a 10 storey mixed use building) the landlord, Adriatic Land 5 Limited (**Adriatic**), made such an application. This followed a discovery that the external wall system of the building presented a fire safety risk and that interim measures and longer terms works were required. Dispensation was sought to facilitate the interim measures being implemented as swiftly as possible. Dispensation was granted but on terms that the costs associated with the application for dispensation should not be passed through the service charge. The cost of the works themselves were not subject to such a restriction. This 'costs condition' was imposed by the Tribunal of its own volition and it was not imposed pursuant to an application made by the lessees.

The relevance of the Act

Hippersley Point meets the definition of 'relevant building' under the Act and the work to which the FTT proceedings was concerned were 'relevant defects' as defined in the Act. Importantly however, at the time these proceedings came before the FTT, the Act was not in force.

The above being the case, it might be asked what relevance this decision has to the Act. Well the answer to this lies in timing. By the time that this appeal came to be determined Paragraph 9 of Schedule 8 to the Act was in force. Paragraph 9 provides that legal or professional charges relating to the potential liability of any person as a result of a relevant defect should not be charged through the service charge of a qualifying lease. There should be no doubt that had an application for dispensation been made after the coming into force of the Act then Paragraph 9 would prevent any of the legal costs incurred in seeking dispensation from being recovered but the question here was the application of the Act in relation to costs incurred prior to the Act coming into force.

The appeal

The Lands Chamber determined that as a matter of procedure the 'costs condition' was not an order that should have been imposed by the FTT and it should be set aside. This meant that subject to any relief given by the Act the costs of the dispensation proceedings could be charged through the service charge.

As to the application of the Act there were 3 lines of argument deployed by Adriatic to contend that the costs fell outside the scope of Paragraph 9:

- The Act was not in force when the costs were incurred, so the provisions of the Act do not apply to these costs;
- If the Act could apply to costs incurred when it came into force it would none the less not apply if those costs fell due to be paid before the Act came into force;
- The costs of the proceedings were not costs relating to the liability or potential liability of any person incurred as a result of a 'relevant defect'.

Dealing with the third bullet point first, the Lands Chamber concluded that the costs of a dispensation application would fall within the ambit of Paragraph 9 as the defects were 'relevant' and the costs related to the liability of Adriatic to remediate the defects. Paragraph 9 was not limited to costs associated with claims under the Act and could catch contractual liabilities to remediate relevant defects.

The retrospective nature of the Act

There are elements of the Act that are plainly retrospective in effect. The new 30 year limitation period for historic Defective Premises Act 1972 claims is one example. Paragraph 9 is not expressed in such explicit terms. However, when looking at the wording of Paragraph 9 and indeed the related sections in the Act the Lands Chamber concluded that it could not be said to exclude historic costs incurred prior to 28 June 2022. The purpose of the 2022 Act in this respect is to secure the remediation of certain defects and to bar the associated costs being charged to lessees that might otherwise fall to be put through a service charge. There was no distinction in this regard between costs pre-dating 28 June 2022 and future costs and it mattered not whether the costs had been demanded or otherwise fell due to be paid by the lessees.

As the costs in this case had not been charged to the lessees the Lands Chamber did not have to consider the scenario where the costs had been paid prior to the coming into force of the Act. It was recognised that this may be a more difficult scenario to consider, but in saying that the Lands Chamber did recognise that in *Batish & Others v Inspired Sutton Limited & Others* the FTT ordered reimbursement of historic paid service charges,

albeit in the context of an application for a remediation contribution order.

This decision appears to support the conclusion that if the gateway criteria in the Act (relevant building, relevant defect, qualifying lease) are met then the Act can intervene to require the landlord to meet the cost itself and to reimburse such costs if paid by lessees through the service charge and, subject to general rules on limitation, it matters not whether these costs were incurred, charged to lessees and/or paid prior to or after 28 June 2022.

If you require assistance with any aspect of the Building Safety Act 2022 then please do not hesitate to contact a member of our specialist Building Safety Act team.

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