Neutral Citation Number: [2024] UKUT 434 (LC)

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

17 December 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BUILDING SAFETY - LEASEHOLDER PROTECTION - Sch 8, paragraph 8, Building Safety Act 2022 - amendment of grounds of appeal - admissibility of documents - permission to apply granted

BETWEEN:

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

Appellants

-and-

VARIOUS LEASEHOLDERS OF CENTRE POINT HOUSE

Respondents

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

Siobhan McGrath, President of the FTT Property Chamber and
Upper Tribunal Member Mark Higgin FRICS FIRRV
17 December 2024
Decision date: 17 December 2024

Martin Hutchings KC and *Harriet Holmes* instructed by Bryan Cave Leighton Paisner, represented the appellants
Justin Bates KC and *Mattie Green* instructed by Howard Kennedy LLP , represented the 2nd to 8th and 14th to 17th respondents
Simon Allison instructed by Forsters LLP represented the 13th respondent and *Samir Amin* (direct access) represented the 11th and 12th respondents

The following cases were referred to in this decision:

Singh v Dass [2019] EWCA Vic 360

1. This is an appeal brought with the permission of the First-teir Tribunal, Property Chamber ('the FTT') in respect of their decision concerning the meaning and impact of Schedule 8 to the Building Safety Act 2022. Schedule 8 incorporates provisions relating to "leaseholder protections" against the cost of certain remediation works required to ensure the safety of high rise buildings. The case concerned remediation works at Centre Point House (CPH) near the junction of Tottenham Court Road and New Oxford Street in Central London. For the reasons set out below, the appeal which was listed for a two day substantive hearing on 17 and 18 December 2024, was adjourned.

2. The case turns on the proper construction of paragraph 8 of Schedule 8 which deals with unsafe cladding. Permission to appeal was limited to the first four grounds advanced by the appellant which are as follows:

> **Ground 1**: The FTT erred in concluding that paragraph 8 of Schedule 8 to the Act applies to the Proposed Scheme.
> **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 Act.
> **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 Act.
> **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 Act] 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".

3. Those grounds were then explained in some detail and an overview provided as follows:

> "In brief compass, the Appellants' case is that the FTT misconstrued paragraph 8 of Schedule 8 to the Act and that this paragraph is more confined in its scope than the FTT thought. The FTT wrongly found that the façade of CPH contained, or consisted of, a 'cladding system' and, that this was a system which was 'unsafe' within the meaning of the Act. This was not in fact the case. They further wrongly found that the Proposed Scheme amounted to 'cladding remediation' within the meaning of paragraph 8 of Schedule 8 to the Act when this was clearly also not the case."

4. Prior to the hearing skeleton arguments were exchanged. The content of the appellant's skeleton argument gave rise to an application by the respondents (separately represented by three counsel). The application sought two orders: firstly an order preventing the appellants from relying on an argument that the application of paragraph 8 is contingent

on the existence of a "relevant defect" and secondly, an order preventing the appellants from relying on documents which it was said amounted to new evidence.

5. The application is framed as follows:

> "1. The exchange of skeleton arguments and production of the authorities bundle reveals that the Appellants are seeking to take two points, neither of which are open to them. The Tribunal is asked to direct that the Appellants must develop their case without reference to these issues.
> 2. First, the Appellants argue - for the first time in their skeleton argument - that paragraph 8 of Schedule 8 of the Act is limited to "relevant defects". The Appellants did not raise this line of argument in their application for permission to appeal dated 18 April 2024, or in their pleaded statement of case set out in their Grounds of Appeal dated 7 June 2024 [p.16]. For the reasons set out below, the Appellants should not be entitled to run this line of argument at the appeal hearing.
> 3. Secondly, the Appellants have included material in the authorities bundle which is neither an authority (in the sense of a decision, academic commentary etc) but which is evidence and, more than that, evidence which did not exist at the time of the FTTs decision. Again, the Tribunal is asked to direct that the Appellants must develop their argument without reference to such material."

The First Issue

6. The question of whether paragraph 8 is limited to "relevant defects" is of importance. In their skeleton argument, the appellants summarised their case as follows:

> "A's case in essence is that:
>
> a. The FTT was wrong to ignore that Schedule 8 was enacted to make provision in relation to the recovery of costs in respect only of the remediation of 'relevant defects' in relevant buildings. To construe the Act otherwise, as the FTT has done, creates extraordinary and significant consequences for landlords in A's position and is quite contrary to the statutory scheme of Part 5. Furthermore, Schedule 8 principally relates to the <u>new liabilities</u> created by the Act. It says nothing about 'old' liabilities arising purely under a landlord's lease repairing obligations, relating to a 60 year old building.
> b. It was secondly, and in any event, wrong to treat what is, in many respects, a conventional 1960s timber-framed window construction at CPH as comprising 'cladding' which forms a 'cladding system' which is part of an external wall system within the meaning of those words and expressions as used in paragraph 8 of Schedule 8 to the Act. Furthermore, it was wrong too to treat the whole of the Proposed Scheme to remedy acknowledged issues with the façade as 'cladding remediation' for the purposes of that provision and, wrong to find that any cladding system was 'unsafe'."

7. On behalf of the Respondents it is said that the first limb of the argument is beyond the parameters of the grounds of appeal on which permission was granted and in effect is a new ground for which permission has not been sought or given. On behalf of the Appellants it is contended that the first limb is integral to its case, that it is not a new ground but a proper elaboration of a point of law and that ground one is drafted in broad terms which can encompass the argument about "relevant defect."

8. Although there is some force in the appellant's submissions the Tribunal decided that in order to rely on the "relevant defect" point, the appellants needed to seek permission to add a further ground of appeal and that if permission was granted, the respondents should have the opportunity to lodge revised statements of case.

9. In the FTT the "relevant defect" point was considered and rejected in terms. It held:

> a. At §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."
> b. At §226: "We are satisfied, in light of the above analysis, that CPH as a building is within the provisions of paragraph 8 of schedule 8."

10. No reference is made to these findings in the appellants ground of appeal. The only references to "relevant defect" appear in paragraph 32(12) of the grounds which is concerned with the correct approach to the word "unsafe" in paragraph 8 and later in paragraph (14)(b) where attention is drawn to the "stark contrast" between other parts of the Act and paragraph 8. There is no direct challenge at all to the FTT's findings set out above.

11. On behalf of the appellants, Mr Hutchings contended that the "safety issue" had been properly raised and clearly included consideration of "relevant defect." Had that been the only reliance on "relevant defect" the Tribunal may have taken a different view of the appellant's case. However, in their skeleton argument, reliance is placed on two aspects of "relevant defect." Firstly, the safety aspect and secondly, the limitation within the Act whereby the leaseholder protection only apply to works carried out since 1992. If the appellants are correct, and paragraph 8 falls within the ambit of "relevant defect" then schedule 8 would not apply to CPH at all because the defects in this case derive from its original construction in 1962. That point is not raised or supported in the grounds of appeal.

12. It was striking that none of the respondents dealt directly with the "relevant defect" point either in their statements of case or in their skeleton arguments. They contend that the

matter had simply not been put in issue in the grounds of appeal. It is correct that reference was made to "relevant defects" in two of the responses but this was not in order to deal with a contentious point, rather it was recitation and reliance on the FTT's decision.

13. We would also observe that the Upper Tribunal (Lands Chamber) Practice Direction, requires that an appellant says "why" the FTT has erred in law. In the detailed and comprehensive grounds of appeal, no mention at all is made of why it is said the FTT was wrong to find that paragraph 8 "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." Without that explanation it is a reasonable inference to make that the "relevant defect" argument as framed within the appellants skeleton argument is new.

14. As to outcome, the respondents submitted that, in effect, the appeal hearing should continue but that the appellants should be prevented from relying on the "relevant defect" argument. They characterised its inclusion in the skeleton argument as an ambush and said that if an application to amend was made at the hearing it would be opposed. Before we gave our determination on whether we considered that the relevant defect point fell within the grounds of appeal as drafted, Mr Hutching suggested that the "relevant defects" point could be dealt with in supplementary written submissions by the respondents when they had heard his full submissions. The respondents argued and we agreed that this approach would be wholly unsatisfactory. The respondents are entitled to know precisely the case they need to meet and to have the opportunity to make oral submissions.

15. The importance of the "relevant defect" point is such that we did not consider that it would be appropriate simply to prevent the appellant relying on it. We considered the guidance in *Singh v Dass* [2019] EWCA Vic 360 and decided that the better way to proceed would be to invite Mr Hutchings to apply to amend the grounds of appeal, for the Tribunal to decide whether to give permission on any new ground of appeal and thereafter to give the respondents an opportunity to respond and to adjourn the case to be re-listed as soon as possible. However, we also indicated that as a condition of the permission to apply to amend, the appellants should pay the respondents costs thrown away by the adjournment. We do not consider that the inclusion of the new point in the skeleton argument was an ambush with all its connotations. The Act is complex and these are novel points of law and errors will be made. The question of whether buildings such as CPH are within the ambit of Schedule 8 paragraph 8 will potentially have far reaching consequences. Taken together, we consider that these points are sufficient to support our decision that the appellants should be given an opportunity to apply to amend the grounds of appeal..

16. After taking instructions Mr Hutchings indicated that the appellants would apply to amend the grounds of appeal and that they would pay the costs thrown away in consequence of the adjournment. Those costs will be payable on an indemnity basis.

The second issue

17. On behalf of the respondents, it is submitted that the appellants have incorrectly included a number of government and professional guidance documents which ought not to be admitted. They contend that many of these cannot be said to be an "authority" instead they are policy documents. It is also observed that many of the documents were not in existence when the FTT reach the decision in the case.

18. Mr Hutchings said that the documents were admissible and that the concerns that had been expressed could be addressed by the Tribunal giving appropriate weight to them. We do not agree. We do not consider that the documents are relevant. If they amount to evidence then they would not be admitted. If they are an expression of policy, and in particular were created after the Act came into force, then they cannot assist in our statutory construction. Further, and again because of the complexity of the legislation, numerous policy and updated policy documents have been issued during the last two years and in some cases, government views have shifted. Accordingly, we direct that reliance may not be placed on them.

Siobhan McGrath, President of the FTT (Property Chamber) Mark Higgin FRICS FIRRV

17 December 2024

ANNEX

LEASEHOLDERS OF CENTRE POINT HOUSE

1. Simon James Ogilvie
2. Derek Savage
3. Claire Penelope Devalk
4. Harmon Properties Two Limited
5. Laura Stedman
6. Chia Yen Huang
7. Innes Gordon Catto
8. Caroline Mary Weeks
9. Ginger Global (UK) 2021 Limited
10. Xavier Property Management (UK) 2021 Limited

11. C.I.D. Investments Limited
12. Mohammed Fahad Jaber Alharthi
13. Sean Michael Doran
14. Edward Charles Alexander Laws
15. Stella Meadows
16. Ingeborg Annie Woolf
17. Taeg Hee Oh

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.