Falcon Chambers

Looking Forward, Looking Back: Service Charges and the Retrospective Effect of the Building Safety Act 2022

- The retrospective effect of Part 5 and Schedule 8 of the Building Safety Act 2022 has been considered in two cases: *Hippersley* for service charge protections and *Triathlon* for remediation contribution orders
- In both cases, the provisions of the Building Safety Act 2022 were held to be retrospective to an extent. Both are under appeal to the Court of Appeal and are listed to be heard sequentially and before the same constitution
- The Court of Appeal recently convened a case management hearing for *Hippersley* and *Triathlon* and allowed the appellant in the former to raise an argument that Schedule 8 should be read consistently with A1P1 of the European Convention on Human Rights
- Consideration of the implications of Schedule 8 to the Building Safety Act 2022 being retrospective, including how leaseholders who diligently paid their service charges in respect of relevant defects can recover their money, reveals that *Hippersley* and *Triathlon* practically need to be decided alongside each other

Introduction

The leaseholder protection provisions in the Building Safety Act 2022 ("the BSA 2022") are, to quote the Explanatory Notes, "*backward-looking only*" and "*a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings*". To what extent Part 5 and Schedule 8 of the BSA 2022 have retrospective effect is currently being considered by the Court of Appeal on appeal from two cases, *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC) and *Triathlon Homes LLP v Stratford Village Development Partnership* [2024] UKFTT 26 (PC).

The Decisions

Hippersley concerned the recovery of the costs of an application under section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") to dispense with the consultation requirements in relation to cladding works. On an appeal from the First-Tier Tribunal concerning a section

20C order, the Upper Tribunal notified the appellant landlord of the further issue of the application of Schedule 8, paragraph 9 of the BSA 2022, 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*". Since the works and the application (although not the First-Tier Tribunal's revised decision) preceded the date when paragraph 9 came into force, namely 28 June 2022, an issue arose as to whether paragraph 9 could apply to sums payable before that date.

The Upper Tribunal decided that paragraph 9, and by extension the rest of Schedule 8, had retrospective effect. Edwin Johnson J, the Chamber President, reached this conclusion on a strict reading of paragraph 9, holding that "*as from 28th June 2022, no service charge is payable in respect of Qualifying Services, regardless of when the costs of those Qualifying Services were incurred, and regardless of when the relevant service charge actually became due for payment*". Nevertheless, he also noted the potential for anomalous results. For example, a leaseholder who refused to pay a service charge demanded before 28 June 2022 would be rewarded by their dilatoriness insofar as the sum included items rendered irrecoverable under the BSA 2022, while a diligent leaseholder would not benefit.

Triathlon was an application for a remediation contribution order under section 124 of the BSA 2022. The First-Tier Tribunal can make an order requiring a specified body corporate to make payments to a specified person "*for the purpose of meeting costs incurred or to be incurred in remedying relevant defects*" if it considers it "*just and equitable to do so*". The Tribunal was under "*no doubt*" that remediation contribution orders could be made in respect of costs incurred before 28 June 2022 as a matter of clear language, and noted paragraph 1012 of the Explanatory Notes which appeared to cover the situation of leaseholders who wished to recover sums already paid through their service charge. Remediation contribution orders were described as non-fault based remedies designed to protect leaseholders, and orders were duly made.

<u>Recovering Service Charges Paid Before 28 June 2022 for Relevant Defects</u>

Were the Court of Appeal to affirm Edwin Johnson J's decision in *Hippersley*, diligent leaseholders (as he described them) who had paid their service charge in respect of relevant defects before 28 June 2022 even though the landlord was responsible for the defect under paragraph 2, the contribution condition was satisfied under paragraph 3, their lease was below a certain value under paragraph 4, etc., may understandably seek to put themselves in the more fortunate position of their fellow leaseholders who did not pay before commencement. There are a couple options for consideration, but their deficiencies reveal the importance of remediation contribution orders and the possible result of the appeal in *Triathlon*.

The first is seeking a restitutionary remedy on the basis of unjust enrichment. The argument would be that the landlord has been unjustly enriched by the amount of the service charge paid for relevant defects, which the leaseholder paid under a mistake of law. *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, in which the House of Lords extended restitution for mistake to mistakes of law, could provide an analogous situation. The claimant had paid the defendant sums of money under swap transactions, which were widely assumed to be enforceable, but which in 1991 the House of Lords decided were void. The claimant sought restitution on the basis that payments made before that date were made due to a mistake as to the law.

It is, however, semantically difficult to speak of a "*mistake*" having been made with service charges in this context. *Kleinwort Benson* involved the House of Lords deciding that a widespread practice assumed to be lawful had never in fact been so; the introduction of the BSA 2022 is, of course, a change in the law which, if *Hippersley* remains substantially as decided in the Upper Tribunal, became effective as to extant service charges on 28 June 2022. Service charges paid for relevant defects before that date, assuming they were properly demanded under the terms of the lease, were lawfully due and owing at the date of payment. The "*mistake*" could perhaps be described as payment on time, when waiting would have entitled the leaseholder eventually to withhold lawfully the service charge, but this would stretch the concept uncomfortably.

An alternative is an application under section 27A of the 1985 Act for a determination that the service charge paid in respect of relevant defects was not payable. The advantage of this approach over restitution for mistake is that subsection (5) explicitly states "*the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*". Further, the mechanism of the BSA 2022 by which service charges in respect of relevant defects are reduced or made not payable is in Schedule 8, paragraph 10, which operates by deeming them not to be relevant costs within the meaning of sections 18 to 30 of the 1985 Act. There is an argument that the deeming provision in paragraph 10 could override the terms of the lease at the date of payment prior to 28 June 2022 and retrospectively renders the sum unpayable.

However, it must be noted that this would be an unusual use of section 27A with potentially complicated interactions with subsection (4), namely that no application can be made in respect of a matter which has been agreed or admitted by the tenant. Plainly the admission can be as to matters of law, such as whether a given service charge was validly demanded, or a particular item was a relevant cost as defined by section 18. In *C&A Gorrara Ltd v Kenilworth Court Block E RTM Co Ltd* [2024] UKUT 81 (LC), Judge Elizabeth Cooke decided that a series of unqualified payments may, depending on the circumstances, suffice to indicate agreement. Delay is also a relevant factor in inferring agreement. Leaseholders who paid service charges for relevant defects before 28 June 2022 without protest and who might, years later, challenge that payment under section 27A may encounter an argument under subsection (4) that they agreed or admitted the payment. Unless paragraph 10 prevents such agreement, the argument may well succeed.

That leaves remediation contribution orders. They are a much more flexible remedy; section 124 merely requires the First-Tier Tribunal to consider it just an equitable to make an order. The Tribunal in *Triathlon* consisted of Edwin Johnson J and Martin Rodger KC and so was well aware of the anomalous results identified in *Hippersley* which could follow from Schedule 8 being retrospective in effect. They stated at paragraph 75 that the purpose of Part 5 "*should not be restricted by precise distinctions of time*" and at paragraph 77 that there would be no remedy for leaseholders who had already paid their service charge if remediation contribution orders could not be made in respect of service charges paid prior to 28 June 2022. The brief discussion of the traditional cause of action in unjust enrichment and the application of section

27A above supports this analysis, as does the approach to Part 5 and Schedule 8 being a self-contained statutory code.

Accordingly, insofar as the problem of leaseholders who paid their service charges before 28 June 2022 is concerned, *Hippersley* and *Triathlon* need to be decided together. If the appeal in *Hippersley* is dismissed, then remediation contribution orders may be the only reliable route to recovery of service charges and the implications would need to be considered in *Triathlon*. If the appeal in *Hippersley* is allowed, and some other event, such as the relevant costs being incurred or the service charge being demanded, assumes greater importance, then the factors relevant to the "*just and equitable test*" in *Triathlon* may need to be analysed differently. In any event, whatever the permutations of the two appeals, diligent service charge payers will no doubt hope that there is a route to recovery, and that the same is tolerably clear.