Falcon Chambers

Certified for broader protection? "Landlord Deed of Certificate" Requirements and "qualifying leases" under Sch. 8 of the Building Safety Act 2022.

- A tenant appears to have a qualifying lease under s.119(2)(d) of the Building Safety Act 2022 ("BSA") if *any* of sub-paragraphs (i) – (iii) of the section apply in the circumstances of the case.
- The critical word in the section is "or".
- *Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2024] UKFTT 26 (PC) not followed.
- Scope for further decisions: two FTT decisions now point in opposite directions.

In *Nuernberg v Adderstone (216 Res) Limited, MAN/00CJ/BSC/2024/0001* the FTT expanded the circumstances where a landlord is required to give a "Landlord Deed of Certificate" to a tenant pursuant to the Building Safety (Leaseholder Protections) (England) Regulations 2022 ("the Leaseholder Protections Regulations"). As stated in the succinct judgment of Judge J Holbrook, a "single – but important – question of statutory interpretation" appears to have been resolved (for now).

The applicant claimed that a "Landlord Deed of Certificate" provided by the Respondent landlord contained a false claim. The applicant thereby alleged that the landlord had failed to comply with its obligations under the Leaseholder Protections Regulations. The Applicant was successful.

The issue was whether the tenant held a "qualifying lease" under s.119 of the BSA and the supporting Leaseholder Protection Regulations.

The Applicant was the leaseholder of a residential flat known as 91 St Ann's Quay, Newcastle upon Tyne ("the property"). The property formed part of a 10-storey mixed-use development, the residential parts of which were owned by the Respondent, which was a "relevant landlord".

On 7 May 2024, the Applicant notified the Respondent's agent of a potential sale of the property. Thereafter the landlord's agent provided him with a "Landlord Deed of Certificate" pursuant to regulation 6 of the Leaseholder Protections Regulations. As is well known, this document is a standard form one. It contains a section on whether a leaseholder holds a "qualifying lease". The Landlord is given three options. Here, the Respondent selected option 2. This states that: "the leaseholder has provided a leaseholder deed of certificate, but does not qualify for the qualifying lease protections".

The genesis of the case was that the Applicant took a different view. He had provided the Respondent with a "leaseholder deed of certificate" in which the Applicant confirmed that he acquired his Lease prior to 14 February 2022; that the Premises were not his only or principal home on that date, and that on that date he owned no more than two dwellings in the UK in addition to the property.

The Respondent's case that the Applicant did not have a "qualifying lease" rested on the simple premise that that the property was not the Applicant's only or principal home on 14 February 2022.

To the language. Section 119(2) of the BSA provides:

> "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 ("the qualifying time")—
> (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."

Per s.119(4)(c) of the BSA, a "relevant tenant" means a person who, on 14 February 2022, was a tenant under the lease in question.

Previously the law had been understood to have been set out in *Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2024] UKFTT 26 (PC), where the Tribunal stated:

> "["Qualifying lease"] is defined in section 119(2) and refers to a long lease of a single dwelling in a relevant building which was granted before 14 February 2022 and under which the tenant is liable to pay a service charge. The dwelling must also have been the tenant's only or principal home on that date and the tenant must not have owned any other dwelling, or not more than two, apart from their interest under the lease." [emphasis added]

In *Nuernberg*, the learned Judge accepted that these "observations do indeed indicate that the condition in sub-paragraph (i) of subsection (2)(d) must be satisfied in *every* case" but went on to state that this is "at odds with the description of section 119(2)(d) in the Explanatory Notes which accompany the BSA." Reliance was placed on paragraph 940 of the Explanatory Notes:

> "Subsection (2)(d) sets out the categories of leases that are qualifying. For a lease to be qualifying, at the qualifying time the lease must have been the tenant's only or principal home, or it must have been the only property they owned in the United Kingdom (even if it was not their only or principal home), or the relevant tenant must have owned no more than two additional properties in the United Kingdom in total. A "relevant tenant" is defined in subsection (4)(c) as a person who is a tenant under the lease (in other words, a leaseholder) at the qualifying time." [emphasis added]

That explanation is supplemented by paragraphs 941 of the Explanatory notes, which speak to the policy of the provision:

> "The provision at subsection (2)(d) means that a leaseholder will qualify for the leaseholder protections for their properties if they own up to three properties in the United Kingdom

> in total. If more than three properties in total are owned, then the principal home qualifies for the protections, but the other properties do not."

Further, the learned Judge in *Nuernberg* took the position that, in *Triathlon Homes*, the Tribunal did not appear to have been taken to the relevant paragraphs in the Explanatory Notes. Further, it was stated that, in paragraph 26 of the *Triathlon* decision, the comments in respect of s.119(2) "were not a central feature of [the FTT's] reasoning in any event (in that they did not affect the outcome of the case)".

On this basis the FTT considered in Nuernberg that section 119(2)(d) is satisfied if *any* of sub-paragraphs (i) – (iii) apply in the particular circumstances of the case:

> "that is apparent from the structure of subsection (2)(d), in particular the use of the word "or" immediately before sub-paragraph (iii). This is the ordinary meaning of the words of the provision (and it is consistent with the Explanatory Notes). It is also consistent with the structure of the prescribed form of leaseholder deed of certificate."

As such, because the Applicant identified that the property was not his only or principal home on the relevant date and that, on that date, he owned no more than two dwellings in the United Kingdom in addition to the property, he had a qualifying lease. Thus, the Deed of Certificate provided by the landlord contained a false claim and consequential directions were made.

As set out in paragraph 26.15 of Erskine May (the bible of Parliamentary practice):

> "Explanatory notes on government bills are produced by the appropriate government department, usually as a separate document accompanying the bill. They are printed by order of the House in which the bill is introduced and are revised when the bill reaches the second House. They do not form part of the bill and are not endorsed by either House.
>
> The notes provide a summary of and background to the bill and explain its various provisions. They are framed in non-technical language and should contain nothing of an argumentative character. They need to be read in conjunction with the bill and are not meant to be a comprehensive description of it."

The upshot? For now, it appears that the requirements in s.119(2) BSA are alternatives and a landlord would be prudent to so regard them. But the scope for further judicial articulation, and appellate determination, on the meaning of the words remains extant. As noted in *Nuernberg*, the decision was made under the procedure set out in Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 which allows for determination without oral argument. Necessarily, scope remains for full argument.

As so often with this relatively young statute: watch this space.

DANIEL BLACK, October 2024