UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 271 (LC) **UTLC Case Number: LC-2023-306**
The Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
(FTT Case Reference: LON/00AL/LDC/2021/0244)

LANDLORD AND TENANT – SERVICE CHARGES – BUILDING SAFETY ACT 2022 – application for dispensation from consultation requirements - whether a costs condition should have been imposed as a condition of granting dispensation – whether the recovery of the costs of the application, by the service charge, was prevented by paragraph 9 of Schedule 8 to the Building Safety Act 2022 – appeal allowed – decision re-made as a decision to grant dispensation on an unconditional basis, together with a determination that paragraph 9 of Schedule 8 prevented recovery of the costs from tenants holding qualifying leases

BETWEEN:

ADRIATIC LAND 5 LIMITED

Appellant

-and-

THE LONG LEASEHOLDERS AT HIPPERSLEY POINT
(listed in the Annex to this Decision)

Respondents

Re: Hippersley Point, 4 Tilston Bright Square, Felixstowe Road, London, SE2 9DR

The Chamber President, Mr Justice Edwin Johnson
The Rolls Building
12 October 2023
Decision Date: 13 November 2023

Simon Allison, instructed by JB Leitch Limited, Solicitors, for the Appellant
The Respondents were not represented and did not appear at the hearing

The following cases are referred to in this decision:

Aster Communities v Chapman [2020] UKUT 177 (LC)
Daejan Investments Ltd v Benson [2013] UKSC 14; [2013] 1 WLR 854
Marshall v Northumberland & Durham Property Trust Ltd [2022] UKUT 92 (LC)
Conway v Jam Factory Freehold Ltd [2013] UKUT 592 (LC)
Re: SCMLLA (Freehold) Limited [2014] UKUT 0058 (LC)
Kostal UK Ltd v Dunkley and others [2021] UKSC 47
URS Corporation Limited v BDW Trading Limited [2023] EWCA Civ 772
Wilson v First County Trust Limited (No. 2) [2003] UKHL 40; [2004] 1 AC 816
Adriatic Land 3 Limited v Residential Leaseholders of Waterside Apartments
(MAN/30UG/LSC/2021/0044 – 27th June 2023)
Batish and others v Inspired Sutton Limited and others
(LON/00BF/HYI/2022/0002 – 13th January 2023)
Waite and others v Kedai Limited
(LON/00AY/HYI/2022/0005 & 0016 – 9th August 2023)
Pepper v Hart [1993] AC 593

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber). The decision, which was made pursuant to the tribunal's powers of review, is dated 30th June 2022. The tribunal's original decision, prior to this review, is dated 20th December 2021.

2. The case came before the First-tier Tribunal (**"the FTT"**) as an application for dispensation from the consultation requirements in Section 20 of the Landlord and Tenant Act 1985 (**"the 1985 Act"**). The application (**"the Dispensation Application"**) was made, pursuant to Section 20ZA(1) of the 1985 Act, by the Appellant in this appeal, Adriatic Land 5 Limited. I will refer to this company as **"the Appellant"**.

3. The Appellant is the freehold owner of a mixed use building, containing 32 residential flats let on long leases, at Hippersley Point, 4 Tilson Bright Square, Felixstowe Road, Abbey Wood, London SE2 9DR (**"the Building"**). The Appellant made the application, for dispensation with the consultation requirements, in respect of remediation works required to the external façade of the Building and in respect of interim fire safety measures.

4. The respondents to the Dispensation Application, and the Respondents to this appeal are the long leaseholders of the flats in the Building. I will refer to the long leaseholders as **"the Respondents"**.

5. By their original decision (**"the Original Decision"**) the FTT decided that dispensation from the consultation requirements should be granted, on an unconditional basis. They also decided that an order should be made, pursuant to Section 20C of the 1985 Act (**"the Section 20C Order"**), preventing the Appellant from recovering any of its costs of the Dispensation Application from the Respondents, by the service charge provisions in their leases.

6. The Appellant sought a review of the Original Decision, so far as concerned the Section 20C Order, on the basis that the FTT had been wrong to make this order. In response to the application for a review the FTT exercised their power to review the Original Decision and produced a revised decision on 30th June 2022. By their revised decision (**"the Reviewed Decision"**) the FTT reversed their decision to make the Section 20C Order. In its place however the FTT made it a condition of the grant of dispensation that the Appellant should not be entitled to recover its costs of the Dispensation Application (**"the Costs"**) from the Respondents.

7. In response to this decision, the Appellant sought (i) a review of the Reviewed Decision, so far as concerned the imposition of the costs condition in relation to the grant of dispensation (**"the Costs Condition"**), or (ii) if the FTT were not willing to exercise their powers of review, permission to appeal against the Costs Condition. The FTT refused to exercise their powers of review and refused permission to appeal. The application for permission to appeal was however renewed to this Tribunal. Permission to appeal was granted by the Deputy President.

8. The grounds of appeal were confined to the Appellant's case that the FTT had been wrong to impose the Costs Condition. In granting permission to appeal however, the Deputy President drew attention to the fact that the grounds of appeal gave rise to a further issue. This further issue was whether the Costs were, in any event, covered by paragraph 9 of Schedule 8 to the Building Safety Act 2022 (**"the 2022 Act"**), so that no service charge was payable in respect of such costs by any leaseholder whose lease was a qualifying lease, within the meaning of Section 119 of the 2022 Act.

9. There are therefore, in broad terms, two issues to be decided in the appeal. The first issue is whether the decision of the FTT to impose the Costs Condition, as a condition of the grant of dispensation from the consultation requirements, can be upheld. The second issue, which effectively only becomes a live issue if the decision to impose the Costs Condition cannot stand, is whether recovery of the Costs is affected by paragraph 9 of Schedule 8 to the 2022 Act. For ease of reference, I will refer to Schedule 8 to the 2022 Act as **"Schedule 8"**, and to paragraph 9 of Schedule 8 as **"Paragraph 9"**.

10. I should also mention that this is the first occasion on which the Tribunal has had to consider the 2022 Act, which provides important protection for certain leaseholders against the costs of remediation of some building defects.

Representation at the hearing

11. At the hearing of the appeal the Appellant was represented by Simon Allison, counsel. The Respondents did not appear and were not represented at the hearing.

12. The Respondents comprise the tenants of all the 32 flats in the Building. They are listed in the Annex to this decision. Not all of the Respondents have participated in the proceedings in the FTT or in the appeal. The Respondents are listed in the Annex to this decision, divided between those who have participated in the proceedings and those who have not. I should also explain that there are only 31 Respondents (treating joint tenants of a flat as a single Respondent for this purpose) listed in the Annex because one Respondent is the tenant of two of the flats.

13. Although the Respondents did not appear and were not represented at the hearing, I was satisfied that those of the Respondents who have participated in the appeal were given adequate notice of this hearing and were aware of the hearing.

14. In this context I should also mention that, in September 2023, one of the Respondents raised a query with this Tribunal as to whether the appeal hearing would be proceeding. The query was raised because a letter was sent on 30th June 2023 by the Department for Levelling Up, Housing & Communities which contained the information that the original developer of the Building had agreed to fund the remedial works required to the Building. It appears to have been assumed, by at least one Respondent, that this meant that the appeal would not be proceeding. This assumption was wrong. The relevant Respondent was advised by the Tribunal, on two occasions, that the appeal hearing would be proceeding unless the Tribunal was informed by the parties either that the appeal had been withdrawn or that all issues had been resolved between the parties. Each of these communications from the Tribunal was copied to those acting for the Appellant and to those of the Respondents (comprising the majority of the Respondents) who had been identified as participating in the appeal. The Tribunal was not informed either that the

appeal had been withdrawn or that all issues had been resolved. Nor was this the case. Nor was any application made to adjourn the hearing of the appeal.

15. For present purposes, the relevant point is that those Respondents who have participated in these proceedings were reminded, in the lead up to this hearing, both of the date of the hearing of the appeal and of the fact that the appeal was proceeding.

16. In these circumstances I was satisfied that it was appropriate to proceed with the hearing of the appeal, notwithstanding the absence of the Respondents, and that there was no reason to adjourn the hearing. It should also be recorded that Mr Allison took some care to be even handed in his submissions, identifying and addressing arguments to be made against his case. This was most helpful, both in terms of identifying points arising in the appeal and in terms of testing the merits of Mr Allison's submissions. In addition to this, a number of the Respondents filed statements in response to the Dispensation Application. A number of the Respondents also filed written objections to the application for permission to appeal or respondent's notices in response to the appeal, identifying their grounds of opposition to the appeal. I have therefore also had the benefit of reading and taking into account the Respondents' arguments, as set out in the documents (falling into the above categories) which were included in the appeal bundle for the hearing of the appeal.

Further submissions

17. The hearing of the appeal took place on 12th October 2023. At the conclusion of the appeal hearing I reserved my decision. Subsequent to the appeal hearing some further legal materials came to my attention. These further legal materials were potentially relevant to the issues in the appeal concerning Paragraph 9. The further legal materials comprised three further decisions of the FTT and a short article prepared by Susan Bright, Professor of Land Law and McGregor Fellow at Oxford University. I invited the parties, meaning both the Appellant and the Respondents who have participated in the appeal, to make any submissions they wished to make in relation to these further legal materials, by way of brief written submissions. I received in response written submissions from some of the Respondents, and written submissions prepared by Mr Allison. One consequence of this was that, although the Respondents did not attend the appeal hearing, I had the benefit of written submissions from some of the Respondents, additional to the documents (referred to in my previous paragraph) filed earlier in the appeal process by the Respondents. I have therefore also been able to take these written submissions into account in formulating this decision.

Relevant background

18. For the purposes of the appeal, I can set out the relevant background very briefly. The findings and decisions made in the Reviewed Decision are not challenged in this appeal, save for the decision to impose the Costs Condition. Accordingly, I can take my summary of the relevant background from the Reviewed Decision and from the documents in the appeal bundle.

19. Hippersley Point comprises land and buildings on the north side of Felixstowe Road, London. The freehold title to the land and buildings is registered under title number

TGL4758. The Appellant was registered as freehold proprietor of these premises on 12th April 2017.

20. The Building itself comprises a 10 storey mixed-use building, with commercial premises on the ground floor and the 32 residential flats (**"the Flats"**) above. The height of the Building exceeds 18 metres. As I have said, all of the Flats are let on long leases. The Respondents are the long leasehold owners of the Flats. The leases of the Flats contain provisions for the payment of a service charge. The appeal bundle contained a sample lease of one of the
Flats. I will refer to the service charge payable under the leases of the Flats as **"the Service Charge"**.

21. In the latter part of 2020 investigations revealed that the external construction of the Building was in an unsatisfactory condition, in terms of fire risk. Substantial remedial works were required to deal with the defects in the external construction. In addition to this, interim fire safety works were required. I will use the collective expression **"the Works"** to refer to all of these various works. For the purposes of this decision, it is not necessary to go further into a description of the Works. A description of the Works can be found in paragraphs 3-5 of the Reviewed Decision.

22. The Works were qualifying works, within the meaning of Section 20ZA(2) of the 1985 Act, to which Section 20 of the 1985 Act applied. As such, the amount of the cost of these Works which could be recovered by the Service Charge was limited to £250 per flat unless the consultation requirements referred to in Section 20 were either complied with or were the subject of a dispensation order made by the FTT. The consultation requirements are those set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

23. In these circumstances the Appellant made an application to the FTT for a determination that the consultation requirements be dispensed with, pursuant to the power of dispensation in Section 20ZA(1). This is the application, dated 15th September 2021, to which I am referring as the Dispensation Application. The essential grounds upon which the Dispensation Application was made were identified in the following statement by the Appellant, in the application form, explaining why there was special reason for urgency:

> *"Following guidance relating to the construction of the external wall system it has been discovered that the construction comprises combustible materials and poses a risk of fire spread. Accordingly, remediation works are required to the external façade of the Premises (the "Cladding Works") and interim fire safety measures ("Interim Works") are also required. The Applicant's agent began the consultation process in relation to the Cladding Works. Due to the nature of the Cladding Works and the Design and Build method adopted, the Applicant is unable to complete the consultation process. Due to urgency of the Interim Works the Applicant is unable to complete the consultation process."*

24. The majority of the Respondents responded to the Dispensation Application. All of these Respondents filed statements with the FTT, opposing the Dispensation Application on various grounds.

The Original Decision

25. The Dispensation Application was dealt with by the FTT by way of paper determination. As I have said, the Original Decision is dated 20th December 2021. For the reasons set out in the Original Decision, the FTT decided to allow the Dispensation Application and to grant a dispensation with the consultation requirements in relation to the Works.

26. The reasons for the decision of the FTT to dispense with the consultation requirements are set out in paragraphs 11-15 of the Original Decision. It is convenient to quote these paragraphs in full:

> *"11. The Tribunal will allow the application for dispensation in this case. It is clear that the building is presently unsafe in terms of fire risk. The public's attention is focused on this worrying issue at present. It is also clear that the building may not have been built to satisfactory standards at the outset. This situation has to be rectified. It is simply not an option to delay works to unsafe premises.*
> *12. The Tribunal accepts that the Applicants have sought to tender the works widely. The Tribunal also accepts that the Applicants have to a limited degree at least sought to keep the leaseholders up-to-date as to the proposed works.*
> *13. The focus on any dispensation application has to be on prejudice suffered by leaseholders as a result of the failure to consult. Here it is impossible to identify any prejudice suffered by the leaseholders because no comparative estimates (even on a global level) have been provided by the leaseholders. If such estimates had been provided the Tribunal would be able to assess the value of potential prejudice suffered. It seems likely that had the leaseholders sought to obtain alternative estimates they would have suffered the same problems as the Applicants in trying to get quotes for this sort of work. The question of fire safety in large buildings is very much a live issue. Companies that provide re-cladding services are likely to be overwhelmed with enquiries considering the number of buildings affected across the country.*
> *14. Whilst it would have been preferable that the Applicants had carried out a full consultation process there is no real evidential indication that this would have made any difference. The tender analysis report is detailed. This is not a case in which the Applicants are seeking to avoid their responsibilities in relation to the leaseholders. Far from it they are seeking to ensure that an unsafe building is made safe as quickly as possible.*
> *15. If funding is given by the government for the works this is plainly to the advantage of the leaseholders and any obstacle put in front of the application e.g. a delay in works within a timescale imposed by the government will itself cause prejudice to the leaseholders."*

27. The FTT concluded the Original Decision, at paragraph 16, in the following terms:

> *"16. Accordingly, the Tribunal has no hesitation in confirming that dispensation should be given unconditionally in this case. The Tribunal does however consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. It is considered that they would be unlikely to do this however the Tribunal makes such a determination pursuant to section 20C of the Landlord and Tenant Act 1985."*

28. As can be seen, the FTT decided, in addition to their decision to make an unconditional grant of dispensation, that an order should be made, pursuant to Section 20C of the 1985 Act, preventing the Appellant from recovering the Costs from the Respondent by the Service Charge. This is the order which I am referring to as the Section 20C Order. As I understand the position, and as matters stood at the date of the Original Decision, no application to the FTT had been made for such an order by any of the Respondents.

The Reviewed Decision

29. Following the Original Decision, the Appellant made an application to the FTT. I have not seen this application, but I assume that it was an application for a review of the Original Decision, so far as concerned the Section 20C Order, with an alternative application for permission to appeal against the Section 20C Order. I say this because the FTT, when they came to deal with the application, described it as an application for review or permission to appeal, and dealt with the application only in relation to the Section 20C Order.

30. In response to this application the FTT decided to exercise their powers of review pursuant to Rules 53 and 55 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. By their decision on this application, dated 30th June 2022 (**"the Review Application Decision"**), the FTT decided as follows:

> *"In its original decision the Tribunal exercised its discretion under s.20C Landlord and Tenant Act 1985 although no application had been made. In their appeal the Applicants rightly raise this issue (ground 1) and the appeal is likely to succeed on this basis without the need to refer to ground 2. In the circumstances however the Tribunal do not consider it reasonable or fair for the Applicants to seek to recover costs from the leaseholders at Hippersley Point therefore the dispensation is granted on condition that they do not do so. The reviewed decision is attached. The same appeal rights apply to it. Alternatively, either party may apply to set aside this decision which was made without a hearing."*

31. On the same date, 30th June 2022, the FTT also published the Reviewed Decision. The Reviewed Decision was in the same terms as the Original Decision, save for paragraph 16. Paragraph 16 of the Reviewed Decision is in the following terms:

> *"Accordingly, the Tribunal has no hesitation in confirming that dispensation should be given in this case. The Tribunal does however consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. This is because dispensation*

is essentially a forbearance by the Tribunal and it would be unfair for the landlord to recover costs from any of the leaseholders living at Hippersley Point in the present case. Although not all of the leaseholders raised objections the Tribunal were satisfied that those that did were making general submissions which applied to all leaseholders. Accordingly, the dispensation is given on condition that the Applicants are prohibited from seeking their costs of this application from the leaseholders at Hippersley Point."

32. Effectively therefore, and by the Reviewed Decision, the FTT reversed the Section 20C Order, but then proceeded to replace what had been the Section 20C Order with the Costs Condition.

33. The Appellant made a further application for a review of the Reviewed Decision, seeking the removal of the Costs Condition, or permission to appeal against the Costs Condition. The FTT, by decision dated 6th April 2023, declined to exercise their powers of review and refused permission to appeal. Permission to appeal was, as I have said, granted by this Tribunal, by the Deputy President, by decision dated 13th July 2023.

The grounds of appeal

34. The grounds of appeal, as set out in the Appellant's application to this Tribunal for permission to appeal, dealt only with the first of the issues in the appeal; namely the question of whether the FTT were right to impose the Costs Condition. Those grounds of appeal, in support of the Appellant's case that the FTT were wrong to impose the Costs Condition, can be summarised in the following terms:
    (1) The FTT were procedurally incorrect to review the Original Decision, so as to include the Costs Condition:
        (i) the decision to review the Original Decision to this effect was made without the parties having had the opportunity to make submissions on whether the Costs Condition should be imposed,
        (ii) none of the parties had sought the imposition of the Costs Condition. The FTT imposed the Costs Condition of their own accord.
    (2) None of the Respondents had made an application for an order under Section 20C of the 1985 Act. Some of the Respondents did not engage with the proceedings in the FTT and did not dispute the Dispensation Application.
    (3) The Dispensation Application was successful, and the Appellant should not be penalised for relying on professional advisors in respect of the Dispensation Application.
    (4) The relevant test, under *Aster Communities v Chapman* [2020] UKUT 177 (LC), is that the Tribunal *"has power to grant a dispensation on such terms as it thinks fit – provided, of course, that any such terms are appropriate in their nature and effect."*. The FTT did not provide any explanation as to how this nature and effect test had been met in respect of the Costs Condition. The Costs Condition was not appropriate in nature and effect because the Dispensation Application was made in the best interests of the leaseholders.

35. As I have explained, Paragraph 9 came into the appeal when the Deputy President drew attention to the question of whether the Costs were covered by Paragraph 9, so that no service charge was payable in respect of the Costs by any leaseholder whose lease is a

qualifying lease, within the definition of a qualifying lease in Section 119 of the 2022 Act. It is convenient to set out the Deputy President's characterisation of this issue, in paragraph
3 of his decision granting permission to appeal. It is also convenient to include the Deputy President's identification of the issues arising in relation to the question of whether the Costs Condition should have been imposed:

> *"1. The proposed appeal raises issues of general importance to the owners of residential buildings and leaseholders of flats within them. Those issues are:*
>
> 1. *Whether, in principle, a dispensation from consultation requirements granted under S.20ZA, Landlord and Tenant Act 1985, in respect of works which are found to be urgent should be conditional on the landlord agreeing, or being prevented from, recovering the legal and other costs of making the application for dispensation from leaseholders through a service charge.*
> 2. *If no such principle exists, whether the condition imposed in this case was nevertheless a proper exercise of the FTT's discretion (the points raised by the applicant in paragraph 11 of its grounds of appeal will all be treated as falling within the scope of this issue).*
> 3. *Whether in any event the legal or other professional costs of seeking dispensation under S.20ZA, Landlord and Tenant Act 1985 in respect of the remediation of defects falling within sections 120 and 122, Building Safety Act 2022 are covered by paragraph 9 of Schedule 8, Building Safety Act 2022 so that no service charge is payable in respect of such legal or other professional costs by any leaseholder whose lease is a "qualifying lease" within the definition in section 119. Although this issue was not considered by the FTT it necessarily arises under ground 2 above in respect of the reviewed decision which was made after the relevant parts of the 2022 Act came into force on 28 June 2022."*

36. It follows that the Appellant does not have a ground of appeal, as such, in relation to the question of whether Paragraph 9 applies to the Costs. Rather, the Appellant is required to deal with this question, as an issue arising in the appeal. By his directions for the conduct of the appeal the Deputy President gave the Appellant permission to file a further statement of case in respect of the Paragraph 9 issue. The Appellant filed a further statement of case in which it set out its case on the Paragraph 9 issue.

37. In summary, the Appellant's case on the Paragraph 9 issue, as set out in the further statement of case, fell into two parts, as follows:
    (1) The 2022 Act had not come into force when the Dispensation Application was made. The Costs, which were the costs of the Dispensation Application, were incurred prior to the provisions of Schedule 8 coming into force. As such Paragraph 9 cannot apply to the Costs.
    (2) Independent of this first argument, legal costs which are incurred in relation to applications for dispensation pursuant to Section 20ZA(1) of the 1985 Act and which relate to relevant defects within the meaning of Section 120 of the 2022 Act are not incurred *"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", within the meaning of Paragraph 9. It follows that, as a matter of language, Paragraph 9 does not apply to such costs. The Costs fall into this category. As such, Paragraph 9 does not apply to the Costs.

My jurisdiction in relation to the appeal

38. The appeal is made pursuant to the provisions of Section 11 of the Tribunals, Courts and Enforcement Act 2007, which contains a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision, as defined in Section 11(5). By virtue of Section 12(1) of the same Act, I am only entitled to interfere with the Reviewed Decision if I find that the making of the Reviewed Decision involved the making of an error on a point of law.

The Section 20C Applications

39. There is one other matter which I should mention, before coming to my analysis of the issues raised by the appeal. Some of the Respondents have now made applications to the FTT for orders under Section 20C of the 1985, preventing the Appellant from recovering the Costs by the Service Charge. These applications (**"the Section 20C Applications"**) are variously dated 31st January 2023 or 1st February 2023. In the case of some of the Section 20C Applications, an order is expressed to be sought for the benefit of all the leaseholders of the Flats.

40. A question which arises, and on which I was addressed by Mr Allison in the course of the hearing of the appeal, was whether I could and should deal myself with the Section 20C Applications and, assuming that I could and should deal with them, what I should do. In relation to the Section 20C Applications I will adopt the following course. I will first consider the issues in the appeal, without reference to the Section 20C Applications. I will then return to the Section 20C Applications and consider the questions of whether I can and should deal with them, including the question of whether the Section 20C Applications have any impact upon my reasoning in relation to the issues in the appeal.

Can the decision of the FTT to impose the Costs Condition be upheld? – Analysis

41. In making their decision to impose the Costs Condition the FTT were exercising their discretion to decide what, if any conditions should be imposed on the making of the order for dispensation with the consultation requirements. It follows that the question for me is not whether I agree or disagree with the decision to impose the Costs Condition. Rather, the question is whether the exercise by the FTT of their discretion in making this decision can be upheld.

42. In my view the exercise by the FTT of their discretion cannot be upheld. I say this for procedural and substantive reasons. I will start with the procedural reasons, which I can state fairly shortly.

43. In paragraph 16 of the Original Decision the FTT stated their decision that dispensation should be granted on an unconditional basis. In reaching this decision the FTT no doubt took into account that they had also decided to make the Section 20C Order, with the consequence that the Appellant would, in any event, be denied the ability to recover the Costs by the Service Charge.

44. The FTT then however proceeded to acknowledge that the Appellant's challenge to this part of the Original Decision was likely to succeed, given that the FTT had made the Section 20C Order on their own initiative, without any application having been made under Section 20C; see the statement of reasons in the Review Application Decision, as quoted above. It is apparent, from this statement of reasons, that the FTT decided to impose the Costs Condition to make up for the reversal of the Section 20C Order. Effectively, and by imposing the Costs Condition, the FTT brought the position back to what it would have been if the Section 20C Order had stood.

45. The problem with the FTT taking this course, as I understand the position, is that the parties were not given the opportunity to make submissions on whether the Costs Condition should be imposed, prior to the Review Application Decision. Nor, again as I understand the position, had any party sought the imposition of the Costs Condition. In these circumstances it seems to me that it was not open to the FTT to impose the Costs Condition, without giving the parties the opportunity to be heard on the question of whether the Costs Condition should be imposed.

46. Effectively therefore the FTT made the same procedural error, in relation to their decision to impose the Costs Condition, as they had made and had acknowledged that they had made in relation to their decision to make the Section 20C Order; that is to say making the decision of their own initiative, without hearing submissions from the parties. It is true that the Review Application Decision granted to either party the right to apply to set aside the decision to impose the Costs Condition, but I do not think that this was sufficient, in the particular circumstances of this case, to avoid or cure the procedural error of making the decision to impose the Costs Condition without first inviting submissions from the parties. The parties were only given the opportunity to make an application to set aside the Costs Condition after the FTT had decided that the Costs Condition should be imposed, for the reasons set out in paragraph 16 of the Reviewed Decision. To my mind this was procedurally unfair. Any application to set aside the Costs Condition would effectively have to challenge a decision which the FTT had already made. If the FTT were minded to impose the Costs Condition it seems to me that the correct course was to invite submissions on this question and, in the light of those submissions, make their decision.

47. In my view this procedural error was sufficiently serious to vitiate the exercise by the FTT of their discretion, and constituted an error of law. As such, it seems to me that the exercise by the FTT of their discretion, in deciding to impose the Costs Condition, cannot stand.

48. In theory, this is sufficient to dispose of the issues raised by this part of the appeal. The exercise by the FTT of their discretion, in deciding to impose the Costs Condition, cannot stand, by reason of the procedural error which occurred.

49. It seems to me however that I must also consider the question of whether the exercise by the FTT of their discretion, in making the decision to impose the Costs Condition, can be upheld on substantive grounds. I say this for three reasons. First, it seems to me that I should consider the substance of the decision to impose the Costs Condition, in case I am wrong in concluding that the decision cannot be upheld on procedural grounds. Second,

if the decision cannot stand on procedural grounds, the question then arises as to what I should do, in terms of setting aside, remitting or re-making the decision. If, putting the procedural error to one side, the decision to impose the Costs Condition is one which can be upheld on a substantive basis, this is obviously relevant to the question of setting aside, remitting or re-making the decision. Third, and as the Deputy President identified in granting permission to appeal, this part of the appeal raises an issue of principle.

50. I therefore turn to the question of whether, if the procedural error is put to one side, the decision to impose the Costs Condition can be upheld on substantive grounds. I continue to bear in mind that the question is not whether I agree or disagree with the decision of the FTT to impose the Costs Condition, but rather whether the underlying exercise by the FTT of their discretion, in making this decision, can be upheld. Putting the matter another way,
the question is not whether the FTT were or right or wrong, but whether they went outside the legitimate and, it should be acknowledged, broad ambit of their discretion.

51. In its application for a review of the Reviewed Decision, the Appellant contended that the Reviewed Decision did not explain the reasoning of the FTT in support of their decision to impose the Costs Condition. Specifically, it was contended that (i) the FTT had failed to explain why the Costs Condition had been imposed when none of the Respondents had sought its imposition or made any submissions in support of the imposition of the Costs Condition, and (ii) the FTT had not explained how *"the nature and effect test"* in *Aster* had been met, particularly in view of the fact that neither party had been offered the opportunity to make submissions on the point.

52. I have already dealt with the Appellant's procedural criticisms. I will come back to what the Appellant refers to as *"the nature and effect test"* in *Aster*. The FTT did however give reasons, in paragraph 16 of the Reviewed Decision, for their decision to impose the Costs Condition. For ease of reference, I repeat those reasons:

> *"The Tribunal does however consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. This is because dispensation is essentially a forbearance by the Tribunal and it would be unfair for the landlord to recover costs from any of the leaseholders living at Hippersley Point in the present case. Although not all of the leaseholders raised objections the Tribunal were satisfied that those that did were making general submissions which applied to all leaseholders. Accordingly, the dispensation is given on condition that the Applicants are prohibited from seeking their costs of this application from the leaseholders at Hippersley Point."*

53. Before I come specifically to the Reviewed Decision, and to the decision of the FTT to impose the Costs Condition, I should summarise the guidance to be found in the case law on the question of when a costs condition should be imposed, as a condition of the grant of dispensation from compliance with the consultation requirements.

54. The nature of the jurisdiction to grant a dispensation order, pursuant to Section 20ZA(1), and the way in which the jurisdiction should be exercised were considered by the Supreme Court in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR

854. In that case the landlord had failed to comply with the consultation requirements in relation to qualifying works to a building comprising shops on the ground floor and flats above. The Supreme Court decided, by a majority, that dispensation should be granted on terms (i) that the cost of the works capable of recovery by the landlord through the service charge be reduced by £50,000 and (ii) that the landlord pay the tenants' reasonable costs of the application for dispensation *"in so far as they reasonably tested its claim for a dispensation and reasonably canvassed any relevant prejudice which they might suffer"*; see the judgment of Lord Neuberger PSC at [85].

55. In his judgment, with which Lord Clarke and Lord Sumption JJSC agreed, Lord Neuberger analysed the consultation requirements as a four stage process. The landlord commenced stage 3 of the process, but proceeded to place the contract for the works and have the works carried out without completing stage 3. The relevant works were substantial works to the building. The four priced tenders which were originally obtained for the works were all in excess of £400,000. The sum which the landlord wished to recover from the tenants of the relevant flats, by their service charge, was £280,000. There were seven flats in the building, of which five were let on long leases containing an obligation to pay a service charge. If therefore the landlord had been unable to obtain a dispensation from compliance with the consultation requirements, the amount which it would have been entitled to recover from the tenants of the relevant flats would have been capped at £250 per flat.

56. In his judgment Lord Neuberger also identified the following key principles in relation to the exercise of the jurisdiction to grant dispensation under Section 20ZA. First, the purpose of the consultation requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate for the works. Second, the issue on which the tribunal should focus, when entertaining an application by a landlord under Section 20ZA(1) must be the extent, if any, to which the tenants have been prejudiced in either respect by the failure of the landlord to comply with the consultation requirements. Third, the tribunal is not presented with the binary choice, on an application for dispensation, of either granting or refusing dispensation. The tribunal has power to grant dispensation on such terms as it thinks fit, provided that such terms are appropriate in their nature and effect. Where it is appropriate to do so, the tribunal can impose conditions on the grant of a dispensation under Section 20(1)(b) of the 1985 Act.

57. In relation to the ability of the tribunal to grant dispensation subject to conditions, Lord Neuberger confirmed that the tribunal would have the power to impose a condition that the landlord pay the tenants' reasonable costs incurred in relation to the application for dispensation, notwithstanding the limited jurisdiction of the tribunal in relation to costs. As Lord Neuberger explained, at [61]:

> *"61 However, in my view, that does not preclude the LVT from imposing, as a condition for dispensing with all or any of the requirements under section 20(1)(b), a term that the landlord pays the costs incurred by the tenants in resisting the landlord's application for such dispensation. The condition would be a term on which the LVT granted the statutory indulgence of a dispensation to the landlord, not a freestanding order for costs, which is what paragraph 10 of Schedule 12 to the 2002 Act is concerned with. To put it*

another way, the LVT would require the landlord to pay the tenants' costs on the ground that it would not consider it "reasonable" to dispense with the requirements unless such a term was imposed."

58. Lord Neuberger then went on, at [62]-[64], to draw the following comparison, in terms of costs, between a landlord's application for dispensation and a tenant's application for relief from forfeiture.

> *"62 The case law relating to the approach of courts to the grant to tenants of relief from forfeiture of their leases is instructive in this connection. Where a landlord forfeits a lease, a tenant is entitled to seek relief from forfeiture. When the court grants relief from forfeiture, it will often do so on terms that the tenant pays the costs of the landlord in connection with the tenant's application for relief, at least in so far as the landlord has acted reasonably: see e g Egerton v Jones [1939] 2 KB 702, 705—706, 709. However, if and in so far as the landlord opposes the tenant's application for relief unreasonably, it will not recover its costs, and may even find itself paying the tenant's costs, as in Howard v Fanshawe [1895] 2 Ch 581, 592.*
> *63 As Mr Dowding QC, for Daejan, pointed out, in Factors (Sundries) Ltd v Miller [1952] 2 All ER 630, the tenant was legally aided and the court was precluded by statute from making an order for costs against him, but the Court of Appeal held that there was none the less jurisdiction to require him to pay the landlord's costs as a condition of being granted relief from forfeiture. As Somervell LJ explained it, at p 633D—F, the liability under such a condition was "not an order to pay costs in the ordinary sense", but "a payment of a sum equal to the costs as a condition of relief".*
> *64 Like a party seeking a dispensation under section 20(1)(b), a party seeking relief from forfeiture is claiming what can be characterised as an indulgence from a tribunal at the expense of another party. Accordingly, in so far as the other party reasonably incurs costs in considering the claim, and arguing whether it should be granted, and, if so, on what terms, it seems appropriate that the first party should pay those costs as a term of being accorded the indulgence."*

59. Lord Neuberger also identified the sympathy which tribunals might be expected to show to tenants, in terms of deciding whether tenants had discharged the burden of demonstrating prejudice caused by the failure of their landlord to comply with the consultation requirements. In the context of costs, Lord Neuberger described how this sympathy was relevant in the following terms, at [68]-[69].

> *"68 The LVT should be sympathetic to the tenants not merely because the landlord is in default of its statutory duty to the tenants, and the LVT is deciding whether to grant the landlord a dispensation. Such an approach is also justified because the LVT is having to undertake the exercise of reconstructing what would have happened, and it is because of the landlord's failure to comply with its duty to the tenants that it is having to do so. For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically*

accept any suggested prejudice, however farfetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the requirements.

69 Apart from the fact that the LVT should be sympathetic to any points they may raise, it is worth remembering that the tenants' complaint will normally be, as in this case, that they were not given the requisite opportunity to make representations about proposed works to the landlord. Accordingly, it does not appear onerous to suggest that the tenants have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it. Indeed, in most cases, they will be better off, as, knowing how the works have progressed, they will have the added benefit of wisdom of hindsight to assist them before the LVT, and they are likely to have their costs of consulting a surveyor and/or solicitor paid by the landlord."

60. Beyond *Daejan*, Mr Allison was able to identify only limited guidance in the authorities on the imposition of costs conditions in granting dispensation under Section 20ZA(1). Mr Allison referred me to the decision of this Tribunal (His Honour Judge Stuart Bridge) in *Aster Communities v Chapman* [UKUT] 177 (LC). This case was concerned with an appeal by the landlord against two of three conditions which had been imposed by the FTT as conditions on the making of a dispensation order. The three conditions were as follows:

(1) The landlord was required to pay the reasonable costs of an expert, nominated by the tenants, to consider and advise upon the necessity of the proposed works.

(2) The landlord was required to pay the tenants' reasonable costs of the dispensation application.

(3) The costs of the dispensation application were not to be recoverable by the landlord through the service charge.

61. The landlord challenged only the first two of these conditions, which meant that the Judge did not have to consider what was, in that case, the equivalent of the Costs Condition. In the present case the Appellant was not required to pay any of the Respondents' costs as a condition of the grant of dispensation. Mr Allison relied upon the decision for the proposition that the exercise of the jurisdiction to dispense stands or falls on the issue of prejudice. In this context Mr Allison relied upon what was said by the Judge at [17], where the Judge contemplated the possibility of dispensation being granted on an unconditional basis where tenants fail to establish any prejudice resulting from the grant of dispensation:

"17. The exercise of the jurisdiction to dispense with the consultation requirements stands or falls on the issue of prejudice. If the tenants fail to establish prejudice, the tribunal must grant dispensation, and in such circumstances dispensation may well be unconditional, although the tribunal may impose a condition that the landlord pay any costs reasonably incurred

by the tenants in resisting the application. If the tenants succeed in proving prejudice, the tribunal may refuse dispensation, even on robust conditions, although it is more likely that conditional dispensation will be granted, the conditions being set to compensate the tenants for the prejudice they have suffered."

62. I should mention that *Aster* went to the Court of Appeal. The appeal against the decision of Judge Bridge was however dismissed and, as I read the decision of the Court of Appeal, there is nothing in that decision to undermine what the Judge said at [17].

63. As I have mentioned above, in its grounds of appeal the Appellant relied upon the decision of the Tribunal in *Aster* for what it referred to as *"the nature and effect test"*. The criticism of the FTT was that they had provided no explanation as to how the nature and effect test had been met in respect of the Costs Condition. This nature and effect test is not however something which emerges from the decision in *Aster* itself. It is simply a reference to what Lord Neuberger said in *Daejan*, at [53] and [54] ([53] is included for context):

> *"53 The respondents contend that, on an application under section 20ZA(1), the LVT has to choose between two simple alternatives: it must either dispense with the requirements unconditionally or refuse to dispense with the requirements. If this argument is correct, then as the Upper Tribunal held, and the Court of Appeal thought probable, it would not have been possible for the LVT in this case to grant Daejan's section 20ZA(1) application on the terms offered by Daejan, namely to reduce the aggregate of the sum payable by the respondents in respect of the works by £50,000.*
>
> *54 In my view, the LVT is not so constrained when exercising its jurisdiction under section 20ZA(1): it has power to grant a dispensation on such terms as it thinks - provided, of course, that any such terms are appropriate in their nature and their effect."*

64. In the context of decisions on dispensation applications, Mr Allison also referred me to the decision of the Deputy President of the Lands Chamber (Martin Rodger KC) in *Marshall v Northumberland & Durham Property Trust Ltd* [2022] UKUT 92 (LC), specifically at [63][64]. The extract from the decision cited by Mr Allison provides a useful reminder of the importance of focussing on the question of prejudice in considering what, if any conditions should be imposed on the making of a dispensation order, but the issues being considered by the Deputy President in that case were rather different to the present case. The decision does not therefore provide any direct guidance on the question of whether the Costs Condition should have been imposed.

65. Mr Allison also referred me to two decisions of the Deputy President which were concerned with orders made under Section 20C of the 1985 Act. In this context I accept the submission of Mr Allison that applications under Section 20C can give rise to issues which are similar to those which may arise in relation to the question of whether a costs condition should be imposed on the making of a dispensation order. I therefore accept that it is relevant, in the present case, to consider decisions concerned with Section 20C applications.

66. The first of these two decisions is the decision of the Deputy President in *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC), in which the Deputy President stressed the importance of considering the financial and practical consequences for all those who will be affected by a Section 20C order. As the Deputy President stated, at [75]:

> *"75. In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make. The omission to do so in this case, an omission for which I do not criticise the LVT in view of the assumption made on both sides, would be sufficient to vitiate the section 20C order. Taken together with the LVT's incomplete balancing exercise, with its omission to give the respondent's success in the substantive application the proper weight which the authorities require, I have no alternative but to set the section 20C order aside."*

67. The particular problem which the Deputy President was considering in the *Jam Factory* case was a Section 20C order made by the Leasehold Valuation Tribunal (as it then was) which benefited some but not all of the tenants who were liable to contribute to the landlord's costs by the service charge. That problem does not arise in the present case.

68. The second of the above two decisions is *Re SCMLLA (Freehold) Limited* [2014] UKUT 0058 (LC), where the Deputy President again stressed the importance of considering all the consequences of the making of an order under Section 20C. At [27] he said this:

> *"27. An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances."*

69. With the above summary of the case law to which my attention has been drawn in place, I turn to the Reviewed Decision, and the question of whether the FTT were right to impose the Costs Condition. The starting point seems to me to be the facts found by the FTT in the Reviewed Decision. The key findings of fact can be found in paragraphs 11-15 of the Original Decision, which I have already quoted, and in some earlier paragraphs of the Original Decision. As I have noted, paragraphs 1-15 of the Original Decision remained the same in the Reviewed Decision.

70. The key findings of fact (with the relevant paragraphs of the Original/Reviewed Decision shown) may be summarised as follows:
    (1) Only two contractors, of the seven contractors from whom tenders were sought, tendered for the external construction works. This probably demonstrated that there was a high demand for contractors doing this kind of work (paragraph 5).
    (2) If funding was approved by the Building Safety Fund, the Works would need to commence soon after (paragraph 6).
    (3) The Building was clearly unsafe, in terms of fire risk. It was clear that the Building might not have been built to satisfactory standards at the outset. The situation had to be rectified. It was simply not an option to delay the Works (paragraph 11).

(4) The Appellant had sought to tender the Works widely and had, to a limited degree, at least sought to keep the leaseholders up to date as to the Works, as proposed (paragraph 12).

(5) It was impossible to identify any prejudice caused to the leaseholders (paragraph 13), for the reasons given in paragraph 13. Those reasons bear repeating:

> *"13. The focus on any dispensation application has to be on prejudice suffered by leaseholders as a result of the failure to consult. Here it is impossible to identify any prejudice suffered by the leaseholders because no comparative estimates (even on a global level) have been provided by the leaseholders. If such estimates had been provided the Tribunal would be able to assess the value of potential prejudice suffered. It seems likely that had the leaseholders sought to obtain alternative estimates they would have suffered the same problems as the Applicants in trying to get quotes for this sort of work. The question of fire safety in large buildings is very much a live issue. Companies that provide re-cladding services are likely to be overwhelmed with enquiries considering the number of buildings affected across the country."*

(6) Whilst it would have been preferable if the Appellant had carried out a full consultation process, there was no real evidential indication that this would have made any difference. The tender analysis report was detailed. This was not a case in which

the Appellant was seeking to avoid its responsibilities in relation to leaseholders. Far from it, the Appellant was seeking to ensure that an unsafe building was made safe as quickly as possible (paragraph 14).

(7) If government funding was provided for the Works, this was plainly to the advantage of leaseholders, and any obstacle put in the way, such as a delay in the Works within the timescale imposed by the government would itself cause prejudice to the leaseholders (paragraph 15).

71. There is no appeal, on either side, against these findings of fact. I was also told by Mr Allison, in his oral submissions, that the Dispensation Application was made as a prospective application. I took this to mean that the Dispensation Application was not made on a retrospective basis, in order to escape the consequences of non-compliance, but rather in advance of carrying out the Works and not in circumstances of past defective compliance with the consultation requirements. While there is no finding in these express terms in the Original Decision or the Reviewed Decision, it seems to me implicit in the findings of the FTT, in paragraphs 11-15 of the Original/Reviewed Decision, that the Dispensation Application was made on at least a substantially prospective basis. I note that the Appellant's original statement of case in support of the Dispensation Application was drafted on the basis that the Appellant had complied with the consultation requirements so far as it practically could, considering the circumstances, and sought dispensation in relation to its remaining obligations under the consultation requirements. To this extent it seems to me that I can accept Mr Allison's characterisation of the Dispensation Application as a prospective application.

72. It will be noted, from the findings of fact of the FTT which I have set out above, that the facts of the present case were very different from those in *Daejan*. In *Daejan* the conduct of the landlord, in failing to complete the consultation process, attracted considerable criticism, both from Lord Neuberger and, to a greater degree, from the dissenting Justices (Lord Hope DJSC and Lord Wilson JSC). In the present case there was no question of the Appellant seeking to avoid its responsibilities; see paragraph 14 of the Original/Reviewed Decision. Another way in which the same point might be expressed is that the present case was not one where the landlord was making what was in effect a retrospective application, seeking to be excused from the consequences of its previous failure to comply with the consultation requirements.

73. It will also be noted that the FTT found no prejudice in this case. This is clearly important. As Lord Neuberger noted in *Daejan*, at [45], it was hard to see why dispensation should not be granted, in a case where the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements; that is to say it was hard to see why dispensation should not be granted in a case where no prejudice was demonstrated. Conditions may be imposed on the grant of dispensation, but only where it is appropriate to do so; see Lord Neuberger at [58].

74. We have the benefit of Lord Neuberger's discussion, in *Daejan*, of the imposition of a costs condition, at [59]-[64]. In the context of the present case it seems to me that there are two important points to be made, in relation to this discussion.

(1) It seems clear to me that Lord Neuberger was not seeking to lay down any hard and fast rules on the imposition of a costs condition. One size does not fit all. It is clear that the question of whether a costs condition should be imposed takes one back to what Lord Neuberger said at [54]. A costs condition could be imposed if the tribunal

thought that such a condition was appropriate in its nature and effect. Putting the matter another way, the tribunal could impose a costs condition on the basis that it would not be reasonable to dispense with the consultation requirements in the absence of the costs condition; see Lord Neuberger at [61].

(2) The analogy with relief from forfeiture was appropriate in *Daejan*. The analogy does not seem to me to have been intended to be applicable in every case. The reason for this is obvious. A tenant who requires relief from forfeiture is, necessarily, a tenant who has breached a covenant or covenants in his lease. As such, the tenant requires the indulgence of the court, in the grant of relief from forfeiture. More simply, the tenant is the party in default. As such, it is not unreasonable that the tenant should have to pay the landlord's costs of responding to the application for relief from forfeiture, so far as reasonably incurred. In *Daejan* the landlord was clearly the party in default, seeking the indulgence of the tribunal. As such, it was not unreasonable that the landlord should be treated as being in the same position as a defaulting tenant seeking relief from forfeiture. In the present case, and on the findings of the FTT, the Appellant was in a materially different position. The Appellant was not seeking to avoid its responsibilities to leaseholders. To the contrary, and as the FTT found, the Appellant was *"seeking to ensure that an unsafe building is made safe as quickly as possible"*. On these facts it seems to me that the analogy with a tenant seeking relief from forfeiture is not necessarily apposite. Nor does it seem to me that Lord Neuberger intended the analogy to be apposite and/or binding in all cases.

75. There is one other point which I should mention, for the sake of completeness, in comparing the present case with *Daejan*. In *Daejan* the costs condition which was actually imposed on the landlord went further than requiring the landlord to pay its own costs of the application for dispensation. The landlord was required to pay the tenants' reasonable costs in connection with investigating and challenging the application for dispensation; see Lord Neuberger at [74]. It is not entirely clear to me, from the judgments in the Supreme Court, whether the landlord had the ability to recover or had sought to recover its own costs of the dispensation application from the tenants. The tenor of Lord Neuberger's judgment suggests that the conditions on which dispensation was granted would have included a prohibition on the landlord recovering its own costs of the dispensation application by the service charge, if this question had been raised. Putting this point to one side, in the present case the Costs Condition did not extend to an obligation to pay any costs of the Respondents. This may be because the Respondents were in person. It may be that those of the Respondents who opposed the Dispensation Application did not incur any professional costs or did not seek to recover any such professional costs. In any event, I do not think that this particular point constitutes a material point of distinction between the present case and *Daejan*. The Costs Condition resembled the costs condition in *Daejan* in the sense that both were costs sanctions imposed upon the landlord, as a condition of the grant of dispensation.

76. I turn next to the reasons given by the FTT for imposing the Costs Condition, as set out in paragraph 16 of the Reviewed Decision. These reasons were that dispensation was essentially a forbearance by the FTT and that it would be unfair for the Appellant to recover costs from any of the Respondents. The FTT were satisfied that those of the Respondents who did make objections were making general submissions, which applied to all of the leaseholders.

77. With all due respect of the FTT, I do not follow this reasoning. In the present case, and on the findings of the FTT, the position of the Appellant was about as blameless as it could be.
In addition to this, the FTT had identified that the Appellant was, in making the Dispensation Application, not seeking to avoid its responsibilities, but was seeking to ensure that an unsafe building was made safe as quickly as possible. In these circumstances I find it difficult to see how the making of a dispensation order was, on the facts as found by the FTT, properly described as a forbearance. It is also difficult to see why it was unfair to the Respondents that the Appellant should be able to recover the costs of the Dispensation Application from the Respondents. Given the circumstances in which the Dispensation Application came to be made, as those circumstances were found by the FTT, it seems to me that the Appellant's expenditure on the costs of the Dispensation Application (the Costs) might legitimately be described as essential expenditure for the benefit of the Building and the safety of the Respondents. This does of course assume that the amount of the Costs was reasonable, but that question would be one for any subsequent challenge to the amount of the Costs based on Section 19 of the 1985 Act.

78. The points set out in my previous paragraph seem to me to be reinforced by the fact that, in paragraph 16 of the Original Decision, the FTT stated that they had *"no hesitation in confirming that dispensation should be given unconditionally in this case"*. This conclusion seems to me to have followed logically from the findings of fact made by the FTT in the Original Decision. It is true that the FTT then went on to make the Section 20C Order, which rendered the imposition of a costs condition unnecessary. While

however this may have been the reason for the FTT not imposing a costs condition in the Original Decision, this does not alter the point that the FTT did conclude in the Original Decision, in terms and, in my view, entirely logically, that dispensation should be granted unconditionally.

79. There is also of course the finding of the FTT that the Respondents had failed to establish any prejudice resulting from the failure of compliance with the consultation requirements; see paragraph 13 of the Original/Reviewed Decision. The FTT stated, quite correctly, that the focus had to be on prejudice suffered by the leaseholders as a result of the failure to consult. This is clear from *Daejan*. In making this finding, the FTT can also be assumed to have had in mind Lord Neuberger's encouragement to tribunals to adopt a sympathetic attitude to tenants seeking to establish the existence of prejudice; see *Daejan* at [67] and [68]. Notwithstanding this encouragement, the FTT were clear in finding that no prejudice would be suffered by the Respondents, if dispensation was granted.

80. This particular point can be taken further. I have already quoted what Lord Neuberger said in *Daejan*, at [68]. It seems to me significant that Lord Neuburger justified the imposition of a condition that the landlord pay the tenants' costs of responding to a dispensation application on the basis that the tenants were entitled to recover their reasonable costs of investigating relevant prejudice. For ease of reference, I repeat what Lord Neuberger said in the second half of [68]:

> *"For the same reasons, the LVT should not be too ready to deprive the tenants of the costs of investigating relevant prejudice, or seeking to establish that they would suffer such prejudice. This does not mean that LVT should uncritically accept any suggested prejudice, however farfetched, or that the tenants and their advisers should have carte blanche as to recovering their costs of investigating, or seeking to establish, prejudice. But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it. And, save where the expenditure is self-evidently unreasonable, it would be for the landlord to show that any costs incurred by the tenants were unreasonably incurred before it could avoid being required to repay as a term of dispensing with the requirements."*

81. In a case, such as the present case, where a tribunal makes a clear finding that the tenants have failed to establish any prejudice and (see paragraph 13 of the Original/Reviewed Decision) have failed to produce any evidence to support a case of prejudice, it seems to me that Lord Neuberger's reasoning at [68] ceases to apply.

82. In all these circumstances it seems to me that the position goes beyond one where I simply find myself in disagreement with the reasoning of the FTT. In my view the reasons given by the FTT, in paragraph 16 of the Reviewed Decision, for imposing the Costs Condition were fundamentally flawed. On the basis of the findings of fact made by the FTT, it seems to me that the reasons given by the FTT for imposing the Costs Condition cannot be upheld. They seem to me to be at odds with, and contrary to the findings of fact made by the FTT. As such, it seems to me that the FTT, in relying on these reasons, went outside the legitimate scope of their discretion, and went wrong in law.

83. There is also what seems to me to be an additional, and similarly fundamental problem with the reasoning of the FTT. This problem goes back to the identification of the issues in this part of the appeal by the Deputy President, in his decision on the application for permission to appeal. Given the findings of fact made by the FTT, it seems to me that the decision of the FTT to impose the Costs Condition can only be justified if one accepts the principle that the imposition of a costs condition is appropriate whenever an application for dispensation is made. While the FTT did not articulate any such principle, it seems to me that their decision does in fact depend upon the existence of such a principle. I say this because it is impossible, on the findings of fact made by the FTT, to identify any justification for imposing the Costs Condition beyond a principle that, in any dispensation application, it is unfair to the tenants to allow the recovery of the costs of the application from the tenants because the grant of dispensation is a forbearance by the tribunal.

84. I do not think that there is any such principle. I do not think that any such principle was stated or was intended to be stated by Lord Neuberger in *Daejan*. I do not think that Lord Neuberger's discussion of the analogy with applications for relief from forfeiture supports or was intended to support any such principle. To the contrary, it seems clear to me, on the authority of *Daejan*, that it is always a matter for the relevant tribunal to consider whether, on the facts of the application for dispensation before the tribunal, the imposition of a costs condition is appropriate in its nature and effect. In many such cases one might expect the imposition of a costs condition to be appropriate. Indeed, in cases where the landlord can reasonably be seen to be seeking to be excused from the consequences of its own default, one might normally expect to see a costs condition imposed. I do not think however that there is any principle or rule that the imposition of a costs condition is appropriate in all applications for dispensation.

85. In the absence of such principle or rule, it seems to me that the reasons given by the FTT for imposing the Costs Condition were wrong, as a matter of law, and cannot stand, independent of the basis on which I have already identified that these reasons cannot stand.

86. In the analysis set out above I have not overlooked or ignored the various written arguments advanced by the Respondents, both earlier in the appeal process and in response to my invitation for further submissions which followed the appeal hearing. It is not necessary to

go through these arguments individually, but the essential points made in these arguments can be divided into three:

(1) A number of the Respondents confined themselves to defending the correctness of the decision of the FTT to make the Section 20C Order and, in its place, to impose the Costs Condition. For the reasons which I have given, I do not think that the reasons given by the FTT for imposing the Costs Condition can stand. The FTT themselves reversed the Section 20C Order.

(2) The point was made that it would be unfair to the Respondents to require them to meet the Costs, when they were required to participate in the Dispensation Application, as respondents, and had acted perfectly reasonably in their conduct of the proceedings. This point was combined with a general appeal to the alleged unfairness and injustice of leaving the Respondents to pick up the Appellant's bill for the Dispensation Application. All this however seems to me to beg the

question of whether it was reasonable to deprive the Appellant of its ability to recover the Costs by the Service Charge. For the reasons which I have given, I do not think that this was reasonable. Nor, for the same reasons, do I think it unfair to the Respondents that the Costs Condition should not be imposed.

(3) Some attempts were also made to go into this history of this matter, with a view to justifying the imposition of the Costs Condition. In this context however, it seems to me that I should confine myself to the facts as found by the FTT in the Original/Reviewed Decision. I do not think that I am in a position to go behind or outside those facts.

87. Drawing together all of the above discussion of the substantive reasoning of the FTT, in making their decision to impose the Costs Condition, it seems to me that the decision cannot stand. In my view, and with due respect to the FTT, the reasoning in support of this decision was sufficiently flawed to take the decision outside the legitimate scope of the discretion which the FTT were exercising. I reach this conclusion on the following two bases:

(1) As I have explained, it seems to me that the reasons relied upon by the FTT were at odds with, and contrary to the conclusion that the Costs Conditions should be imposed. I think that the situation is one where it can be said that the FTT, in the light of their own findings of fact, reached a decision which no reasonable tribunal could have reached, and thus went wrong as a matter of law.

(2) The decision to impose the Costs Condition implicitly depended, as I have explained, upon there being a principle or rule that the imposition of a costs condition is appropriate whenever an application for dispensation is made. In the absence of such a principle or rule it seems to me that the decision to impose the Costs Condition involved a serious error which can, in my view, be characterised as an error of law. As such, and in addition to what I have said in my previous sub-paragraph, it seems to me that the exercise by the FTT of their discretion was fatally flawed, and cannot stand.

88. For the sake of completeness I should mention that Mr Allison also sought to persuade me that the conduct of the proceedings before the FTT by those of the Respondents who resisted the Dispensation Application had itself been such as to increase the costs of the Dispensation Application, not only because the relevant Respondents had unsuccessfully opposed the Dispensation Application and had failed to establish prejudice, but also because the relevant Respondents had opposed the Dispensation Application on an individual rather than a collective basis. I do not think that this part of Mr Allison's case added anything to the appeal. The fact that the opposition to the Dispensation Application failed, and the fact that
no prejudice was established are relevant to the question of whether the FTT were correct, in the exercise of their discretion, to impose the Costs Condition, but only for the reasons which I have set out above. Turning to the question of whether the conduct of the relevant Respondents, in not acting on a collective basis, had the effect of increasing the costs of the Dispensation Application I do not consider myself able to make any decision on that question, for two reasons. First, I do not regard myself as being in a position to decide whether there was a failure by the relevant Respondents to act on a collective basis. Second, and assuming that there was such a failure, I do not regard myself as being in a position to decide whether this failure resulted in an increase in the costs of the Dispensation Application which could otherwise have been avoided. The FTT made no findings in either of these respects and, in these circumstances, it does not seem to me

appropriate that I should attempt to make findings of my own. It seems to me that my analysis should concentrate on the findings and reasoning of the FTT in the Original Decision and the Reviewed Decision, as set out above. It will be appreciated that this is effectively the same point as I have already made in respect of the equivalent attempts by some of the Respondents, in their written arguments, to go behind or outside the findings of fact made by the FTT.

89. Drawing together all of the analysis set out in this section of this decision, meaning my analysis of the procedural and the substantive position, my overall conclusion is that the decision of the FTT to impose the Costs Condition cannot be upheld. In my view the decision of the FTT to impose the Costs Condition fell outside the legitimate scope of their discretion, for the procedural and substantive reasons I have identified, and was wrong in law.

Is the recovery of the Costs affected by Paragraph 9? – Analysis

(i) The legislation

90. In the remainder of this decision all references to Sections and Paragraphs are, unless otherwise indicated, references to the sections of the 2022 Act and the paragraphs of Schedule 8.

91. Paragraph 9 provides as follows:

> *"(1) 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.*
> *(2) In this paragraph the reference to services includes services provided in connection with—*
> *(a) obtaining legal advice,*
> *(b) any proceedings before a court or tribunal,*
> *(c) arbitration, or*
> *(d) mediation."*

92. Mr Allison stressed in his submissions that the restriction in Paragraph 9 does not operate in a vacuum. It is one of the Paragraphs of Schedule 8 which is supplemented by Paragraph 10, which sets out the machinery by which service charges caught by Paragraph 9 are rendered non-payable. Paragraph 10(2) provides as follows:

> *"(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing—*
> *(a) no costs incurred or to be incurred in respect of that thing (or in respect of that thing and anything else)—*
> *(i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge payable under the lease, or*
> *(ii) are to be met from a relevant reserve fund;*
> *(b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly (and any necessary adjustment must*

be made by repayment, reduction of subsequent charges or otherwise).”

93. The *“relevant provisions”* referred to in Paragraph 10(2)(a)(i) are identified as Sections 1830 of the 1985 Act. As Mr Allison pointed out, Paragraph 10 imposes a limitation on what is a relevant cost, as defined in Section 18(2) of the 1985 Act and thus what can be included in the relevant service charge. The limitation is upon the *“relevant cost”* of the thing which is incurred. It is not simply a limitation based upon an inability to demand the repayment of costs falling within the terms of paragraph 10(2). Paragraph 10(2) also prevents a landlord from circumventing this limitation by funding the costs incurred or to be incurred in respect of the relevant *“thing”* from a service charge reserve fund.

94. Section 18(2) of the 1985 Act defines the relevant costs in the following terms:

> *“(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.”*

95. As is apparent from the language of Paragraph 10, Paragraph 9 is not the only provision in Schedule 8 which restricts what can be recovered by a service charge. There are equivalent restrictions, in relation to other items of expenditure, in Paragraphs 2, 3, 4 and 8. Paragraph 10(1) states that Paragraph 10 supplements Paragraphs 2 to 4, 8 and 9. As it featured prominently in Mr Allison’s submissions, I set out the restriction in Paragraph 8, which is concerned with cladding remediation:

> *“(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 a cladding system that— (a) forms the outer wall of an external wall system, and*
> *(b) is unsafe.”*

96. Returning specifically to Paragraph 9, it will be noted that Paragraph 9 is restricted in its effect to a service charge payable under a qualifying lease. A qualifying lease is defined in Section 119. For present purposes it is not necessary to go into the definition itself. I should mention that Mr Allison’s position was that not all of the leases of the Flats were qualifying leases. I note this position. For the purposes of this decision, it is not necessary for me to determine which Flats are held on qualifying leases and which are not, and I make no determination in this respect. I proceed on the assumption that at least some of the Flats are held on qualifying leases, so that Paragraph 9, if it applies at all to the Costs, is capable of affecting the ability of the Appellant to recover the Costs by the Service Charge.

97. Paragraph 9(1) uses the expression *“relevant defect”*. This expression is defined in Section 120, which I should set out in full:

> *“(1) This section applies for the purposes of sections 122 to 125 and Schedule 8.*

(2) "Relevant defect", in relation to a building, means a defect as regards the building that—

(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and (b) causes a building safety risk.

(3) In subsection (2) "relevant works" means any of the following— (a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;

(b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;

(c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

"The relevant period" here means the period of 30 years ending with the time this section comes into force.

(4) In subsection (2) the reference to anything done (or not done) in connection with relevant works includes anything done (or not done) in the provision of professional services in connection with such works.

(5) For the purposes of this section—

"building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from— (a) the spread of fire, or

(b) the collapse of the building or any part of it;

"conversion" means the conversion of the building for use (wholly or partly) for residential purposes;

"relevant landlord or management company" means a landlord under a lease of the building or any part of it or any person who is party to such a lease otherwise than as landlord or tenant."

98. The provisions of Schedule 8, including Paragraph 9, were brought into force by Section 170(3), which provides as follows:

"(3) The following provisions come into force at the end of the period of two months beginning with the day on which this Act is passed— (a) sections 116 to 125 and Schedule 8;

(b) section 134;

(c) section 135;

(d) section 146 and Schedule 11;

(e) sections 147 to 155;

(f) sections 157 to 159."

99. The 2022 Act was passed on 28th April 2022, with the consequence that Paragraph 9 came into force on and with effect from 28th June 2022.

100. It will be noted that Section 170(3) contains no transitional provisions in relation to those parts of the 2022 Act which it brought into force on 28th June 2022. So far as Section 170 itself is concerned, Section 170(1) brought Section 170 into force, as a provision of Part 6 of the 2022 Act, on 28th April 2022. So far as I can see there are no transitional

provisions, in relation to the application of Paragraph 9, either in Section 170 or elsewhere in the 2022 Act or in any of the statutory instruments containing transitional and savings provisions in relation to the 2022 Act.

(ii) The Appellant's submissions

101. I have already set out the Appellant's case, as set out in its Further Statement of Case in the appeal, in relation to the issue of whether the restriction in Paragraph 9 applies to the Costs.

As I have noted, the Appellant's case fell into two parts. In his submissions in the appeal Mr Allison expanded his argument in relation to one part of this case. For ease of reference,

I repeat my summary of the Appellant's case on Paragraph 9, with this expansion.

(1) The 2022 Act had not come into force when the Dispensation Application was made. The Costs, which were the costs of the Dispensation Application, were incurred prior to the provisions of Schedule 8 coming into force. As such Paragraph 9 cannot apply to the Costs.

(2) To this first part of the case Mr Allison added an alternative fallback argument, consistent with the theme of his argument that Paragraph 9 should not be construed to be retrospective in its effect. If, contrary to his primary argument, Paragraph 9 was capable of applying to costs incurred prior to Schedule 8 coming into force, Mr Allison contended that Paragraph 9 did not apply to costs payable by the Service Charge which were demanded or became payable before Schedule 8 came into force. I do not know whether, or to what extent this alternative argument, if successful, would actually assist the Appellant, in terms of a challenge to the recoverability of the Costs based upon Paragraph 9. It is not however necessary for me to have this knowledge in order to determine this alternative argument.

(2) Independent of the above arguments, legal costs which are incurred in relation to applications for dispensation pursuant to Section 20ZA(1) of the 1985 Act and which relate to relevant defects within the meaning of Section 120 are not incurred *"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"*, within the meaning of Paragraph 9. It follows that, as a matter of language, Paragraph 9 does not apply to such costs. The Costs fall into this category. As such, Paragraph 9 does not apply to the Costs, regardless of whether Paragraph 9 has any retrospective effect.

102. I find it convenient to take first the second part of the Appellant's case. In determining the reach of Paragraph 9, in chronological terms, it seems to me that it is first necessary to consider what categories of services are brought within the scope of Paragraph 9, and in what way.

(iii) Are the costs of a dispensation application, as a matter of language, capable of falling within the terms of Paragraph 9?

103. Mr Allison's principal argument on the construction of Paragraph 9, in support of the second part of the Appellant's case, was that a dispensation application is not concerned with, or focussed upon the liability or potential liability of a leaseholder, within the terms of Paragraph 9. A dispensation order is not made against leaseholders. Nor is a dispensation order made in respect of the liability of any leaseholder. The focus of a

dispensation application, as is clear from *Daejan*, is upon the question of whether prejudice has been suffered or will be suffered by leaseholders as a result of the relevant failure to comply with the consultation requirements. The focus is not upon prejudice suffered as a result of a relevant defect.

104. Further to this argument Mr Allison also raised the question of what is meant by the reference to *"any person"* in Paragraph 9(1). He submitted that these words were not apt to include a leaseholder. The liability referred to in Paragraph 9(1) was a liability to put things right, in terms of remedying relevant defects. The purpose of Paragraph 9 was to give the leaseholder protection in respect of having to pay for professional costs relating to such liability. The leaseholder could never be in the category of persons who might end up with a liability incurred as a result of a relevant defect. Mr Allison also pointed out that the driver for many dispensation applications was a desire to ensure that Building Safety Fund funding could be obtained and retained. Service charges needed to be payable as a condition of funding, and strict timetables had to be met in terms of contracting for the required works. All this created problems for landlords, in terms of compliance with the consultation requirements, and created the need for dispensation applications, as in the present case. It would be odd, so Mr Allison submitted, if the landlord's ability to recover the costs of making such dispensation applications was cut off by Paragraph 9.

105. The starting point for considering these arguments seems to me to be the reference to *"the liability (or potential liability) of any person incurred as a result of a relevant defect"*. Whose liability or potential liability is being referred to? The answer to this question seems to me to be relatively straightforward. The relevant liability or potential liability is one which is incurred as a result of a relevant defect. The liability or potential liability can be the liability or potential liability of any person. This seems to me to mean what it says. Any person can include anyone subject to the liability or potential liability. Given however the definition of a relevant defect in Section 120, given the jurisdiction to make remediation orders against relevant landlords in Section 123, and given that Paragraph 9 is concerned with what is payable by a service charge, the person most likely to be subject to such a liability or potential liability is a landlord or management company. It is difficult to think of circumstances in which a leaseholder (in their capacity as leaseholder and not, for example, in a separate capacity as joint owner of the freehold) would be such a person. To that extent I agree with Mr Allison. I do not think however that it is right to say that a leaseholder could never be the person referred to in Paragraph 9. It seems to me that the words *"any person"* are capable of including a leaseholder, even though it is difficult to think of circumstances in which a leaseholder would be the person liable or potentially liable to deal with a relevant defect. I am however doubtful that this particular point matters much. What seems to me to be important is that the liability or potential liability is the liability or potential liability of the person who is liable or potentially liable to remedy the relevant defect. The most obvious example of such a person is a landlord who is obliged to remedy a relevant defect. Indeed, the Appellant may be said to be a good example of such a person.

106. One other point which arises in this context is whether the reference to a liability or potential liability in Paragraph 9(1) means, and only means, a liability arising under the 2022 Act itself, or extends to include other liabilities, such as a landlord's contractual liability to remedy a relevant defect, arising pursuant to the landlord's covenants in leases of flats in a building. In support of his arguments on the correct approach to the

construction of Paragraph 9 Mr Allison referred me to the Explanatory Notes to the 2022 Act, and specifically to paragraphs 1756-1759, which are within the section of the Explanatory Notes which deals with Paragraph 9. I should mention at this point that Mr Allison's position was that I was able to look at the Explanatory Notes, as an aid to the construction of the 2022 Act. It is clear that courts and tribunals do have the ability to look at explanatory notes as an aid to the construction of a statute; see the explanation of the correct approach to statutory interpretation given by Lady Arden and Lord Burrows JJSC in their joint judgment in *Kostal UK Ltd v Dunkley and others* [2021] UKSC 47, at [109].

107. The Explanatory Notes comment on Paragraph 9 by reference to the liabilities of landlords under the 2022 Act, which might be said to support the argument that the liabilities referred to in Paragraph 9(1) are only those arising under 2022 Act. The reference to *"any person"* in Paragraph 9(1) may also be said to reflect the fact that a number of different categories of person can be liable to remedy relevant defects under the terms of the 2022 Act.

108. As against these considerations, the reference to a liability or potential liability in Paragraph 9(1) is open ended, in terms of its wording. As such, it may be said to include liabilities arising under the 2022 Act and liabilities arising from other sources. In the present case I do not think that the point matters a great deal, and I make no final decision on this particular point. I assume that the Appellant's liability to carry out the Works arises or is capable of arising both from the Appellant's contractual obligations under the leases of the Flats and from the provisions of the 2022 Act. In any event Section 123(1) defines a remediation order as an order requiring a relevant landlord to remedy specified relevant defects. Section 123(3) defines a relevant landlord in the following terms:

> *"(3) In this section "relevant landlord", in relation to a relevant defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect."*

109. As can be seen, this definition ties the liability of a landlord to be made the subject of a remediation order to a landlord's contractual or statutory liability to remedy a relevant defect.

110. This analysis of the second part of Paragraph 9 clears the way to considering the wording of the first part of Paragraph 9(1). The first section of this wording is straightforward. No service charge is payable under a qualifying lease in respect of legal or other professional services. The mechanism by which this is achieved is set out in paragraph 10, which deems the costs incurred or to be incurred in respect of legal or other professional services not to be relevant costs within the meaning of Section 18(2) of the 1985 Act, and thus irrecoverable by way of the service charge.

111. What remains is identification of the legal or other professional services referred to in Paragraph 9. They are not any legal or other professional services. The relevant services must be services *"relating to"* the liability or potential liability which I have discussed above.

112. The words *"relating to"* are very wide. All that is required is a relationship between the services and the liability or potential liability of the relevant person incurred as a result of
the relevant defect. I find it difficult to see how such a relationship can be said not to exist between the costs of a dispensation application made by a landlord, in relation to works required to remedy a relevant defect, and the liability of that landlord to remedy the relevant defect.

113. It seems to me that one can test this by reference to the present case. The Costs are the Appellant's costs of the Dispensation Application, representing legal and (it may be) other professional services rendered to the Appellant in relation to the Dispensation Application. As I understand the position, the Works comprise or, at the least, include works required to deal with a relevant defect or relevant defects, within the meaning of Section 120. There was no argument to the contrary from Mr Allison. The Appellant is the person liable or potentially liable to remedy the relevant defect or defects. I assume that such liability arises under the terms of the leases of the Flats and, at least potentially, also under the terms of the 2022 Act. The Appellant thus has a liability or potential liability incurred as a result of relevant defects, within the meaning of Paragraph 9. As I have already noted, it is not necessary, given that this liability or potential liability arises under the terms of the 2022 Act and as a matter of contract, to decide whether the reference to liability or potential liability refers only to a liability or potential liability arising under the 2022 Act or includes a liability or potential liability arising from another source.

114. In order to ensure that the Appellant's ability to recover the costs of the Works by the Service Charge is not capped at £250 per Flat, the Appellant has been obliged to make the Dispensation Application. It seems to me that the legal or other professional services rendered to the Appellant in the Dispensation Application are quite easily and naturally described as services *"relating to"* the liability or potential liability of the Appellant incurred as a result of the relevant defects to which the Building is subject. The relationship seems to me to be an obvious one.

115. I take Mr Allison's point that this construction of Schedule 9 is capable of causing problems for landlords making dispensation applications for the purposes of ensuring Building Safety Fund funding for works required to remedy relevant defects to buildings. I do not think however that this point is anywhere near sufficient to justify a reading of the words *"relating to"* in Paragraph 9 as excluding the professional services rendered to the Appellant in the Dispensation Application. Put simply, the words *"relating to"* are very wide, and were no doubt intended to be very wide. I also note that sub-paragraph (2) of Paragraph 9 contains a wide-ranging set of categories of services which are included in the reference to services in sub-paragraph (1). In particular, such services include services provided *"in connection with…..(b) any proceedings before a court or tribunal"*. It is hard to see how this is not capable of extending to services provided in relation to a dispensation application, in circumstances where the dispensation application is made by reason of the landlord having a liability or a potential liability to remedy a relevant defect or relevant defects.

116. As I have already noted, in support of his arguments on the correct approach to the construction of Paragraph 9 Mr Allison referred me to the Explanatory Notes to the 2022

Act, and specifically to paragraphs 1756-1759, which comment on Paragraph 9. I do not need to set out each of these paragraphs, but I note that paragraph 1758 states as follows:

> *"The terms of many leases will allow for landlords to pass legal and other professional costs through the service charge. The purpose of Schedule 8 is to protect leaseholders from costs associated with historical building safety defects. Where landlords incur costs in connection with their new liabilities under the Act, this paragraph prevents these costs incurred by landlords from being passed to leaseholders. Without these protections, it would be possible for landlords to pursue spurious or unrealistic legal claims and charge these costs to leaseholders; this paragraph mitigates against that and ensures incentives are aligned by requiring building owners and landlords to absorb the costs of their own legal and other professional advice."*

117. The language of this paragraph and the remainder of the commentary on Paragraph 9 in the Explanatory Notes does not seem to me to provide any support for the argument that the professional services rendered to the Appellant in the Dispensation Application are not services relating to the Appellant's liability to carry out the Works incurred as a result of the relevant defects. The relevant words used in paragraph 1758 are *"associated with"* and *"in connection with"*. Both of these terms have a width similar to *"relating to"*.

118. I therefore conclude that the costs of a dispensation application are capable of falling within the terms of Paragraph 9, with the consequence that the Costs are capable of falling within the terms of Paragraph 9. This conclusion is however subject to the question, to which I now turn, of whether Paragraph 9, by reason of the date when it was brought into force, cannot apply to the Costs.

(iv) Can Paragraph 9 apply to the Costs, bearing in mind the date when Paragraph 9 was brought into force?

119. Mr Allison submitted that Paragraph 9 is not retrospective in its effect. Up to a point, I accept this submission. Paragraph 9 is not expressed to be retrospective in its effect, in the sense that it is not expressed to have effect prior to 28th June 2022. The same is not true of the entirety of the 2022 Act. In this context I refer to Section 135 of the 2022 Act, which introduces a new Section 4B into the Limitation Act 1980. Section 135(3) specifically provides that this new Section 4B, in relation to an action by virtue of Section 1 of the Defective Premises Act 1972, is to be treated as always having been in force. It follows that the new limitation periods in the Section 4B are capable of applying to claims under the Defective Premises Act 1972 which had, prior to the coming into force of Section 135, already become statute barred. The potential human rights problem which this creates is managed by Section 135(5), which provides that where an action is brought which, but for Section 135(3) would have been barred by the Limitation Act 1980, the court hearing the action must dismiss the action in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.

120. The provisions of Section 135 of the 2022 Act were considered by the Court of Appeal in *URS Corporation Limited v BDW Trading Limited* [2023] EWCA Civ 772. In that case BDW was seeking, by amendment, to introduce claims under the Defective Premises Act 1972 which took advantage of the longer limitation periods provided by Section 135. One of the arguments raised by URS in response to the application to amend was that the

new limitation periods were not available because the retrospective amendments made by Section 135 did not apply in the case of parties involved in continuing litigation. As it was put in argument, the rules of the game could not be changed after the relevant action had been commenced. This argument was not accepted by the Court of Appeal. The principal judgment in the Court of Appeal was given by Coulson LJ. Asplin LJ gave a shorter judgment, agreeing with Coulson LJ. King LJ agreed with both judgments.

121. Coulson LJ recorded the submissions of counsel for URS in the following terms, at [158]:

> *"158. Ms Parkin made a number of submissions in support of what seems, certainly at first blush, a rather odd result. She relied on what the House of Lords said in Wilson v First County Trust Limited (No 2) [2003] UKHL 40; [2004] 1 A.C. 816 about the need to construe any statute in a way that was compatible with Convention Rights. She referred to Lord Hope's speech at [98] and Lord Rodger's speech at [198], to the effect that there was a general presumption that legislation was not intended to operate retrospectively, such that accrued rights and the legal effect of past action should not be altered by subsequent legislation. Ms Parkin said that it could not have been Parliament's intention that the BSA changed the existing rights of the parties before the court. In addition, she argued that s.135 of the BSA "impliedly repealed" s.9 of the Limitation Act in so far as it affected claims under the DPA and that, in consequence, pursuant to s.16 of the Interpretation Act, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, "affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment."*

122. Coulson LJ did not accept these submissions. In his view the wording of Section 135 was clear, in its retrospective effect. As he explained, at [160]-[162].

> *"160. In my view, Mr Hargreaves' interpretation of s.135 of the BSA was correct. The section was retrospective in effect and, although there was an exception to that addressing claims which had been finally determined or settled (s.135(6)), there was no exception relating to the rights of parties involved in ongoing litigation. There are a number of reasons for my conclusion.*
>
> *161. The starting point – and, in some ways, the end point – must be the ordinary linguistic meaning of the words used in s.135(3): see Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition, at paragraph 10.4 and R (Jackson) v Attorney General [2005] UKHL 56; [2006] 1 A.C. 262 at [29]. The amendment which, by way of s.135 of the BSA, adds the extension to the relevant limitation position "is to be treated as always having been in force".*
>
> *162. In my view, that could not be any clearer: the amendments to the DPA , and therefore the longer limitation periods, are to be treated as always having been in force. To put the point another way, since 1972, there was never a time when those extended periods did not apply. Ms Parkin accepted that the provision plainly had retrospective effect. Thus the remarks of Lord Hope and Lord Rodger in Wilson are inapplicable, because this is a situation*

where Parliament plainly intended that the extended limitation periods would have retrospective effect."

123. Returning to the present case I accept the submission of Mr Allison that Paragraph 9 does not contain provisions, of a kind which are to be found in Section 135, which give Paragraph 9 retrospective effect. In his further written submissions Mr Allison elaborated on the point that, in the absence of express provision to this effect, legislation should not be construed so as to have retrospective effect. It is not necessary for me to go through Mr Allison's submissions and further submissions on this point in detail. I accept, indeed I am bound to accept that there is a general presumption that legislation is not intended to operate retrospectively, and that this general presumption is based upon concepts of fairness and legal certainty; see the references to the speeches of Lord Hope and Lord Rodger in *Wilson v First County Trust Limited (No. 2)* [2003] UKHL 40 [2004] 1 AC 816 (at [98] and [198]) given by Coulson LJ in his judgment in *URS*, at [158] (quoted above). I accept that this general presumption applies to Paragraph 9, to the extent that the express language of Paragraph 9 does not require a contrary conclusion.

124. The problem with these submissions is that they seem to me only to take matters so far. They leave unanswered what seems to me to be the critical question in this context, which is how, in chronological terms, Paragraph 9 takes effect. Paragraph 9 provides that no service charge is payable under a qualifying lease in respect of legal or other professional services referred to in Paragraph 9. I will use the expression **"the Qualifying Services"** to refer to services of the kind referred to in Paragraph 9 (but without prejudging the question of how, in chronological terms, Paragraph 9 takes effect). As from 28th June 2022, no service charge is payable under a qualifying lease in respect of the Qualifying Services. This restriction is clear enough, in itself. What however is less obvious is how the restriction works where some or other component of the Qualifying Services predates 28th June 2022.

125. As I have explained above, Mr Allison's submissions on this question, as finalised in his further submissions, fell into two parts. The first part comprised Mr Allison's primary submission on this question. If Mr Allison's primary submission was not accepted, the second part comprised his alternative and fallback submission on the question. I will start by giving a more detailed summary each of these primary and alternative submissions.

126. Mr Allison submitted, by way of his primary submission, that the costs of services otherwise falling within the terms of Paragraph 9 were not caught by Paragraph 9 if those costs were incurred prior to 28th June 2022. As can be seen, this first part of Mr Allison's submissions proceeds on the basis that what matters, for the purposes of the application of Paragraph 9, is when the costs of relevant services were incurred. Mr Allison sought to support this argument in two principal ways.

127. First, Mr Allison drew my attention to the provisions of Paragraph 10. These provisions, so he submitted, meant that the limitation in Paragraph 9 was a limitation on what qualified as relevant costs, for the purposes of Section 18(2) of the 1985 Act. Read with Paragraph 10, Paragraph 9 did not in fact provide that a service charge was not payable in respect of Qualifying Services. Instead, Paragraph 10 prevented the costs of Qualifying Services from being treated as relevant costs. Given that the form of limitation in Paragraph 9 is a limitation on what qualify as relevant costs, coming into

effect as from 28th June 2022, it would be wrong to treat the costs of services incurred prior to 28th June 2022 as being subject to this limitation. Such costs were not incurred at a time when Paragraph 9 was available to treat such costs as non-relevant costs.

128. Second, Mr Allison pointed to the injustice which he said would result from treating costs incurred prior to 28th June 2022 as being subject to Paragraph 9. He drew my attention to Paragraph 8, which I have set out above, and which provides that no service charge is payable under a qualifying lease in respect of cladding remediation works. Mr Allison pointed out that if costs of services incurred prior to 28th June 2022 could be treated as subject to Paragraph 9, Paragraph 8 must work in an equivalent fashion. If Paragraph 8 did operate in this fashion, a landlord who had incurred costs, which might easily run to millions
of pounds, on cladding remediation works prior to 28th June 2022, could find himself prevented from recovering those costs from his tenants by the service charge, as from 28th June 2022. This would, so Mr Allison submitted, be a highly unjust result which Parliament cannot have intended. It would also allow Paragraph 9 to have a retrospective effect which, again, Parliament cannot have intended, in the absence of express wording in Paragraph 9 which achieves this result.

129. Turning to the alternative submission, and on the assumption that I did not accept the primary submission, Mr Allison submitted that Paragraph 9 does not apply where the costs of the relevant services were demanded/became payable, I assume by way of service charge, prior to 28th June 2022. As can be seen, this alternative submission proceeds on the basis that what also matters in this context is the date on which the relevant service charge, by which the costs of the relevant professional services are sought to be recovered, becomes demanded/payable. It should be noted that Mr Allison used the expression *"demanded/payable"* in his submissions, which is why I am using this expression. Provided that the relevant service charge is demanded or becomes payable prior to 28th June 2022, so the argument goes, Paragraph 9 does not apply.

130. In support of his alternative submission on this question Mr Allison reiterated his argument that Paragraph 9 does not have retrospective effect. If Paragraph 9 could catch service charges which were demanded or became payable prior to 28th June 2022, this would be to give Paragraph 9 a retrospective effect which it was not intended to have, in addition to creating undesirable and anomalous results.

131. A further, and simpler alternative to Mr Allison's primary and alternative submissions is that Paragraph 9 does, so it may be argued, what it says on its face. If the relevant professional services are Qualifying Services, no service charge is payable in respect of those services as from 28th June 2022. Questions of when the costs of the relevant services were incurred or when the service charge was demanded or became payable are irrelevant. As from 28th June 2022 any such service charge is not payable. This alternative was resisted by Mr Allison, again on the basis that this would give Paragraph 9 a retrospective effect which it was not intended to have, in addition to creating undesirable and anomalous results.

132. In summary therefore Mr Allison's primary submission was that the applicability of Paragraph 9, in chronological terms, depends upon when the costs of the relevant services were incurred and when the relevant service charge is demanded/becomes payable. If

the costs of the relevant services were incurred prior to 28th June 2022, their recoverability by the service charge is unaffected by Paragraph 9. If I was to reject this primary submission, Mr Allison's alternative submission was that if the costs of the relevant services were demanded/payable prior to 28th June 2022, their recoverability by the service charge is unaffected by Paragraph 9.

133. Before considering Mr Allison's submissions, there are some decisions of the FTT and some other legal materials which bear on the questions I am considering, and to which reference should be made.

134. In *Adriatic Land 3 Limited v Residential Leaseholders of Waterside Apartments* (MAN/30UG/LSC/2021/0044) the FTT (Judge Holbrook) had to consider the question of whether the provisions of Schedule 8 restricted a leaseholder's liability for service charges which were otherwise payable before the provisions of Schedule 8 came into force. Judge Holbrook decided, by a decision dated 27th June 2023, that the answer to this question was no. The question was determined by the Judge as a preliminary issue in the proceedings. The proceedings were concerned with an application by the applicant landlord for a determination of the service charge liabilities for the 2019 and 2020 service charge years of the respondents, who were the long leaseholders of the flats in the relevant building. In particular, the applicant sought a determination that each respondent was liable to contribute towards costs incurred by the applicant in 2019 and 2020 in relation to fire prevention works. Service charge demands in respect of this sum were issued to the respondents in 2019 and 2020. One of the issues which arose in the proceedings, which was dealt with by the preliminary issue, was whether the protections in Schedule 8 were available to the respondents.

135. In answering this question in the negative the essential reasoning of the Judge can be found in paragraph 13 of his decision, in the following terms:

> *"13. Now that the provisions in Schedule 8 have been enacted and have come into force, their effect is clearer, and I have no doubt that the interpretation contended for by the Applicant is to be preferred. The provisions were brought into force, without transitional provision, by section 170(30(a) of the Act itself, and the language of both section 122 are* [and] *of Schedule 8 is in the present tense: "certain service charge amounts...are not payable" and "No service charge is payable" and "No service charge is payable…." etc. This is language which is apt only to affect liability for service charges which would otherwise become payable after the new provisions came into force, and nothing about it suggests that the payability of past (pre-commencement) service charges may be revisited by reference to the new provisions in Schedule 8."*

136. It appears to be the case, from information contained in paragraph 11 of this decision, that the costs in issue had been incurred, and the resulting service charges demanded and paid before 28th June 2022. The fact, if fact it was, that the relevant service charges had been paid would not necessarily have affected the ability of the FTT to determine the payability of those service charges; see Section 27A(5) of the 1985 Act.

137. I should also mention that the decision in *Waterside* was made without a hearing, and that the respondent leaseholders had ceased to be represented as from January 2023; that is to say some months prior to the decision.

138. The decision in *Waterside* was one of the FTT cases which was the subject of my invitation to the parties to make further submissions. In his further submissions Mr Allison suggested that it had been touched upon in the oral submissions in the appeal hearing. My notes from the appeal hearing do not disclose this, but they were not of course a verbatim note, and in fairness to Mr Allison I am content to accept that this case was referred to in the appeal hearing. In any event, the decision in *Waterside*, at least so far as the reasoning in paragraph
13 of this decision is concerned, supports Mr Allison's argument that Paragraph 9 only applies to service charges which become payable as from 28th June 2022.

139. The next case is *Batish and others v Inspired Sutton Limited and others* (LON/00BF/HYI/2022/0002). This was a decision of the FTT (Judge Siobhan McGrath, President of the Property Chamber, and Judge Timothy Powell) on an application for a remediation contribution order pursuant to Section 124. The application was made by the long leaseholders of the relevant building on the basis that they had made service charge payments for the remediation of relevant defects. The long leaseholders sought, by the remediation contribution order, to have those payments returned. They contended that the service charges fell within the limiting provisions in Schedule 8 and that it was just and equitable to make a remediation contribution order in their favour. The first respondent to the application was the freeholder and developer of the building. The remaining respondents were named as the parent company of the freeholder and the directors of the freeholder. It should be noted that the parties were not represented in the proceedings.

140. The FTT decided that remediation contribution orders should be made in favour of the applicant long leaseholders. For present purposes the relevance of the decision, which is dated 13th January 2023, lies in the fact that the FTT did not see any objection to making a remediation contribution order in relation to sums which, it appears from the decision, were incurred by the landlord and paid (or paid in part) by the long leaseholders by way of the service charge prior to 28th June 2022. In this context I note that application for the remediation contribution order was made in August 2022. The FTT thus accepted that a remediation contribution order under Section 124 could be made in relation to service charge costs incurred and paid prior to Section 124 and Schedule 8 coming into force. The most relevant part of the decision for present purposes seems to me to be found in paragraphs 48-50 of the decision, where the FTT stated as follows:

> *"48. We can only make a remediation contribution order if we consider it just and equitable to do so. We take the view that in order to satisfy the condition in this case we must be satisfied that the lessees paid for the cost of works which ought to have been met by Inspired Sutton Limited.*
> *49. Paragraph 2 of Schedule 8 to the Act provides that no service charge is payable for defects for which the landlord is responsible. The paragraph applies in relation to a lease of any premises in a relevant building and has effect in respect of a relevant measure (i.e. the remediation works) if the landlord (or an associate) is responsible for the relevant defect.*

> *50. Inspired Sutton Limited was the developer and the landlord under the lease at the qualifying time. Accordingly, by reference to paragraph 10 of Schedule 8, the costs are not to be regarded as relevant costs to be taken into account in calculating the amount of the service charge. The Tribunal are satisfied that there are no mitigations or other matters to be taken into account in the exercise of its discretion in this case. The Applicants are therefore entitled to a remediation contribution order in their favour."*

141. If Section 124 can have the retrospective effect which it appears to have been given by the FTT in *Sutton*, this might be said to support the argument that Paragraph 9 can have a similarly retrospective effect, in terms of applying where the costs of the relevant services were incurred prior to 28th June 2022 or service charges were demanded or became payable prior to 28th June 2022.

142. The third case is *Waite and others v Kedai Limited* (LON/00AY/HYI/2022/0005 & 0016). This was a decision of the FTT (Judge Timothy Powell and Mrs Helen Bowers MRICS) on two consolidated applications for a remediation order pursuant to Section 123. The applications were made by the long leaseholders of two blocks of flat in the relevant development. The respondent was the freeholder owner of the blocks. The parties were represented by counsel at the hearing of the applications.

143. As I read this decision, it does not engage directly with questions of retrospectivity. There is some commentary on Part 5 of the 2022 Act in paragraphs 66-71 of the decision, where the FTT comment on their approach to Part 5, but there is nothing specific on the retrospectivity or otherwise of the provisions of Part 5 or Schedule 8. That said, paragraphs 66-71 of the decision seem to me to contain some useful general observations on Part 5. I quote paragraph 67 of the decision, in particular:

> *"67. Sections 116 to 125 of Part 5 of the BSA 2022 relate to the "remediation of certain defects". They constitute a self-contained code, containing its own specific definitions in sections 117 to 121 and its own statutory test for the making of a remediation order in section 123. As paragraph 957 of the Explanatory Notes to the BSA explains, the leaseholder protections in sections 116 to 125 "are a one-off intervention designed to deal with the current safety defects in medium- and high-rise buildings." The statutory definitions are intended to be clear, simple and straightforward."*

144. Paragraph 9 is referenced in this decision, at paragraph 153, but only in the context of a Section 20C application made by the leaseholders. The FTT observed that, by virtue of Paragraph 9(1), qualifying leaseholders would not have to pay the landlord's costs of the applications, independent of any Section 20C order. The consolidated applications for the remediation order were however both made after 28th June 2022. I therefore assume that the costs being considered by the FTT were costs which were incurred after 28th June 2022, so that the question which arises in the present case did not there arise.

145. This leaves the article by Professor Bright. The article is a short article (an alternative description, so I was told, is blog post), to which my attention was drawn, which considers

the decision in *Waterside*. Mr Allison submitted, while making it clear that he intended no disrespect to the author by this submission, that no weight should be given to the article which, so he submitted, was not and was not intended to be a detailed consideration of the provisions of the 2022 Act. I accept this submission, in the sense that I accept that the article comprises academic commentary, as opposed to any kind of authority, although I am not sure that the commentary loses anything, as commentary, by being commendably brief. I also accept that I should concentrate my attention on the arguments of the parties in the appeal, and on the authorities to which my attention has been drawn in the appeal. The real relevance of the article seems to me to be twofold. First, the article makes reference to *Waterside* and *Sutton*, to which I have already referred. Second, the article makes reference to the Explanatory Notes to the 2022 Act, to which I have of course already been referred by Mr Allison.

146. The specific paragraph of the Explanatory Notes which is referenced in the article is paragraph 986, which is part of the commentary on Section 122. Section 122 introduces the provisions of Schedule 8 into the 2022 Act. Paragraph 986 is rather lengthy, but I should set it out in full:

> *"The Schedule sets out that, in relation to historical building safety defects, "no service is payable" in certain circumstances, and in other circumstances that the service charge is only payable if it "does not exceed the permitted maximum". These provisions in the Schedule apply from commencement (two months after Royal Assent of the Act, or 28 June 2022): from that date, the service charge protections apply. The protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents. This means that, even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule. In practice, this means that managing agents and landlords will need to rescind service charge demands issued prior to commencement where they relate to historical building safety defects. Where landlords are entitled to recover some costs from leaseholders according to the Schedule, they will need to issue new service charge demands which comply with the provisions set out in the Schedule."*

147. This paragraph would appear to support the argument that Paragraph 9 is capable of applying to service charges demanded prior to 28th June 2022 and the consequential argument that what matters, in terms of the application of Paragraph 9, is when the relevant service charge comes to be paid, as opposed to when the relevant service charge is demanded or become payable, or when the costs comprising the relevant service charge were incurred.

148. The article also makes reference to an extract from Hansard and to a letter from the Secretary of State for Levelling Up, Housing and Communities dated 27th June 2022. I accept the submission of Mr Allison that I should not give weight to the letter from which, in any event, only a short extract is included in the article. In relation to the Hansard extract the point has been made by Mr Allison that the parties have not, in the present case, carried out the substantial undertaking of conducting their own searches of Hansard

for material admissible pursuant to the principles set out in *Pepper v Hart* [1993] AC 593. In these circumstances it does not seem to me that it would be right or fair to take the extract from Hansard into account. If there is to be investigation of Hansard, assuming the existence of admissible material, that will have to be for another case.

149. I now return to consider directly Mr Allison's submissions on the question of how, in chronological terms, Paragraph 9 takes effect.

150. The starting point and, as it seems to me, the overriding point in relation to my analysis of this question is a point well made by Mr Allison in his further submissions. In interpreting statutory provisions, the start point and the end point of the process, lies in the words of the relevant Act. Mr Allison's point has the solid support of Coulson LJ in *URS*. It is convenient to repeat what Coulson LJ said at [161]:

> *"161. The starting point – and, in some ways, the end point – must be the ordinary linguistic meaning of the words used in s.135(3): see Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition, at paragraph 10.4 and R (Jackson) v Attorney General [2005] UKHL 56; [2006] 1 A.C. 262 at [29] . The amendment which, by way of s.135 of the BSA, adds the extension to the relevant limitation position "is to be treated as always having been in force".*

151. Looking at the wording of Paragraph 9, I find it difficult to see how Paragraph 9 can be said not to apply where the costs of the relevant services were incurred prior to 28th June 2022. This is not how Paragraph 9(1) is drafted. Paragraph 9(1) is drafted on the basis that no service charge is payable under a qualifying lease in respect of Qualifying Services. As I have already decided, the liability or potential liability referred to in Paragraph 9(1) is the liability or potential liability incurred as a result of the relevant defect. It is not a liability or potential liability to pay the costs of the relevant services. If the relevant services qualify as services *"relating to"* to the relevant liability or potential liability of any person incurred as a result of a relevant defect, that is to say (using my definition) if the relevant services qualify as Qualifying Services, I find it difficult to see why it matters when the costs of the relevant services were incurred. Paragraph 9 is not framed by reference to the incurring of the costs of the relevant services.

152. Mr Allison's answer to this point was that Paragraph 10 explains what is meant by the reference to no service charge being payable, in Paragraph 9(1). Paragraph 10 ties this expression to costs incurred or to be incurred in respect of the Qualifying Services, as opposed to focussing on the date when the relevant service charge is demanded or becomes payable.

153. I am not persuaded by this argument. It seems to me that Paragraph 10 contains the mechanism by which the result is achieved that no service charge is payable. I do not think that it actually changes or affects the opening words of Paragraph 9(1), which are that no service charge is payable.

154. In addition to this, it is to be noted that paragraph 10(2) refers to costs incurred or to be incurred in open ended terms, not in terms which suggest that such costs can only have

been incurred or can only achieve the status of costs to be incurred as from 28th June 2022.

155. I can see Mr Allison's point that if Paragraph 9 is capable of applying to costs incurred prior to 28th June 2022, that could produce a result which might be said to be unfair to a landlord who expended large sums on items of expenditure caught by the terms of Schedule 8 prior to 28th June 2022. It seems to me that the blunt answer to this point is that this is how the relevant provisions of Part 5 of the 2022 Act and Schedule 8 work. As the FTT explained in their decision in *Kedai*, at paragraph 67, Sections 116-125 of the 2022 Act constitute a self-contained code, containing its own specific definitions in Sections 117-121 and its own statutory test for making a remediation order under Section 123 or, it can be added, a remediation contribution order under Section 124. They are, to quote from the Explanatory Notes at paragraph 957, *"a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings"*.

156, In keeping with this objective, it seems to me that the purpose of the restrictions (or limitations) in Schedule 8 is simply to provide that service charges for certain *"things"*, to use the language of paragraph 10(2), are not payable in the circumstances set out in the relevant paragraphs of Schedule 8. The provisions of Schedule 8 are clear in simply removing certain categories of what would otherwise be service charge expenditure from what is payable by way of the relevant service charge.

157. This point can, it seems to me, be taken further. Viewed as a self-contained code, the overall scheme of Sections 116-125 and Schedule 8 can be seen to emerge. This part of the 2022
Act is concerned with relevant defects. Section 116 provides that *"Sections 117 to 125 and Schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings."*. Broadly, relevant buildings are buildings of a certain height, and relevant defects are those which arise as a result of relevant works and cause a building safety risk. A building safety risk means a risk to the safety of people in or about the relevant building arising from the spread of fire or the collapse of the relevant building or part of it. The legislative intention which emerges from these provisions, and specifically from Schedule 8, is that certain categories of expenditure, in relation to relevant defects, are no longer recoverable by a service charge, including the costs of Qualifying Services. In terms of the passing on of liabilities for expenditure caught by Schedule 8, there is Section 124 and the ability to apply for remediation contribution orders. Whether an application under Section 124 will produce an equitable distribution of a liability to meet expenditure which is caught by Schedule 8 will depend upon the circumstances of each particular case. What is clear is that Parliament has decided that the specified categories of costs in Schedule 8 are not to be payable by the service charge.

158. Viewed in this light it does not seem to me to be surprising that Paragraph 9, or for that matter other Paragraphs of Schedule 8 are capable of applying to costs incurred before Schedule 8 came into force. This seems to me to be consistent with the overall scheme of Sections 116-125 and Schedule 8. What might be seen as unfair results are, it seems to me, simply a reflection of life in the new world of the 2022 Act.

159. So far as the problem of the 2022 Act having retrospective effect is concerned, this seems to me to beg the question which has to be answered, which is how, in chronological terms and on its language, Paragraph 9 operates. There is no provision in Paragraph 9 or Schedule 8, equivalent to Section 135, which provides that Paragraph 9 must be treated as having always been in force. Paragraph 9 has to be treated as coming into force on 28th June 2022. If however there is no restriction, in terms of time, as to when the costs of Qualifying Services have to have been incurred, and I can see none in Paragraph 9, I do not see that this gives Paragraph 9 a retrospective effect of a kind which infringes the general presumption against retrospective legislation identified in *Wilson v First County Trust Limited*.

160. For all these reasons I reject Mr Allison's primary submission on the question of how, in chronological terms, Paragraph 9 takes effect. I do not think that it is possible to read into Paragraph 9 a provision that it does not apply to the costs of Qualifying Services incurred prior to 28th June 2022.

161. Turning to Mr Allison's alternative submission, I was, initially, attracted by this alternative submission. Paragraph 9(1) provides, as I have said, that no service charge is payable. Given that the restriction is on payability, then there is a certain logical attraction in concluding that Paragraph 9 does not apply to a relevant service charge (ie. a service charge comprising the costs of Qualifying Services) which became payable prior to 28th June 2022. The same would apply in the case of a service charge demanded prior to 28th June 2022, assuming that the service charge became payable on the date of the demand. This construction of Paragraph 9 would also avoid the anomalous result that, if service charges payable prior to 28th June 2022 are capable of being caught by Paragraph 9, a situation could easily arise where one tenant might pay the relevant service charge prior to 28th June 2022, while another tenant in the same building might, by delaying payment, reach 28th June 2022, and then not have to pay the service charge. In this situation the late payer would be rewarded, which would be an unattractive result.

162. Once again however it seems to me that this alternative submission does not fit with the language of Paragraph 9, which provides that no service charge is payable. Given that Paragraph 9 came into force on 28th June 2022, this means that no service charge in respect of Qualifying Services is payable as from 28th June 2022. There is no exclusion, in the wording of Paragraph 9, of service charges in respect of Qualifying Services which became payable prior to 28th June 2022, and I find it hard to see how any such provision can be read into Paragraph 9.

163. So far as the problem of retrospectivity is concerned, I repeat my reasoning in this respect in relation to Mr Allison's primary submission. If there is no restriction, in terms of time, as to when the service charge in respect of Qualifying Services became payable, and I can see none in Paragraph 9, I do not see that this gives Paragraph 9 a retrospective effect of a kind which infringes the general presumption against retrospective legislation identified in *Wilson v First County Trust Limited*.

164. I do very much see the problem of anomalous results which could be produced, particularly between diligent and less diligent service charge payers, if Paragraph 9 applies to service charge in respect of Qualifying Services which became payable prior to 28th June 2022, but I am not convinced that this is sufficient to justify reading into Paragraph 9 a provision that such service charges are excluded from Paragraph 9. In this

context I repeat what I have said above, as to the legislative purpose behind Sections 116-125 and Schedule 8. It seems to me that my reasoning in this context, as set out above, applies equally to Mr Allison's alternative submission.

165. Ultimately, and keeping firmly in mind the importance of following the language of Paragraph 9, I find myself drawn to the most obvious interpretation of Paragraph 9(1). It seems to me that the words *"No service charge is payable"* mean what they say. As from 28th June 2022, when Paragraph 9 was brought into force, no service charge is payable in respect of Qualifying Services. The new regime applies, regardless of when the costs of the Qualifying Service were actually incurred, and regardless of when the relevant service charge became payable.

166. This construction of Paragraph 9 seems to me to be consistent with what I have identified above as the overall purpose of Sections 116-125 and Schedule 8, as noted by the FTT in *Kedai*, and with my reasoning on this point, as set out above.

167. This construction may also be said to be supported by paragraph 986 of the Explanatory Notes, which I have set out above. In his further submissions Mr Allison made the point that the Explanatory Notes cannot override the words of the 2022 Act. I accept this point, but the present case is not one where I am relying on the Explanatory Notes to override what would otherwise be the natural construction of Paragraph 9. Rather, the Explanatory Notes seem to me, in particular at paragraph 986, to support what I regard as the most obvious reading of Paragraph 9.

168. My construction does not seem to me to be consistent with the reasoning of Judge Holbrook in paragraph 13 of his decision in *Waterside*, which I have quoted above. To that extent, I find myself in disagreement with the reasoning of Judge Holbrook in *Waterside*. That said, it seems to me to be significant that *Waterside* was concerned with service charges which, so it appears, had already been paid before Schedule 8 came into force. The Judge did not therefore have to consider what would have been the more difficult case of service charges becoming payable prior to 28th June 2022, but remaining unpaid as at that date. Bearing this point in mind, the actual decision in *Waterside* does not seem to me to be inconsistent with my construction of Paragraph 9.

169. Turning to *Sutton*, it seems to me that the approach of the FTT in that case was correct, in the sense that the FTT proceeded on the basis that there was no objection to making a remediation contribution order in relation to sums which, it appears from the decision, were incurred by the landlord and paid (or paid in part) by the long leaseholders by way of the service charge prior to 28th June 2022.

170. Drawing together all of the above analysis of the question of whether Paragraph 9 can apply to the Costs, bearing in mind the date when Paragraph 9 was brought into force, I reach the following conclusions:
    (1) The effect of Paragraph 9 is 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.
    (2) Accordingly, Paragraph 9 is capable of applying to the Costs, notwithstanding the date when Paragraph 9 was brought into force.

(v) Is the recovery of the Costs affected by Paragraph 9? – overall conclusions

171. Drawing together all of my analysis on the question of whether the recovery of the Costs is affected by Paragraph 9, I reach the following overall conclusions:
    (1) The costs of a dispensation application are, as a matter of language, capable of falling within the terms of Paragraph 9
    (2) Paragraph 9 is capable of applying to the Costs, notwithstanding the date when Paragraph 9 was brought into force.
    (3) Accordingly, the ability of the Appellant to recover the Costs by the Service Charge is affected by Paragraph 9. The Costs are not recoverable, by the Service Charge, from those of the Respondents who hold qualifying leases within the meaning of Section 119.

172. It will be appreciated that it does not follow from these overall conclusions that the decision of the FTT to impose the Costs Condition was necessarily wrong. Although I have previously decided, in the earlier part of this decision, that the decision to impose the Costs Condition was wrong in law, it does not seem to me that my conclusions in relation to Paragraph 9 necessarily provide an additional reason for saying that the decision to impose the Costs Condition was wrong. It seems to me that the situation is more accurately expressed as one where the Reviewed Decision can be said to have been incomplete. The Reviewed Decision did not take account of the fact that the Costs were not recoverable, in any event and by reason of Paragraph 9, from those of the Respondents who hold qualifying leases. In fairness to the FTT I should record that the Reviewed Decision is dated 30th June 2022, and that it is clear that no one raised Paragraph 9 before the FTT. It would therefore be unfair to criticise the FTT for the fact that the Reviewed Decision was incomplete. Nevertheless, the omission of the effect of Paragraph 9 does seem to me to constitute a reason for saying that the Reviewed Decision was incomplete.

173. In the light of my overall conclusions, the position seems to me to be this. By the time the
    FTT came to exercise their discretion as to what (if any) conditions to impose on the grant of dispensation in the Reviewed Decision, Paragraph 9 was in force. As I have said, it seems to me that Paragraph 9 fell to be taken into account in the exercise of the discretion because, as I have decided, Paragraph 9 affected the ability of the Appellant to recover the Costs from those of the Respondents who hold qualifying leases, regardless of the Costs Condition. The failure of the FTT to take this factor into account seems to me to have constituted an error of law in the exercise of their discretion.

What, if anything, should be done about the Section 20C Applications?

174. I now come back to the Section 20C Applications and the question of whether I can and should deal with them, including the question of whether the Section 20C Applications have any impact upon my reasoning in relation to the issues in the appeal. It will be recalled that the Section 20C Applications have been made by certain of the Respondents, in January or February 2023.

175. It was not initially clear to me whether the Section 20 Applications had been made to the FTT or to this Tribunal. Subsequent inquiries have confirmed that the Section 20C Applications have been made to the FTT.

176. Mr Allison submitted that I could and should deal with the Section 20C Applications, which he characterised as misconceived, given that they postdate both the Original Decision and the Reviewed Decision.

177. I have come to the conclusion that I should not deal with the Section 20C Applications. It seems to me that the FTT should deal with the Section 20C Applications. The Section 20C Applications are not before me in this appeal. Beyond this, I have already noted that the Respondents did not attend the appeal hearing. That was a matter for the decision of the Respondents, so far as the issues in the appeal were concerned, and was not a matter, as I have explained, which prevented my hearing the appeal in the absence of the Respondents. In relation to the Section 20C Applications it seems to me that the position is not the same. I assume that the Respondents would not have been expecting me to deal with the Section 20C Applications in the appeal, given that they were made to the FTT. If I was to deal with the Section 20C Applications it seems to me that I would run the risk of committing a similar procedural error to that which I have identified in the decision of the FTT to impose the Costs Condition.

178. I do not see that the Section 20C Applications can or should have any impact on my reasoning in relation to the issues in the appeal. The position seems to me to be the other way round. As I understand the position, nothing has been decided in relation to the Section 20C Applications. If and to the extent that the FTT may decide that they should entertain the Section 20C Applications, they will need to be considered in the light of this decision and my reasoning in this decision.

179. In these circumstances I leave the Section 20C Applications for argument in the FTT, including any argument from the Appellant that the FTT should not entertain the Section 20C Applications at all.

Summary of my conclusions

180. In summary, my conclusions on the two issues raised by the appeal are as follows:
    (1) The decision of the FTT to impose the Costs Condition was wrong in law, both as a matter of procedure and as a matter of substance. For the reasons which I have set out, the decision cannot be upheld as lying within the legitimate scope of the discretion which the FTT were exercising.
    (2) By virtue of Paragraph 9, and for the reasons which I have given, the Costs are not recoverable, by the Service Charge, from those of the Respondents who hold qualifying leases within the meaning of Section 119. The Reviewed Decision was, for this reason, incomplete. The Costs were not recoverable in any event from those of the Respondents who hold qualifying leases. In this context I should also repeat that it does not seem to me that it would be fair to criticise the FTT for this omission.

Should the decision to impose the Costs Condition be set aside?

181. By virtue of Section 12 of the Tribunals, Courts and Enforcement Act 2007 I may set aside the decision of the FTT to impose the Costs Condition, if I find that the decision involved an error on a point of law. More accurately, I may set aside the Reviewed Decision so far as it contained the decision to impose the Costs Condition, if I find that the decision to impose the Costs Condition involved an error on a point of law. For the

reasons which I have given I have found that the decision to impose the Costs Condition did involve errors on points of law.

182. I can however see no basis on which I should leave the Reviewed Decision undisturbed. It seems to me that the Reviewed Decision must be set aside, so far as it contains the decision to impose the Costs Condition. If the failure to take Paragraph 9 into account was the only error of law which existed in relation to the decision to impose the Costs Condition, one might conclude that the decision should stand, since Paragraph 9 would, on that hypothesis, simply constitute another reason why the Appellant could not recover the Costs from those of the Respondents holding qualifying leases. This is not however the position. In the earlier part of this decision, and independent of the failure to take Paragraph 9 into account, I have concluded that the decision to impose the Costs Condition cannot stand in relation to any of Respondents.

Should the Reviewed Decision be remitted or re-made and, if so, on what terms?

183. I can see no basis for remitting this case to the FTT. A remission is appropriate in circumstances where it is reasonable to allow the first instance tribunal or a different first instance tribunal to consider the matter afresh, on what has been determined by the appeal tribunal to be the correct legal basis. In my view it would be wrong to take this course in the present case, in circumstances where (i) on the basis of the findings made by the FTT, I can see no case for the grant of dispensation on anything other than an unconditional basis, and (ii) Paragraph 9 has intervened to render the Costs irrecoverable from those of the Respondents who hold qualifying leases within the meaning of Section 119.

184. This leaves the question of whether the Reviewed Decision should be re-made. It seems to me that I should re-make the Reviewed Decision in the following terms:
    (1) The Reviewed Decision should take effect as a decision to grant dispensation on an unconditional basis, with the decision to impose the Costs Condition excised.
    (2) The Reviewed Decision should also take effect as a decision that, by virtue of Paragraph 9, the Costs are not recoverable, by the Service Charge, from those of the Respondents who hold qualifying leases within the meaning of Section 119.

The outcome of the appeal

185. The outcome of the appeal is that the appeal is allowed. The Reviewed Decision is set aside, and re-made as a decision in the terms set out above.

Mr Justice Edwin Johnson
Chamber President

13 November 2023

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.

ANNEX

LIST OF PARTICIPATING RESPONDENTS

ROSS LUCAS (1)
RANA B B KHAN (2)
BRUCE CHRISTOPHER BENJAMIN CHESNEY (3) NAM YIK LP AND CATHERINE TING YAN LI (4) ZOBNINA MILDA AND ZOBNIN DIMITRI(5)
IAN HOUGH (6)
YUE TING YVONNE PONG (7)
MS RUTA PATEL (8)
MS NANCY WAH HO AND TERESA HO LEE (9) ANITA CHUN YUEN-NG AND CHIU SHING LEUNG (10) GABRIEL GAM SIN WAN AND MAN FU (11)
DR IMRAN RASIB (12)
HO YING CHUN AND CHEUNG WING (13)
MISS SHARMILA GOHIL (14)

PONG CHEUNG CHOW AND NYMPHA YEE CHING CHENG (15)
YUK CHIN WONG (16)
STEPHEN CROSS (17)
YANNICK SAMUEL ALEXANDER (18)
PETER READ (19)
AVNISH SHARMA (20)
SMEENA RASIB (21)

LIST OF NON-PARTICIPATING RESPONDENTS

JILU MIAH AHMED AND KONI SHAHEENA AKTAR AHMED (22)
RAYMOND CHENG WING KEUNG (23) DR
MIFTAH ULLAH (24)
JIGNA PATEL AND DIPEN PATEL (25)
CHARLES WIFRID MAXWELL AND KAREN LOUISE MAXWELL (26)
WINNIE HII WEN YAH AND WILLIE HII WEN YEW (27)
STEPHEN LAM SHUN KWAN (28)
BRINDED PROPERTY INVESTMENT LIMITED (29)
MYRA MARY MENDES (30)
BERNADINE OBIGWE (31)