FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LSC/2023/0012**
Property	**:**	**Centre Point House, 15A St Giles High Street, London WC2H 8LW**
Applicant	**:**	**(1) Almacantar Centre Point Nominee No. 1 Limited and (2) Almacantar Centre Point Nominee No. 2 Limited**
Representative	**:**	**Mr Martin Hutchings KC and Ms Harriet Holmes (counsel), instructed by Bryan Cave Leighton Paisner LLP (solicitors)**
Respondents	**:**	**(1) Mr Simon Ogilvie (Flats 1, 14, 26 and 30)** **(2) Ms Laura Stedman (Flat 11)** **(3) Mr Sean Doran (Flat 29)** **(4) Mrs Caroline Weeks (Flat 18)** **(5) Mr Innos Catto and Mr Ali Negyal (Flat 17)** **(6) Mr Derek Savage (by his power of attorney, Ms Nichola Hutchens) (Flats 2, 7, 8, 9, 16 and 28)** **(7) Ms Penny DeValk (Flat 5)** **(8) Harmon Properties Two Limited (Directors: Mr Paul Harmon and Mrs Maureen Harmon) (Flat 10)** **(9) Mr Mohammed Fahad Jaber Alharthi (Flat 24)** **(10) Mr Chia Yen Huang (Flat 15)** **(11) Ginger Global (UK) 2021 Ltd (Director: Mr Mukesh (Mike) Patel) (Flat 19)** **(12) Xavier Property Management 2021 Ltd (Director: Mr Hans Patel) (Flat 22)** **(13) CID Investments (Director: Mr Vas Hava) (Flat 23)** **(14) Mr Edward Laws (Flat 31)** **(15) Ms Stella Meadows (Flat 33)** **(16) Mrs Inge Woolf (Flat 34)** **(17) Mr Henry and Mrs Ranjou Oh**

		(Flat 35) (18) Mr Arun Chauhan (Flat 12)
Representative	**:**	**(1) In person** **(2) Mr John Stedman for Ms Stedman (Flat 11)** **(3) Mr Simon Allison (counsel) instructed by Forsters LLP (solicitors) for Mr Doran (Flat 29)** **(4) Mr Oliver Weeks for Mrs Weeks (Flat 18)** **(5) Mr Ali Negyal for Respondents listed at (5) – (17) above** **(6) Mr Arun Chauhan did not appear and was not represented**
Type of application	**:**	**To determine the payability of service charges pursuant to section 27A(3) Landlord and Tenant Act 1985**
Tribunal	**:**	**Deputy Regional Judge Nikki Carr** **Ms Helen Bowers MRICS, Regional Surveyor** **Mr Ian Holdsworth MSc FRICS**
Date of Hearing	**:**	**29 January 2024 – 2 February 2024**
Date of Decision	**:**	**25 March 2024**

DECISION

INDEX

Paragraph 90 of this decision has been redacted, pursuant to rule 17 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013

DECISION

(1) If costs were incurred for the repairs/improvements to the façade of Centre Point House as set out in the specification in the Proposed Scheme, those sums would in principle be recoverable by the Applicants from the leaseholders who hold flats in respect of which the leases are not qualifying leases pursuant to the Building Safety Act 2022, pursuant to section 27A(3) of the Landlord and Tenant Act 1985;

(2) If costs were incurred for the QLTA for a project manager to supervise the Proposed Scheme, those sums would in principle be recoverable by the Applicants from the leaseholders who hold flats in respect of which the leases are not 'qualifying leases' pursuant to the Building Safety Act 2022, pursuant to section 27A(3) of the Landlord and Tenant Act 1985;

(3) In respect of the Building Safety Act 2022:

a. The façade at Centre Point comprises an unsafe cladding system to which paragraph 8 of Schedule 8 applies;
b. The presumption in paragraph 13(2) of schedule 8 applies to flat numbers 5, 11, 15, 17, 18, 19, 22, 28, 29, 31, 33, 34 and 35 ('those flats') that they are held under qualifying leases;
c. No service charge or reserve fund is therefore recoverable from the lessees of those flats in respect of the Proposed Scheme, by virtue of paragraphs 8 and 10(2)(a) of schedule 8; and
d. No service charge or reserve fund is therefore recoverable from the lessees of those flats in respect of the QLTA, by virtue of paragraphs 8 and/or 10(2)(a) of schedule 8;

(4) Any costs incurred in respect of the Proposed Scheme or QLTA, that would otherwise be recoverable in respect of the residential leases by virtue of section 27A(3), would therefore not be recoverable from the leaseholders of those flats listed in (3)b. above.

REASONS

(a) Introduction

1. Centre Point Tower, sitting at the intersection of New Oxford Street, Charing Cross Road and St Giles High Street in WC2H and at the crossroads of Oxford Street and Tottenham Court Road, was commissioned by millionaire property tycoon Harry Hyams during the commercial rents boom of the early 1960s. It was one of the first London skyscrapers to be developed. It was a controversial development. Many questioned how permission was granted by the local authority for the 34-storey Tower in the then-relatively low-rise London skyline on a busy traffic junction. It was designed by Richard Seifert and Partners, engineered by Pell Frischmann, and constructed by Wimpey during 1963 – 1966.

2. Mr Hyams was determined that it would be occupied by a single commercial tenant, and it remained empty until 1975. In 1974, it was unlawfully occupied for a short period by housing activists, including Jim Radford, Ron Bailey, and the late Mr John Eugene Joseph Dromey (known as Jack; later to become an

MP who continued in the campaign for housing), in protest over the vast space remaining unoccupied while a housing crisis deepened, and people slept rough at its doorstep. The charity Centrepoint, set up by Reverend Ken Leech in the basement of St Anne's church in Soho in the shadow of the Tower, took its name from the building, calling it an "affront to homelessness". In 1995 it, and its neighbouring buildings in the estate, were given Grade II listing status.

3. This case is about its humbler but no less experimental neighbour, Centre Point House, 15A St Giles High Street, London WC2H 8LW ('CPH'). Little is known about why it was constructed or Mr Hyams' intentions in respect of it. It is thought by the experts in this case that perhaps CPH was intended also to be leased by whichever single wealthy commercial occupant Mr Hyams had in mind, possibly to offer on-site overnight accommodation for its employees. It too appears to have lain empty for a very substantial period. It is believed that in or around 1987 the substantial part of CPH was finally converted to residential leasehold flats.

4. It is, we are told, a matter of some debate even as between experts as to the number of storeys at Centre Point House, but it is convenient to describe it as having 8 floors. CPH is a six-storey podium situated atop, and is separate from, the two-storey or double-height units of restaurant/retail units below. When we refer in this decision to CPH, it is to this residential part.

5. CPH is connected with Centre Point Tower by a 'link' building, which is also commercial/retail/restaurant space. Within the six residential storeys are situated 36 duplex flats, which interlock with each other 'Tetris'-like in a stepped-L pattern **[ExB 373]**. There is no number 13, and so the numbers run from 1 at the lowest storey to 37 at the upper. Entrance corridors are on the 3rd, 5th and 7th floors only, onto north and south stair cores (which form no part of this application). We understand that 10 flats are retained in the ownership of Almacantar Group Limited. The remainder are in residential occupation by their owners or sub-tenants.

6. Each of the flats has a projecting balcony. The east and west elevations comprise timber framed glazing and a spandrel glazing 'wrap' around the projecting balconies (accessed by a timber sliding door set into the glazed screen), formed by an internal timber ladder frame, with external aluminium pressure plates, glazing panels, and window lights.

7. The framing system is unusual, in that the dominant structural element is at the horizontal instead of the vertical. It appears to have been factory assembled in units 3 meters wide by 1 storey tall. 3 meters equates to two glazing frames. The upper horizontal frame sits on a metal bracket. It is thought that was intended to be a temporary support, until a dwarf wall (blockwork or concrete) was built up and a bed of mortar laid between the horizontal timber frame and it, onto which the glazing was then installed. Mortise and tenon joints join the vertical members into the structure. The horizontal members are only fixed back to the building at the ends, by metal restraint fixings designed to take wind load.

8. Externally, distinct 'tramline' patterns appear where pairs of vertical frames adjunct, situated at party wall locations. The tramlines and staggered vertical frames are part of the architectural features protected by grade II listing. Where the glazed façade passes between party walls or floor slabs, glazed back-painted annealed glass spandrel panels have been inserted. Behind each of the spandrel panels is a thin layer of polystyrene insulation, and then a gap before the dwarf blockwork or concrete wall, behind and onto which the window lights are fixed.

9. The window lights (of which there are both large and small) are made up of a mixture of original and replacement frames, some of which are now aluminium. It is not known when replacements or repairs might have been made in respect each individual flat.

10. The glazing was constructed by pressing glazing tape against the timber frames, pressing the glass panels onto the tape, and then applying two layers of glazing tape to aluminium clamp strips which are aligned with the frame and pressed to the outside of the glass. Fixing screws are then driven in and tightened to ensure that the clamp strip is fixed tight against the nosing of timber at the front edge of the frame. Joints are then sealed with mastic.

11. The difficulty with this construction is that small gaps between the pressure plates to allow for movement between adjunct frames will result in water ingress, as do any screw holes in respect of which the sealant has failed. Once water is in the system, there is limited ability for it to evaporate off (as it would in a normal timber system), as it is sealed in by the impervious aluminium clamp strip, glass and glazing tape. It therefore remains in the timber, forming interstitial condensation which in turn leads to degradation and (eventually) rot of the timber members. Further over-sealing the system will only keep such water as has made its way past the gaps *in* the system, exacerbating the problem and promoting further decay.

12. The façade experts agree that this process will have been occurring since the minute CPH was built. The design is inherently defective.

13. It is proposed by the Applicants that in order to resolve this problem a steel stick curtain wall system including bespoke steel hollow section frames with integrated double glazed vision panels and opaque insulated spandrel panels be superimposed on the existing timbers and fixed to the concrete structural frame, rendering those timbers non-structural ('the Proposed Scheme') **[EvB 1332]**. There is a considerable amount of detail about the Proposed Scheme, and the façade experts in this case agree it is the best – and realistically only – solution to the problem.

(b) Procedural History

14. By an application dated 4 January 2023, and sent to the Tribunal on 9 January 2023, the Applicants applied to the Tribunal pursuant to section 27A(3) of the Landlord and Tenant Act 1985 ('the 1985 Act'). The Applicants' 19-page statement of case accompanied that application.

15. By letter of 19 January 2023, the Tribunal convened a case management hearing ('CMH') on 7 February 2023 by video (CVP). On 26 January 2023, Judge Vance refused a request, made by Ms Laura Stedman, that the CMH be adjourned. Further applications to adjourn, made by Mr Simon Ogilvie, Mr Vas Hava (on behalf of CID Investments) and Mr Derek Savage (by his power of attorney, Ms Nichola Hutchens) were refused by Judge Hawkes on 3 February 2023, in which letter Judge Hawkes explained what the CMH was for and that the main dispute would not be determined at it.

16. At that CMH, Judge Nicola Rushton KC heard from Ms Harriet Holmes of counsel for the Applicant. Mr Ogilvie, Mr Innes Catto and Mr Ali Negyal, Mr Hava on behalf of CID Investments, Mr Henry and Mrs Ranjou Oh, Mr Chia Yen Huang, Ms Stedman, Mr Edward Laws, Mr Hans Patel on behalf of Xavier Property Management, Mr Mukesh (Mike) Patel on behalf of Ginger Global Ltd, Mrs Caroline Weeks (represented by Mr Oliver Weeks), Ms Maureen Harmon for Harmon Properties Two Ltd, and Ms Stella Meadows were present for the Respondents. Mrs Inge Woolf, Ms Penelope DeValk, and Mr Mohammed Fahed Jaber Alharthi were not present, but were represented by Mr Negyal, Mr Catto or Mr Ogilvie.

17. Judge Rushton KC identified a number of issues that were likely to require determination, which issues were, of course, identified prior to the Respondents providing their statements of case, and prior to the majority obtaining legal advice in these proceedings.

18. Directions were sent to the parties on 9 February 2023. Those directions included a listing for a Pre-Trial Review ('PTR') and for a five-day final hearing, on dates to be notified to the parties on receipt of their dates to avoid.

19. On 27 February 2023, Mr Catto made an application pursuant to section 20C of the 1985 Act, on his own behalf and on behalf of all the other leaseholders. Other leaseholders repeated the application, but it is clear that Mr Catto's application was made with the other leaseholders' knowledge and consent.

20. Having received dates to avoid, I amended Judge Rushton KC's directions to extend time for the Respondents' replies at the request of Mr Ogilvie, and listed the PTR for 21 November 2023, with a five-day hearing to take place between 29 January – 2 February 2024. Those amended directions were sent under cover of a letter addressing various matters on 21 March 2023, which also identified in its last line the PTR date.

21. By letter dated 5 April 2023, Forsters LLP wrote to notify that it was now instructed by Ms DeValk, Mr and Mrs Harmon, Mr Chauhan, Mr Huang, Mr Catto and Mr Ali, Mrs Weeks, Mike Patel, Hans Patel, CID Investments, Mr Alharthi, Mr Doran, Mr Laws, Ms Meadows, Mrs Woolf, and Mr and Mrs Oh. On 2 June 2023, Forsters wrote to clarify that it also represented Mr Savage, and that insofar as Messrs Patel and Mr and Mrs Harmon were concerned, it in fact represented Ginger Global, Xavier Management, and Harmon Properties Two.

22. On 11 June 2023, Mr Ogilvie, by an email from his son, requested a further link to the Applicants' Reply to the leaseholders' cases (as now variously represented) and the accompanying 2840 pages of documents on which it proposed to rely (those having been sent in accordance with directions). The Applicants re-provided it the following day. On 24 June 2023, Mr Ogilvie made an application for a further extension for, amongst other things, additional time to give disclosure in accordance with the directions. I granted that application on 29 June 2023, permitting Mr Ogilvie additional time to provide his disclosure, and indicated to the parties that a further application for extensions of time for exchange of witness statements would be granted, should Mr Ogilvie's disclosure materially affect that next step in the timetable. As anticipated, on 10 August 2023 I granted the additional extension for witness statements at the parties' request and provided to the parties re-amended Directions under cover of letter dated 10 August 2023.

23. Throughout September, Forsters and Bryan Cave Leighton Paisner ('BCLP') endeavoured to agree directions for additional quantity surveying evidence ('the QS evidence'). I provided re-reamended directions for expert evidence, as agreed between the parties but subject to additional requirements (in particular, statements of agreed facts and disputed issues) on 10 October 2023. By agreement, the parties extended the dates for the QS evidence.

24. At the PTR on 21 November 2023, Ms Holmes attended for the Applicants, accompanied by three instructing solicitors. Mr Stedman attended on behalf of Ms Stedman by telephone (the intention was that he would attend by video, but unfortunately there appeared to be a compatibility issue with the device he was using). Mr Simon Allison of counsel attended for the Forsters-represented leaseholders, accompanied by his instructing solicitor, Ms Kaleigh Moreton. Mr Ogilvie did not attend. We were not informed why, but were informed by Ms Moreton that she had been in recent contact with him. We note that we have been aware of Mr Ogilvie's personal circumstances throughout these proceedings.

25. Various issues were covered off in the PTR, such that the list of issues was refined by reference to the Respondents' various cases as follows:

    a. *Whether the proposed works amount to works of repair falling within the Applicants' repair obligations set out in the leases;*

    b. *Whether the proposed works amount to repairs or improvements, or to a separate/divisible combination of repairs and improvements, and if (to any extent) they are improvements whether they would fall within the Applicants' repairing obligations under the leases;*

    c. *Whether the Applicants have breached those repairing obligations it is under by the leases, by failing to carry out repair works when it acquired the freehold or in or around 2017 or otherwise;*

d. *If the Applicants have breached those repairing obligations, whether those breaches have caused loss and damage to the Respondents that should be set off against the cost of the works;*

e. *Whether the Applicants failed to consider, or to properly consider, any other reasonable alternative option for repairing the façade, either when it acquired the freehold or subsequently, and if so what is the impact of that failure on the decision on the scheme of works and the cost of it;*

f. *Whether the proposed cost of the proposed works is in any event reasonable, and if not, what would be the reasonable cost;*

g. *Whether the proposed façade works are a reasonable solution to the Applicants' repairing obligations (it is noted that neither the specified Respondents nor Ms Stedman pursue this point. It is left within this list in case Mr Ogilvie wishes to pursue it);*

h. *Whether the proposed apportionment of the cost of the proposed works in the retained parts is not a fair proportion, and if not what would be a fair proportion, within the meaning of the leases that the Applicants' should be limited to (as above, neither the specified Respondents nor Ms Stedman pursue this point. It is left within this list in case Mr Ogilvie wishes to pursue it)*

i. *Whether some or all of the Respondents hold qualifying leases within the meaning of section 117 of the Building Safety Act 2022 ('the 2022 Act') and the façade is within the definition of 'cladding' in paragraph 8(2) of schedule 8 of the 2022 Act, if so whether no costs in respect of the proposed works are in any event payable by the Respondents in respect of those leases, pursuant to paragraph 8(1) of schedule 8 of the 2022 Act;*

j. *Whether any order under section 20C of the 1985 Act should be made.*

26. At the PTR, Mr Allison informed us (myself and Regional Surveyor Helen Bowers) that the Forsters-represented leaseholders no longer pursued a., b., e., g., and h., in light of various information arising (not least of which was the report received from Mr Lawrence Gray, the Forsters-represented leaseholders' Façade Expert, agreeing with Dr Richard Harris, the Applicants' Façade Expert, that the only reasonable remedy of the problems with the façade is to overclad it). Those issues were nevertheless left as potential issues in the directions, as a form of a. and/or b. was pursued by Ms Stedman, e. might be, and Mr Ogilvie's position in his pleaded case was unclear.

27. At that PTR, we also enquired whether the Applicants had sought leaseholder certificates in light of the Building Safety Act 2022 ('the 2022 Act') arguments. They confirmed they had not. We required that the Forsters-represented leaseholders identify which of them was said to hold a qualifying lease for the schedule 8 paragraph 8 argument that was to be pursued by them.

28. We further noted as follows: "*there is as yet no quantification by the Respondents of the amount of any set off that they say arises through the asserted delay by the Applicants to address the disrepair in the façade. The Quantity Surveyors have yet to meet. As indicated by Mr Allison, the specified Respondents' position will be formalised after that meeting. The specified Respondents are encouraged to do so as soon as possible. We indicated that doing so by skeleton argument days before the hearing would not be welcome nor sufficient for the Applicants to prepare for the case against them.*"

29. We set out the hearing arrangements, including which witnesses would attend on what days, in anticipation that the numbers of attendees would outstrip the number of seats available in the hearing room available to us, such that a second 'observation' room would be required at Alfred Place for witnesses not immediately giving their evidence. With the PTR directions, we also asked non-participating observers to indicate whether they had video facilities so that they could join by hybrid means. We further notified the parties that we considered that an inspection should be held a week before the hearing.

30. Arrangements were confirmed by correspondence after the PTR, including fixing of the inspection on 22 January 2024 and arrangements for attendance. The Forsters-represented leaseholders also made an application to substitute their quantity surveying expert. I gave permission for Mr Oliver Blowey to attend in Mr Sullivan's stead by letter dated 14 December 2023.

31. By a series of letters between 5 – 11 January 2024, Forsters notified that it no longer acted for any leaseholder except Mr Doran. I sent a series of letters to the leaseholders to seek clarity over who intended to attend at the hearing in person or remotely by video, who they wished to present their case at the hearing, and who was likely to be representing them at the inspection. I then listed an emergency CMH to take place after the inspection on 22 January 2024, to ensure that adequate preparations were made, and to explore with the formerly-represented leaseholders their understanding of the concessions made on their behalf when represented, to ensure that there were no additional matters that needed to be addressed and to maintain the effectiveness of the hearing. Mr Ogilive was also notified of these arrangements by post. The parties were invited to notify the Tribunal of their attendance at the inspection and CMH.

32. The inspection took place on 22 January 2024 and was attended by the following: myself, Ms Bowers and Mr Ian Holdsworth; Ms Alex Selka, Solicitor (BCLP), Dr Richard Harris, façade expert, and Mr James Waite, Project Director at Almacantar, all for the Applicants; Mr Allison and Ms Moreton for Mr Doran, together with Mr Allison's pupil Mr Thompson; Mr Stedman for

Ms Stedman; Mr Catto for himself and Mr Negyal, Mrs Woolf, Mr Alharthi, Mr Huang, Mr and Mrs Oh, Ms Meadows, Ginger Global, Xavier Management, and Mr Laws; Mr Hava for CID Investments, and for Mr Savage, Harmon Properties Two, and Ms DeValk; Mr Weeks for Mrs Weeks; and Mr Gray for all of the formerly represented Respondents except Mr Doran (who had not required his attendance). Mr Ogilvie had not replied and did not attend.

33. At the emergency CMH after the inspection, the same individuals attended in addition to Ms Holmes and a further solicitor, Ms Rachel Katz, for the Applicant. Mr Ogilvie had not replied and did not attend. Ms Meadows also attended and assisted Mr Catto in his submissions.

34. At the emergency CMH, we made clear to the formerly-represented leaseholders that we would not, without good reason, re-open the concessions that had been made at the PTR. No party asked us to.

35. We raised with the Applicants the difficulties we envisaged with certain parts of their application, which we will cover in more detail below. We also made clear that the Tribunal had still not received what was said to be the basis of any quantum of set-off on either Mr Doran's behalf or anyone else's. The Applicant notified that some data and spreadsheet calculations, with which it took issue, had been provided to BCLP on the previous Thursday. We required that they be sent to us. Mr Allison notified that Mr Blowey was now instructed only on behalf of Mr Doran for reasons that could not be disclosed. We received spreadsheets on 23 January 2024.

36. We invited the formerly-represented leaseholders to consider whether their interests and arguments were 'as one', such that a single spokesperson could be appointed to present their case. We were also invited to extend time for skeleton arguments to 4pm on Wednesday 24 January 2024, which we did, and they were provided accordingly.

37. On the morning of the hearing, a long email and letter was provided to us from Mr Ogilive. In it, he requested to attend at the hearing by video conferencing. He also supplied further written evidence, and requested that he be permitted to make pre-recorded videos to give evidence, and that the Applicants be refused permission to cross examine him, for the reasons he gave and which we understand. At the outset of the hearing, we explained that Mr Ogilvie would not be permitted to rely on new evidence now. We would allow him to rely on his written statement of case, however, and not to be cross-examined on it. He would, at the end of the hearing, be permitted to make a closing statement, in writing or orally, dealing with the evidence that he had heard and the difference it made to his written position, although he would not be permitted to give new evidence. In the end, Mr Ogilvie elected to give an oral closing statement.

38. For the hearing, we were provided with three (digital; 13 in hard-copy) bundles in accordance with the directions: a core bundle; an evidence bundle; and an expert bundle. We refer to pages in them throughout as **[CB…]**, **[EvB…]**, and **[ExB…]** respectively. We were also provided with the Applicant's skeleton argument which will be referred to as **[SkelA…]**, Mr

Doran's skeleton argument **[SkelD…]**, and Mr Ali Negyal's skeleton argument on behalf of the formerly-represented leaseholders, of which we were provided a revised version prior to closing submissions **[SkelN…]**. Additional drawings of the wall make up for the proposed works to be carried out at CPH found at **[EvB972 – 974]** were provided in larger form and containing the descriptions of the elements from the missing legend from the smaller A4 pages, and will be referred to as **[SK024]**, **[SK025]**, and **[SK026]**. Authorities bundles were also provided by the Applicants and Mr Allison, which will be referred to as **[AAB…]** and **[DAB…]** respectively. We were provided with, but in the end did not make use of, the spreadsheet calculations referred to at the emergency CMH, for reasons that we set out below.

39. In total there were around 7,000 pages. We are grateful to the parties for the care with which they presented their cases to ensure that we were referred to relevant documents. We wish to give Mr Negyal particular recognition, as despite being drafted in at the eleventh hour he diligently and deftly managed to present the case for his fellow formerly-represented leaseholders, despite the weight of that responsibility, and despite the whole group not being in total agreement with each other rendering his position particularly difficult.

(c) Background to the dispute

40. MEPC UK Ltd was the freeholder of the Centre Point estate up until late 2000. In late 1999 it commissioned investigations into the state of repair of the façade at CPH.

41. On 13 January 2000, Ove Arup & Partners ('Arup'), reported **[EvB 33-46]** that:

> "*the curtain wall to the flats is in poor condition. In the short term, opening up is recommended in order to assess the condition of concealed components. There are grounds for concern about the wellbeing of these until shown otherwise… It is considered likely that replacement of the curtain wall to the flats with a new system meeting present day standards will be required…*". Arup discovered "*many incidences of dampness in the external walls*", and commented that "*the design performance of the curtain wall is considered to be basic by present day standards…*". Arup considered that "[t]*he curtain wall has broken down severely both in appearance and performance. This state of affairs may have prevailed over a number of years. Evidence of moisture penetration was seen. Some of this may originate from condensation as well as rainwater leakage. Attempts to address this have been made with extensive sealant work. At best we would expect short-term success from this approach. It is not a lasting or fully effective solution. We would expect the condition to deteriorate further even if sealant work were continued. Furthermore, if the source of some of the moisture is condensation, the application of further sealant to the outside of the building will not help matters and may indeed make things worse.*"

42. Arup considered a number of measures that might be considered to remediate the problem. Amongst those considerations, it considered whether taking

apart the existing system and rebuilding it would be a reasonable approach. Arup was of the view it was not:

"6.1.2 Take the existing curtain wall apart and rebuild it

This approach amounts to taking the existing curtain wall apart, then rebuilding it as a replica of its former self. The existing curtain wall would be taken apart by removing the cover strips and the glazing. This would leave the supporting mullions and transoms and internal linings. Any components in still reasonable condition could be salvaged for reuse. However, failed parts or items not economic to remove and refurbish, would be replaced with new. In addition to the failed parts already known not to be reusable, there would be a high expectation of breakage. Depending on the condition of the revealed mullions, transoms and brackets and firestopping these may also need replacement with new components. Re-assembly of cover strips would probably require an amended design to overcome shortcomings in watertightness of the existing arrangement and to allow some ventilation against condensation.

It is not the intention of this scheme to upgrade the designed performance. Whilst the scheme represents a 'conservation' approach, this will not remedy the shortcomings from the curtain wall in comfort levels for the occupants. It would be a costly undertaking with disruption and may not last longer in the future than the existing design has done in the past. This approach is often impossible to achieve satisfactorily as it is unlikely that exactly matching spandrel glass and cover strips are still available. This approach is not favoured for these reasons."

43. Arup concluded that the preferable approach would be to reclad the façade using a different system. At 6.1.4:

"*This approach would involve completely removing the existing curtain wall and replacing it with a new system throughout. The new system could be designed to observe the same panel sizes and arrangement and present outwardly surfaces of similar materials and appearance to those in the existing curtain wall… The new system would be purpose designed to accommodate double glazed units and insulated spandrel panels and to achieve present day standards of weathertightness, thermal insulation, noise reduction, firestopping and ventilation and safety.*

It is envisaged that the curtain wall could be based on a standard system rather than a bespoke design. Whilst a simple curtain wall stick system might suffice, a unitised system might be installed more efficiently and so be a better choice in terms of speed of installation.

Whilst this approach appears to have the most disruption, this is probably not much greater than [removing the curtain wall and rebuilding it to modern day standards] *and may be of shorter duration. The cost of both is likely to be in similar order of magnitude but the value for money is greatest with this complete reclad in that there is certainty of meeting present day levels of performance.*"

44. MEPC sold the Centre Point estate to Blackmoor LP (a property investment consortium led by Portfolio Holdings) in late 2000, which held the freehold during the period 2000 – 2005. Its plan appears to be to develop a restaurant at the top of the Tower, accessed by an exterior lift (amongst other things). It is not known what, if anything, Blackmoor LP did in consequence of the Arup report. There is evidence of a Landlord and Tenant Act 1985 ('the 1985 Act') section 20 Notice of Intention dated 20 July 2005, with a number of line items referring to windows, frames and glass cladding **[EvB 48]**. However, in the same year Blackmoor LP sold the estate to Targetfollow for £85million.

45. It appears that Targetfollow had revitalisation plans for the estate, including CPH. Targetfollow commissioned its own reports into CPH. Arup (now 'Arup Façade Engineering') carried out a second inspection **[EvB 50-56]**. It made the following observations:

"*<u>Cladding System</u>*

The weathering performance of the building envelope relies entirely on the silicone seal applied to the aluminium pressure caps. Secondary seals were not identified.

The cladding system consists of a hardwood timber sub frame clad with glass and aluminium. Timber can be used for cladding systems, if adequately protected against moisture and other factors that can cause deterioration and most significantly movement, which can lead to water penetration. However, in this case the external line of defence is ineffective and needs replacing.

The examination of the timber framing and its fixings was limited to a small area. The structural principle of this cladding system could therefore not be entirely investigated. Further investigation would be required to understand how the timber framing is attached to the main structure and how structural tolerances and building movements are dealt with…

…

<u>Recommendations</u>

….

The curtain wall system is very basic. However, the timber and metal work is in better condition than anticipated. A calculation check is required on the structural ability of the timber to resist the required wind loads and dead loads. If appropriate, two options exist:

- to replace the curtain wall in entirety with a new modern system
- to adapt the existing arrangement to improve its performance and durability.

If the second option were preferred, further investigation is required to assess its viability and the level of performance that could be achieved. The option must involve:

- *Creating a new, reliable water-excluding cladding line in front of the timber, but perhaps recruiting a contribution to the stiffness from the timber framing. It must address movement in the timber.*
- *Upgrading the insulation*
- *Installing stiffer framed windows with restricted opening dimension*
- *Prototypes would be required.*"

46. It is not clear what further investigatory work was undertaken as a result of Arup's second inspection. A letter of 23 March 2007 **[EvB 57]** indicates that they remained in discussions with Targetfollow over what was to be done. A much lesser scope of works appeared to be anticipated, including revision of the hardwood framing, but again Arup confirmed that "*a prototype to confirm feasibility*" was required. There was also talk of reinforcement of the joints between mullions and transoms by inserting stainless steel plates and fixings and adding double-glazed units.

47. In December 2007, Ramboll WhitbyBird reported for Cox Project Management regarding the curtain wall refurbishment **[EvB 62 – 128]**. It is clear from the following passage that by that point, Targetfollow had instructed that it was not going to be doing the remedial work necessary to cure the issues in the façade once and for all, on the basis that they had other plans:

"*1.3 The works are required by the client to have a service life of 7 years but no more than 10 years in anticipation of either more permanent refurbishment works, or demolition of the building as part of a wider site redevelopment. However, the works are to satisfy the planning authorities concerned with the heritage value of the Listed Building, in correspondence exclusively with the architect.*"

48. Ramboll WhitbyBird appear to have had a number of reservations about what it was being instructed to do by virtue of what it viewed as the unsatisfactory evidence of the underlying problems, as can be seen for example in 2.7, 2.15, and most particularly 2.19 – 2.25 where it set out that the approach being taken in the works was, in its view, a low-cost high-risk approach, and the cost savings illusory if the frames turned out to be rotten. No doubt that is why Ramboll WhitbyBird noted at paragraph 2.4 that "[t]*his report is not to be relied upon exclusively by the client for decision making purposes since the client has already relied upon a number of considered reports from Ove Arup & Partners… which appear to date from 1999*", and at 2.22 "[a] *full replacement rather than a refurbishment is clearly the most risk-free approach for the project manager to recommend, but this has been rejected by the client.*"

49. In July 2008, Independent Building Investigation Services ('IBIS') reported on the external glazing systems at CPH **[EvB 129 – 144]**. The main façades were found to be in generally poor condition. IBIS provided a long list of

issues, including warping and outwards movement of the aluminium press-on plates, broken glazing panels, poor fitting of some windows, lost/sheared/broken window armature and hinges, exposure of the wooden sub-frame and evidence of rot, inappropriate fixings piercing aluminium frames, hardened cracked and failed mastic and poor repairs to it, evidence of damp ingress at many locations, and removal of aluminium frame sections for wire installation through glazing, leaving the sub-timber exposed to the elements. IBIS concluded:

"*The main façades'* [sic] *glazing system is essentially in need of a major overhaul as the seals have long passed the point where they should have been replaced. Repairs to date have been reactive, haphazard and generally very poor, and ultimately ineffective. Given the many other issues identified, it is probable that complete replacement of the glazing system is the most viable long-term solution.*"

50. A tender report was prepared by Cox Project Management on 30 March 2009 **[EvB 146 – 196]**. On 11 June 2009, Jones Lang LeSalle notified the residents of a presentation about the proposed refurbishment of the exterior of CPH **[EvB 145]**. At that meeting on 30 June 2009 **[EvB 59]**, the leaseholders were informed that, so far as the façade was concerned, it was proposed that the timber sub-frames be 'hammer tested' (a process by which an operative, under the supervision of a supervisor, would strike the frame from the inside using a rubber hammer on a block of wood, and assess the visible movement of the frame. It was suggested that the more observable movement in the frame, the more likely the frame or fixings were water damaged **[EvB 66 para 3.2.1]**). Any large top-opening window-lights that were deemed by this test to be unsafe would be replaced and decorated, and the existing "steel" curtain walling would be redecorated. Existing windows might be eased and adjusted if necessary.

51. A 1985 Act section 20 Notice of Estimates was sent to leaseholders under cover of letter dated 25 September 2009 (a previous one of 3 December 2008 seemingly having been withdrawn at the leaseholders' request) **[EvB 200 – 272]**. Insofar as the works to the façade were concerned, the work was said to be for "[t]*he replacement of large size external opening windows, where damaged, with new single glazed units. There will also be an element of internal reinstatement works following water ingress. Timber frames where rotten will also be cut out and replaced with hardwood frames*." It was proposed that Bryen Langley be appointed as Targetfollow's contractors.

52. While there are updates that were provided by Bryen Langley (to the leaseholders by way of 'weekly newsletters' **[EvB 273]**, and progress reports to Targetfollow **[EvB 274-276 and 283 - 289]**), and a completion certificate dated 27 August 2010 limiting any defects claim to one year **[EvB 290]**, the Applicants have been unable to find any record of what was in fact carried out in the course of these works prior before Almacantar's acquisition of the Centre Point estate. We are told that the works in total, including works to the mosaic tiling and balconies, eventually cost each flat in the region of £30,000.

53. Targetfollow finally achieved 100% commercial occupation in the Tower, but appears to have overreached itself with its investments strategy, and in April 2011 Almacantar (Centre Point) Limited ('Almacantar') bought Targetfollow (and its sole remaining asset, the Centre Point estate) out of receivership for in the region of £120 million. In the course of that acquisition, on 11 February 2011 Almacantar obtained a fenestration survey report from Tee Technical Building Forensics ('Tee Technical') **[EvB 291 – 324]**.

54. It would appear that Tee Technical had no more than visual access, at a distance, to the exterior of CPH when providing its report. It misidentified the windows in the façade as being made from aluminium, rather than a hardwood sub-structure onto which aluminium pressure-plates were fixed, and further misidentified the spandrel panels as being made from "*coated sheet aluminium*". Despite a number of similar inaccuracies in the report (some no doubt arising because of the limited access), Tee Technical nevertheless identified that "*the various fenestration systems date*[d] *back to the original construction and* [had] *nominally reached the end of their design life*", and that "*the aluminium framed window systems to the residential accommodation…* [were] *visually in a poor condition with widespread ad-hoc poorly applied external sealants and a consequent moderate risk of internal rainwater ingress and/or condensation problems.*"

55. Pell Frischmann also provided a structural appraisal report to Almacantar on 15 February 2011. However, it did not inspect anything but the concrete elements. It recorded that because of the covering of the whole of the CPH structure by mosaic tile, visual inspection was limited, but that it did not identify any evidence of significant structural defects **[EvB 334]**.

56. Malcolm Hollis LLP also provided a Building Survey report on 17 February 2011 **[EvB 344 – 432]**. It was not given access to flats in CPH to carry out its survey, although it did have access to the common areas. In its summary **[EvB 346]** it noted that "[t]*he podium residential areas of Centre Point House… are in worse condition. Regular maintenance will be necessary going forward, as has been carried out recently with new casement windows being installed. Condensation is a problem throughout the block and this will not be rectified until the current installation is replaced with a modern equivalent. Due to the regular work required to keep the cladding system performing adequately, we consider the current installation is becoming obsolete.*" Malcolm Hollis otherwise deferred to the report of Tee Technical **[EvB 355 at 2.5.1]**.

57. Almacantar then embarked on a grand scheme of renewal, renovation, and redevelopment of the Centre Point estate. Planning permissions were sought and obtained, as was listed building consent, for a particular scheme that included improvement to the external envelope of CPH (including its balconies) ('the Consented Scheme'). The Tower was converted from commercial to residential occupation. That was not without its difficulties (see, for example, *Century Projects Limited v Almacantar (Centre Point) Limited & Ors* [2014] EWHC 394 (Ch)). The link building became something akin to a restaurant village. However, there was a very particular difficulty posed by CPH, given the terms of the residential leases, which demise the

balconies, and the internal parts of the window frames and glass, to the lessees.

58. On 19 March 2012, Almacantar wrote to the residential lessees **[EvB 441-442]**, the material terms of which were are follows:

"*…Given that we have greater control over the complex than at any time since its construction, there is not an opportunity to substantially upgrade the complex as a whole to our collective benefit…*

With regard to [CPH]*, our plans are rather more modest in that we wish to reconfigure the lower level commercial areas to provide two storey, double height retail units throughout. We also consider it would be beneficial to refresh the exterior façade and to renew the fenestration (i.e. the windows) of each elevation of CPH at the same time…*

To undertake the Scheme, Almacantar require the consent of residential tenants, which would necessitate agreement to:

a) *A Deed of Variation of each flat lease to make future responsibility for the repair of windows the responsibility of the Landlord, as a service charge matter;*
b) *A general waiver of any claims in nuisance and for any impairment of the Quiet Enjoyment clause in each lease for the duration of the works;*
c) *Acceptance of the Party Wall notices that will be necessary to serve on the bottom floor residential flats;*
d) *Agreement not to object to Almacantar's planning application.*

We believe that our proposals will result in a vastly improved asset for all the owners. In return for granting the above, if the Scheme is commenced, Almacantar is prepared to offer each tenant the following inducements:

a) *Almacantar will bear the legal costs of each tenant provided they appoint a single legal firm to act in connection with the variation of the leases and collectively appoint no more than two residents' representatives to act on their behalf with the authority to negotiate the detail of the terms set out herein and to ensure smooth progress of the legal formalities;*
b) *At no cost to the tenants, Almacantar will:*
    - *Replace the communal ground floor entrance doors and electrical security access arrangements and all existing external windows to all facades with new double-glazed units to a design and specification to the satisfaction of the relevant statutory authorities and in keeping with the existing window design, together with localised making good and redecoration as necessary to window reveals and rejambs*;*
    - *Because the kitchen worktops in each flat dovetail into the cill of each relevant window, Almacantar will also contribute £10,000 plus VAT toward a new kitchen for each tenant to acquire and install;*

- *Rectify the continuing water ponding and drainage issues experienced with all balconies*;*
- *Undertake redecoration, lighting and re-carpeting of the communal corridors and redecoration of the stairways*;*
- *Bear the cost for cleaning and repairing all of the external elevations of CPH as necessary*;*
- *Provide a durable solution to the on-going de-bonding of the external mosaic tiles to the satisfaction of the relevant statutory authorities*; and*

c) *In consideration of the waiver of Quiet Enjoyment for the duration of the works (estimated to be 6 months), Almacantar will make an additional payment to each flat owner, irrespective of whether they choose to actually vacate, of £12,500.*

For the avoidance of doubt, if we do not get approval from the tenants, those costs listed above marked by an asterisk will be borne by Almacantar on a one-off basis. From the completion of the works, future repair of these items will return to being a service charge matter. We believe that these works, combined with our proposals for the rest of the complex will significantly enhance the value of each individual flat…

…
[A meeting was convened for 12 April 2011 from 4.30pm, with Almacantar representatives available at from 6.30pm] *In order to facilitate the residents' consideration of this proposal, Almacantar are also willing to bear the reasonable costs of a surveyor and a solicitor to advise the residents in preparing for and attending this meeting, up to a cap of £5,000 + VAT.*
…
We trust you will recognise the very substantial contribution Almacantar is prepared to make to what otherwise would be tenants' costs to secure agreement to undertake these works for our collective benefit.

If we do not secure agreement to the above offer from tenants by 25 April 2012, we will revert to our base proposal of a more modest refurbishment of the lower floor commercial areas without removing the floor slabs and will proceed only with the general exterior works to Centre Point House (cleaning, fissure repair and tiling rectification) and the upgrade of the communal areas internally. In this situation, since these works are service charge items, Almacantar will seek a fair proportion of these costs from each tenant in the normal way. We anticipate that the eventual cost to the service charge account in this scenario will total approximately £600,000 plus VAT (i.e. £16,666 plus VAT per flat)."

59. On 12 April 2012, a residents meeting went ahead. The minutes of the meeting seem to reflect positive attitudes to the offer at the outset but doubts by the end of it. The residents asked a good deal of relevant questions about the scheme and what was proposed. The need for a deed of variation appears to have been explained, as was the calculation behind the £12,500 offer. Invitations to the public planning meetings to be held on 21 and 23 April 2011 were extended. It appears that Almacantar explained that the future service

charge would be reduced if the works went ahead. The leaseholders were told that Almacantar would need unanimous agreement to the offer for the CPH part of the Consented Scheme to go ahead **[EvB 443 – 445]**.

60. On 3 and 8 May 2012, Almacantar wrote to the leaseholders to identify that it intended to proceed with a more modest scheme of works to the lower-level commercial units at CPH **[EvB 446 – 452]**, per the Consented Scheme, that would nevertheless involve slab-cutting works. It notified that, in consequence, there would be a minimum of 8 months' work to completion, and it was likely to be disruptive to the occupiers. Works in the rest of the estate were anticipated to take in the region of 30 months. It therefore sought the leaseholders' consent in similar terms to those that had been set out in its 19 March 2012 letter, but set out the works and requirements, and the proposals in more substantial detail. It increased the offer in c) of the previous letter to £16,650 plus VAT, with an overrun daily rate payment of £68.50 plus VAT. It also proposed further assistance in storage for valuable items during the proposed period of vacation of the flats, and a number of other security measures. It reiterated that if the proposal was not unanimously accepted, the lower floor renovations would go ahead without removing the floor slabs, and only general works to CPH would be done at a cost to the leaseholders via the service charge.

61. It appears that there were subsequent meetings, either with all the leaseholders or with their then-representatives Mr Michael Woolf and Ms DeValk. A letter proposing "revised enhanced terms" was sent to Mr Woolf on 24 July 2012 **[EvB 462 – 467]**. In it, Almacantar identified that:

    "*Almacantar consider it would be beneficial at the same time* [as the wider estate works and commercial units works at the base of CPH] *to refresh the exterior façade and to renew the fenestration (i.e. the windows and patio doors) of each elevation of CPH. As we have discussed, the windows (and balconies) are excluded from the landlord's repairing obligations under the service charge of the leases with the consequence that over time, the fenestration has become unsightly, being a patchwork of various states of disrepair with the landlord having no effective ability to procure its repair, maintenance and renewal. As the residents are all too aware, the fenestration itself (i.e. the windows and patio doors) is now not fit for purpose, falling well short of modern statutory thermal and acoustic performance requirements and indeed acts as a cold bridge affording the ingress of water through condensation and causing spoiling of the localised internal decoration.*"

62. By that letter, Almacantar once again increased its offer. For the slab-cutting phase of the works, whether or not the leaseholders chose to decant for the 8-month period, it offered £20,000 plus VAT, and an overrun daily rate of £81.00 plus VAT per flat. Further assurances were made regarding working hours, warranties and so forth. The leaseholders were again told that the commercial works would continue without cutting the floor slabs if agreement was not reached, and the lesser works to CPH would be service charge items.

63. By letter of 2 August 2012 **[EvB 469]** Almacantar wrote to all leaseholders "*following conclusion of negotiations with Mr Woolf who has now requested we write to each individual flat owner enclosing various copy correspondence*". The implication of the letter is that the leaseholders had not been able to achieve unanimity as required, and that Mr Woolf sought intercession by Almacantar to assist in what must have been a difficult role.

64. Email correspondence from Mr Woolf of 6 August 2012 **[EvB 471]** demonstrates that Mr Savage remained un-swayed by Almacantar's offer.

65. In is not clear what happened thereafter between Almacantar and the leaseholders, but throughout 2013, Almacantar continued to develop its plans for a proposed new curtain walling system for CPH, and it appears that at least two leaseholders objected to the planning application for it (**[EvB 479]** and **[EvB 628]**) on the basis that Almacantar was not entitled to do the works. A tender specification was prepared, and at least one tender submitted, for a replacement façade using a Schüco system **[Ev 480 – 606]**.

66. In September 2013, Almacantar transferred its interest to the Applicants, though Almacantar Group Limited continues to have the controlling interest in respect of both, and each is a dormant company on Companies House records.

67. It appears from advice from Gately Legal disclosed by the leaseholders that there was a further offer in at least October 2013. Advice in general terms appears to have been given on the practical consequences of the refusal of the offer (it was suggested that injunctions could be sought), but no particular focus on the Applicants' repairing covenants, or the benefits or otherwise of acceptance of the proposal, appears in that advice **[EvB 607-608]**.

68. Planning permission for the development of the estate, including the Consented Scheme at CPH, was granted on 1 April 2014 subject to a section 106 Town and Country Planning Act 1990 agreement. There were also certain conditions that needed to be first fulfilled, the material ones for CPH being those relating to the heritage/listing status. As might be expected, the consent was also conditional on detailed plans being approved before the relevant part of the work was begun **[EvB 610 – 626]**.

69. It appears that the wider estate works, including the works to the commercial space beneath CPH, commenced sometime in 2015. There were a number of regrettable incidents throughout the duration of those works that significantly affected the leaseholders and further undermined their relationship with the Applicants (we are told, for example, that statutory working hours were not adhered to, there was at least one significant health and safety incident with a resident, and that despite the contents of the letters above, the slabs beneath CPH were in fact cut in the course of the works to the commercial areas, causing significant disturbance). The leaseholders and Applicants engaged party wall surveyors to monitor movement. The London Borough of Camden put in noise monitoring equipment**.** Various issues that arose are recorded in **[EvB 657-663]**.

70. The leaseholders called on the assistance of their local councillor, Mrs Sue Vincent, to assist in resolving the issues between them and the Applicants. We were told that payments were made for breach of quiet enjoyment, and that a hotel conference room was arranged for daytime respite. During the course of that assistance, it would appear (and Mr Catto confirmed that it was probably correct) that the leaseholders asked Mrs Vincent to reopen the discussions regarding the 2011 Consented Scheme. A meeting was held on 9 November 2015, which prompted a letter from Almacantar setting out its view of the history of the dispute between the leaseholders, revealing that all leaseholders except Mr Savage had in fact accepted their previous offer **[EvB 634 – 637]**. In that letter, the Applicants set out as follows:

"*As you will be aware, Centre Point is now circa 50 years old. It and its infrastructure are in need of thorough refurbishment or replacement. The residents' leases are typically of 125-year duration and reserve to the landlord the rights to undertake exactly the nature of works we are now doing. It is wholly reasonable for us to expect that, in accepting such rights, the residents expect that at sometime such works have to be undertaken.*

…

Notwithstanding our position set out above and in BLP's [as they then were] *letter to the residents' lawyer, Gateley Plc, dated 31 July 2015, the ongoing situation is unsatisfactory and we would like to find a swift and amicable resolution. Following recent events, I have spent some significant time considering the way forward.*

Given the procurement timetable and the ever shortening period to complete our other works we had resolved that it was simply not possible to revisit another re-fenestration proposal along the lines tabled in October 2014. However, upon further reflection and with some considerable amendments to out plans, we would be willing to consider how we could now accommodate this. I should point out that it is incredibly late in the programme and as a result the already significant costs for these works have not only increased further but are very difficult to incorporate at this stage. I need to stress that there is a very small window for the works to be incorporated at this time and it requires that all residents agree to this offer without further delay.

Accordingly, we shall be informing the residents that provided they all agree in very short order and no later than 15 December 2015 to give us unfettered access, we would reconsider undertaking the refenestration works and, as part of that, offering each resident an ex gratia payment of £25,000."

71. A revised offer was made. A meeting was to be held with the leaseholders on 11 January 2016. Prior to that meeting, Mr Savage informed Mrs Vincent (and she in turn communicated it to the Applicants, to whom she expressed her regret at Mr Savage's decision to ignore his fellow leaseholders, and their own disappointment) as follows:

"*So that you have my reply before the meeting on Monday, I will be asking for a minimum payment of £100,000 per flat (six) plus all costs associated with relocating all of my tenants for the duration of the works. I will also require at least three months* [sic] *notice per flat before works begin on each property*."

72. Almacantar continued to attempt to pursue the offer at least until July 2016, and prepared a deed of settlement **[EvB 655 – 679]**. At the hearing, the leaseholders criticised the Applicants for not convincing Mr Savage, or not negotiating better, or for not accepting the offer that some of their individual sums of £25,000 be offered to Mr Savage instead. As we observed at the hearing, even had every other flat forfeited their £25,000 in Mr Savage's favour, they would still have been £100,000 short of the minimum sum demanded by Mr Savage (before taking into account additional relocation costs of his tenants etc). A 'ransom' sum is indeed an appropriate description of it.

73. The negotiations having finally and irrecoverably failed, there continued to be reports of water ingress into the façade **[EvB 687 – 690]**. The Applicants then sought professional advice from Dr Harris, a partner of Sandberg LLP, and façade specialist **[EvB 680 – 686]**, who we understand was involved in the Tower works prior to this. He was instructed by them that the Applicants' preferred way forward was a re-fenestration project. They identified that the façade was not performing as it should, there being leaks and condensation occurring. Dr Harris's instructions were set out at paragraph 5:

"*5.1 You are instructed to advise on the issues set out below:*

5.2 Are any of the following parts of the residential apartments in the Property in disrepair:

(a) the exterior surfaces of the windows,

(b) the exterior surfaces of the door frames,

(c) the exterior surfaces of the doors, and

(d) the structural parts of the balconies?

5.3 If so, what remedial works can be carried out to remedy disrepair in those parts?

5.4 What are the costs of the remedial option(s)?

5.5 What are the pros/cons to the remedial options?

5.6 Is the Client's proposed solution of the Fenestration Works a reasonable option for remedying the disrepair?"

74. In the hearing, the leaseholders made criticism that part of the instruction letter to Dr Harris was redacted. The part that is redacted is in the section

'Legal Issues'. At the end of it, in the unredacted part, the instruction letter states: "*For the avoidance of doubt, we are not asking you to comment on* [the] *legal position or the interpretation of the lease. We are just setting out our position by way of background, so that you understand the context of the expert advice sought.*" It is plain from those contents that what was set out was what the Applicants were being advised by BCLP regarding the respective rights under the lease as regards repair/renewal/improvement and good and substantial repair/equal standard that remained, until the PTR in November 2023, in issue between the parties. The fact that the legal advice was redacted because it was privileged was explained to the leaseholders in an email of 22 July 2021 **[EvB 1431]**. It is not a surprise to the Tribunal that those parts were therefore redacted while the issue remained live, though we understand that the leaseholders consider that means that the Applicants were hiding something, which built on the mistrust between them. We are satisfied that the instructions make clear to the expert that his only job was to use his expertise to identify what if anything was wrong with the identified areas, and what might be done about it. Legal issues were never a matter for him (or any expert) to opine on, but were in the sole purview of the lawyers.

75. The leaseholders also suggested that this letter shows that the Applicants had already made up their mind and would not consider any other reasonable options. We are satisfied that the letter specifically asks Dr Harris to consider all remedial options, even if the Applicants' preference is indicated.

76. By report dated 4 August 2017 (**[ExB 928 - 996]**, hereafter 'the first Sandberg report'), Dr Harris advised that the windows in the east and west elevations of CPH were found to be degrading and rotting, which was being hidden by the aluminium face-plates. Joints were showing evidence of failure, and a limited opening-up exercise revealed that one frame profile was no longer firmly secured at either end, such that it moved when touched. He considered that the windows were life-expired and needed replacement within the next 12-24 months. He suggested (his emphasis):

    "*If action is taken now, before rot is able to extend deeper into the frames, then the structural element of the timber frames can likely be saved, and the windows converted to a high performance drained double glazing system by means of plant-on frame profiles fitted onto the existing timber frames externally. This will significantly reduce disruption to the building occupants, since the bulk of the works can be carried out working from outside the building and there will be little or no disruption to internal finishes. <u>If the rot is allowed to continue then wholesale replacement of the timber frames is inevitable, and will likely require the apartments to be emptied whilst this is done</u>.*"

77. Dr Harris set out his concerns in respect of the façade **[ExB 949]**:

    "7.4 Condition of Primary Facade Windows

    > *7.4.1 The windows are timber framed, with single glazing (toughened spandrel panels, annealed vision glass) and screw-fixed aluminium pressure plates externally to retain the glazing.*

7.4.2 A number of frame joints have failed, in that they are no longer tight and sealed, and in a limited random inspection one frame was found to move under light pressure once the pressure plate had been removed.

7.4.3 The timber frames to the windows are rotting internally, as would be expected for window frames of this age. It is impossible to say what the overall extent of the rot is, but it is clear that if rot has commenced in some locations, it is quite likely occurring elsewhere: two out of four locations picked at random (from the available vacant apartments) were found to be rotting (the other two locations were found to have damp inside the glazing rebate, which indicates that the mechanism for rot is present, and some degradation of the timber has likely already occurred).

7.4.4 The structural integrity of the windows is therefore uncertain. Any degradation of the nosing of the frames will reduce the pull-out strength of the pressure plate fixing screws, and the worst case is that a pane of glazing could be sucked out of the facade in high winds. If the frames are allowed to continue to degrade in this way then an accident is inevitable:

7.4.4.1 Based on our inspection we are of the opinion that replacement works should be undertaken within the next one to two years (allowing time for Building Regulations approval to be obtained).

7.4.5 Based on our observations we believe that the rot has not yet progressed to the point where the timber frames need to be replaced wholesale:

7.4.5.1 The primary structural element of the timber frames could be retained, with the rotting nosing cut away, and a plant-on profile added externally. It should be possible to obtain a warranty for the new window elements, although this would exclude the retained timber frames.

7.4.6 These works could be carried out externally, most likely working from a scaffold, and would involve minimal disruption inside the apartments.

7.4.7 In terms of cost, removal and replacement of existing windows can easily cost £1,000 per square metre or even more, and to obtain reliable costings would require the support of a suitable glazing contractor. Based on an estimated area of 1,200 m2 for the two main elevations (excluding the balcony door screens) this would indicate costs of the order of £1.2m."

78. In conclusion, Dr Harris summed up his recommended actions as follows **[ExB 950]**:

"7.5 Temporary Repairs

7.5.1 We would not recommend any attempt at wholesale re-sealing of the windows externally: as described above any such re-sealing would be expected to fail within the first year after application, and would simply be throwing money away. However, localised resealing could be used to address any areas where significant leaks into the building are occurring, but this should not be regarded as a long term solution.

7.5.2 Any attempt at repairing the rotting timber locally would require 100% removal of the pressure plates and glazing, with the risk of consequential damage. The access required for such an approach (scaffolding) would be a major cost element. It is quite possible that all of the pressure plates will be damaged beyond the point of re-use, and there will likely also be some considerable degree of glass breakage. The resulting repaired windows would essentially be the same low-performance system that is there at present. In any event, the cost of such repairs would be prohibitive and unreasonable.

7.6 Alternative Remedial Works

7.6.1 We have considered various options but have not identified any viable alternatives for remedial works that do not involve replacement of the entire glazing system or are not a variant of the plant-on glazing approach. Plant-on framing profiles are available from several suppliers, and are an accepted means of applying modern thermally-broken drained glazing systems onto any form of supporting structure.

7.7 We re-iterate our concern that if these works are not carried out within the next one or two years then there is an increasing risk that a pane of glass could be sucked out of the facade. Although regular inspections of the facade should indicate when a pressure plate is started to become detached (it will likely unzip from one end), this would then necessitate immediate action to re-fix the pressure plate, and the fact that the pressure plate is coming away is an indicator that the timber frame is rotting to the point that wholesale replacement is likely to be necessary.

79. A copy of the first Sandberg report was sent to leaseholders under cover of a letter dated 5 October 2017 **[EvB 696]**, notifying that a 1985 Act consultation would be progressed in due course. On 10 October 2017, Rick Mather Architects (now rebranded as MICA) advised the Applicants on the consequences in terms of differences between the plant on system and the Consented Scheme, and their likely fees/timescales **[EvB 698]**. Further actions were discussed regarding the approach to an updated planning consent in a meeting between the Applicants, Gerald Eve, MICA, and HML Hawksworth (the Applicants' managing agents for CPH – hereafter 'HML') on 8 February 2018 **[EvB 754]**. WT Partnership Limited ('WTP') were approached for appointment as the Applicants' quantity surveyors **[EvB 756]** and MICA for appointment as the Applicants' architects **[EvB 757]** in April 2018. HML started making demands for reserve fund contributions to the façade replacement in June 2018 **[EvB 759 – 762]**.

80. It appears that a meeting took place with the Applicants' appointed team on 21 September 2018, at which MICA indicated that a report was required as to the structural integrity of the timber sub-structure at CPH to support the plant on scheme proposed by Dr Harris. Dr Harris was therefore instructed to carry out that report, by letter of instruction dated 20 November 2018 **[EvB 763 – 767]**. An initial technical meeting was convened by MICA on 21 January 2019, at which MICA identified an alternative potential technical solution to the façade remediation by the installation of a Raico system, a form of over-cladding not unlike the Schüco system, but of a slimmer profile to the advantage of the preservation of the protected facade **[EvB 768]**. WTP were formally appointed on 19 March 2019 **[EvB 769]**.

81. On 18 March 2019, a window fell out of its frame in flat 20. Fortunately, it fell onto the flat roof above the podium level rather than into the public square below. Falcon Building Maintenance ('Falcon') attended to check the condition of the windows in the flats 3, 4, 6, 21, 25, 27, 32, 36 and 37, but were refused entry to flat 6. The windows in the other flats were fixed closed due to Falcon's assessment of their condition. The occupier of flat 4 refused permission for Falcon to do so **[EvB 804]**. Falcon commented as follows:

    "*Previous windows we have viewed in Centre Point House had rotted sections of frames, and are coming to the end of their life span, and need replacing. We also noted in the inspection of 26/3/19 that the window in Flat 37 cannot be closed due to dropped hinges and the handles had broken where residents had attempted to close it.*

    We have fixed closed the windows [as above] until they are replaced with new as we consider the frames are in poor and unsafe condition, and if these fall there is a high risk of fatality in the street. We also recommend that bedroom windows in the other flats should be fixed shut until renewed."

82. On 23 March 2019, Eckersley O'Callaghan provided a Scope Inspection for Intrusive Investigation **[EvB 957 – 964]**. Opening-up works followed at flats 36 and 37, identifying the metal straps tying back the timber frames to the concrete structure **[EvB 806]**.

83. On 20 May 2019, Dr Harris wrote to the Applicants to recommend the screwing shut of all the large opening lights, in consequence of the incident with flat 20 and the unknown spread of rot within the timber system **[EvB 808]**. This was a request communicated to leaseholders on a number of repeat occasions over the following years, both in writing and at residents' meetings (e.g. **[EvB 810]**, **[EvB 816]**, **[EvB 820]**, **[EvB 822]**,**[EvB 965]**, **[EvB 1291]**). By 10 February 2020, leaseholders of 18 flats had either failed to or had only partly complied **[EvB 1108]**. We were informed at the hearing, almost five years later, that Dr Harris believed that Mr Doran still had not complied.

84. It seems that it was during this period that the previous reports from Arup, Ramboll WhitbyBird, IBIS, Cox Project Management, and JonesLangLesalle were made available to Dr Harris. It is a matter of contention when the

Applicants knew about those reports, which we will need to decide on another occasion if necessary. Leaving the other reports aside, at least so far as the Arup reports are concerned Dr Harris' recollection was that he approached Arup for them, which is suggestive that they were not previously in the Applicants' possession (and therefore it would seem the contents could not have been in their knowledge). In any event, no-one suggests Dr Harris had them or was aware of their contents prior to preparing his first report.

85. In July 2019, Clearwater provided façade modelling for environmental performance of a new façade **[EvB 829 – 838]**, presumably on the basis of the Raico system. On 13 June 2019 Eckersley O'Callaghan provided a Condensation Analysis of Balcony Interfaces **[EvB 944 – 956]**, and on 26 July 2019, a Façade Replacement Options Feasibility Study **[EvB 880 - 904]** and Preliminary Thermal Performance Report **[EvB 905 – 943]**.

86. In October 2019, Dr Harris identified a further remedial option, Option A*, based on a like-for-like replacement of all the elements of the façade except for the glazing to the door screens and balconies **[ExB 997]**.

87. It appears that in or around January or February 2020, the Applicants served a 1985 Act section 20 Notice of Intention regarding the façade works on the leaseholders, but that the notice was withdrawn at the request of some leaseholders because the first covid lockdown was put in place and some of them did not have access to their documents **[EvB 1109]**.

88. On 25 August 2020, Dr Harris provided his second report ('the second Sandberg report') after further inspections he had undertaken on 29 April 2019, 14 May 2019, October 2019 and March 2020 **[ExB 999 – 1157]**. As he told us at the hearing, it was in the course of these further visits and in light of the previous reports that his understanding of the façade was developed such that it is now his belief that the façade was never capable or remediation by a plant on system, even at the date of the first Sandberg report. His conclusions were as follows:

11.4 Condition of Primary Facade Windows

> …
>
> *11.4.2 A number of frame joints have failed, in that they are no longer tight and sealed, and in a limited random inspection one frame was found to move under light pressure once the pressure plate had been removed, indicating that the structural connection has already failed.*
>
> *11.4.3 The timber frames to the windows are rotting internally. This is not unusual for undrained window frames of this age. It is impossible to say what the overall extent of the rot is. To establish the extent of the rot now would entail a 100% opening-up exercise and some degree of destructive testing (drilling into the timber at intervals along the length of a frame). Even a localised area of rot may be sufficient to weaken the frame to the point of failure, if it occurs at a location*

where the frame is most heavily stressed (at the end joints or within the central one-third of its length).

11.4.4 It is clear that if rot has commenced in some locations, then it is quite likely occurring elsewhere: two out of four locations picked at random for opening-up works (from the available vacant apartments) were found to be rotting. The other two locations were found to have damp inside the glazing rebate, which indicates that the mechanism for rot is present, and some degradation of the timber and loss of structural strength has likely already occurred. Numerous other locations have been identified, including some new locations identified during the October 2019 inspection (see section 8 above), where there is visible evidence of decay, as well as mould growth and condensation inside the flats, which indicates that another mechanism for rot is also at work.

11.4.5 The structural integrity of the windows is therefore uncertain. Any degradation of the nosing of the frames will reduce the pull-out strength of the pressure plate fixing screws, and a pane of glazing could be sucked out of the facade in high winds. Rotting of the lower horizontal frame of the window sashes could lead to another sash falling out of the facade, with potentially fatal consequences. If the frames are allowed to continue to degrade in this way then an accident is inevitable:

> *11.4.5.1 Based on my inspection I am of the opinion that replacement works should be undertaken as soon as possible (allowing time for the necessary Building Regulations approval to be obtained and for the consultation under Section 20 of the Landlord and Tenant act 1985 to be carried out with leaseholders).*

11.4.6 In terms of the best approach to remediation, I am strongly of the opinion that patch repairs of the timber frames are not possible or appropriate for this kind of timber frame curtain walling system. Moreover the extent of repairs cannot be determined until a 100% inspection of the timber elements is carried out - the disruption that this entails will inevitably lead to further damage, disruption and cost to the leaseholders.

11.4.7 On that basis I am of the opinion that the safest, least disruptive and most cost-effective approach is to replace the outer parts of the glazing system with a more conventional curtain walling system, fixed back to the primary structure of the building at the floor slabs. I have referred to this above as Option B.

11.4.8 These works could all be carried out externally, most likely working from a scaffold, and would involve minimal disruption inside the apartments. In both cases I would propose that the timber frame is retained (although part of the nosing may be cut away to create more room for the replacement frame elements). The timber frame would

remain as a purely decorative element, and would present no ongoing liability in terms of structural performance.

11.5 Temporary Repairs

11.5.1 I would not recommend any attempt at wholesale re-sealing of the windows externally: as described above any such re-sealing would be expected to fail within the first year after application, and would simply be throwing money away. However, localised resealing could be used as a temporary fix to address any areas where significant leaks into the building are occurring, but this should not be regarded as a long term solution, and any leaks addressed by this method will inevitably reoccur as the sealant fails.

11.5.2 Any attempt at repairing the rotting timber locally would require 100% removal of the pressure plates and glazing, with the risk of consequential damage (the glazing tape has hardened and glass breakage during removal is inevitable). The access required for such an approach (scaffolding) would be a major cost element. It is quite possible that the pressure plates will be damaged beyond the point of re-use, and there will likely also be some considerable risk of glass breakage. The resulting repaired windows would essentially be the same low-performance system that is there at present. In any event, the cost of such repairs would be prohibitive and unreasonable.

11.6 Alternative Remedial Works

11.6.1 I have considered three options for replacement of the glazed facade:

11.6.1.1 Wholesale replacement of all elements of the facade, including the timber frame, has been rejected on the grounds of the degree of disruption that this would occur to the internal finishes to the flats, which would significantly increase the inconvenience and cost of the works;

11.6.1.2 Removal of the glass and external pressure plates and fixing of a plant-on framing system onto the retained timber elements has been rejected because it is simply impossible to know the degree of rot and reserve of strength of the timber frame elements until either the works are undertaken or until a 100% intrusive (and possibly destructive) survey of the timber frames is carried out. Either of these approaches will likely increase the overall cost and inconvenience of the replacement;

11.6.1.3 Fixing of a new intermediate structural framing element in front of the existing timber frames ('overglazing') will eliminate the need to remove the existing timber frames - the rotting areas will dry out and stabilise, and the removal of loads from the timber frames will eliminate the risk of later failure. Retention of the timber elements will

retain the appearance of the facade when viewed from inside and will also minimise disruption to the internal finishes.

11.6.2 I have considered other options for repair or replacement of the glazing facade but have not identified any other alternatives for remedial works that do not involve replacement of the entire glazing system or are not a variant of the approaches that have been outlined above.

11.6.3 I re-iterate my concern that if these works are not carried out at the earliest possible opportunity then there is an increasing risk that a pane of glass could be sucked out of the facade, or that another window sash could fall out, possibly with fatal consequences:

11.6.3.1 The failure of a window sash in April 2019 has already necessitated remedial works to reduce the risk of another sash becoming detached from the building elevations. At the date of this report these remedial works had been satisfactorily carried out to at least ten apartments, and were ongoing in the remainder. Once completed, these remedial works will substantially reduce the risk of another sash falling from the building.

89. At some point prior to the re-issued 1985 Act section 20 Notice of Intent, the leaseholders were provided with a document pack containing the second Sandberg report, a letter from Dr Harris approving delaying the works until 2022 **[EvB 1123]**, an initial costs estimate for the façade works from WTP dated 5 May 2020 (inclusive of professional fees and VAT, in the sum of £5,971,260 **[EvB 1111]**, making clear that the figures might change once quotes were obtained), and the MICA Scope of Works document **[EvB 1125]**. It is apparent that at around the same time, new demands were made towards the reserves for considerably higher sums of money, which precipitated various reactions from the leaseholders, most of whom indicated that they were viscerally opposed to paying **[EvB 1126 – 1157]**. As we understand it, to date approximately £6,762,860 has been demanded from leaseholders for the Proposed Scheme and the QLTA (roughly £260,000 per flat). £1,382,860 has been paid, which equates to roughly 5.4 leaseholders having paid in full (we are told that Ms DeValk, Mr Catto and Mr Negyal, and Mrs Woolf are amongst those who have either paid in full, or overpaid, on their sums). That leaves over 19 flats in respect of which either nothing has been paid or full payment has not been made. The outstanding sums are approximately £5,380,000.

90. In around December 2020, the leaseholders (it is not clear which, save for Mr Catto) commissioned advice from a dilapidations surveyor at [redacted] **[EvB 1158 – 1169]**.

91. In January 2021, CBRE valued the flats in their current condition (with the works pending) in the region of £640,000 - £680,000, with £1,140,000 being achievable after carrying out of the Proposed Scheme **[EvB 1248 – 1260]**.

92. On 20 January 2021 Dr Harris wrote to the leaseholders, at the Applicants' invitation, to clarify the difference in indicative costs of a plant on system

(£1.2m) versus the estimated costs of the Proposed Scheme (nearly £6m) (which was explained by reference to the cost of the systems themselves, versus the costs of the systems plus all the other necessary parts of a scheme to install it e.g. labour, the latter of which he had not addressed in his first report), and to address allegations that vibrations from works to the wider estate had caused or exacerbated the problems with the façade at CPH (in summary, there was no evidence to support that contention) **[EvB 1261 – 1264]**. On 21 January 2021, BCLP wrote in response to queries raised by leaseholders, which letter set out within it sums expended on the professional team by that date **[EvB 1273 – 1280]**. The leaseholders set out their various responses **[EvB 1283 – 1290]**. Essentially, the leaseholders' position was that the Applicants were not entitled to undertake the Proposed Scheme, on grounds that the windows (save for their exterior) were demised to them. Mr Hans Patel suggested that the only resort seemed to be to the Tribunal. This did not appear to be agreed by other leaseholders.

93. In April 2021, Dr Harris provided a note on the condition of the window and sash that fell out on 15 March 2019, with photographs and his observations, supporting his call for action to fix the large window lights shut **[EvB 1295 – 1312]**. On 27 April 2021, he provided answers to a number of questions put to him by the leaseholders' former expert **[EvB 1313 – 1319]**. Those were sent to the leaseholders under cover of letter of 28 April 2021, together with the minutes of the meeting between the technical team that had taken place on 22 March 2019 and the letter of instruction to Dr Harris **[EvB 1320]**.

94. On 17 May 2021, Eckersley O'Callaghan provided a fourth revised Façade Performance Specification for tender **[EvB 1321 - 1366]**, specifying a stick curtain wall system. On 24 May 2021, Astute Fire provided a Summary of the External Wall Performance Review **[EvB 1367 - 1383]**, to provide fire safety advice for the Proposed Scheme. In July 2021, MICA provided a revised (version 5) Scope of Work for the Proposed Scheme **[EvB 1411 – 1424]**.

95. A further residents meeting was held on 15 July 2021, at which the leaseholders were informed that the section 20 consultation process was about to recommence **[EvB 1426 – 1427]**, and 1985 Act section 20 Notices of Intention for the Proposed Scheme and QLTA were given on 17 August 2021 **[EvB 1439 – 1448]**.

96. The leaseholders' then position may be summarised by reference to a response from Mr Catto, dated 15 September 2021 **[EvB 1462 – 1464]**. In it he set out that he did not believe that the Applicants had the right to carry out the works, on grounds that (i) there was no evidence of disrepair; (ii) the Proposed Scheme was improvement not repair; (iii) the façade was capable of repair; and (iv) the Proposed Scheme amounted to works outside his contemplation at the date he entered into his lease, the amounts concerned were unreasonable, and the costs should therefore be borne by the Applicants. He also disputed that it would be necessary to move out for a period of 8-9 months whilst any such works were undertaken. Therefore, it was his view that there was no right to recover service charges. Mr Catto required various evidence if the Proposed Scheme was not to be abandoned.

97. At a residents' meeting on 14 October 2021 **[EvB 1465 - 1471]** the leaseholders raised a wide range of questions about the practicalities of the Proposed Scheme. The Applicants stated that in due course BCLP would reply to any objections received, and that:

"*Leaseholder observations have been considered in detail. However, there was nothing in them that Almacantar or their team felt necessitated a departure from the proposed approach. Almacantar has confirmed that they are taking steps to provide leaseholders with the information that they have requested on patch repair, even though this is not a methodology they approve of.*

…

One of the main observations from the leaseholders was disputing whether a full replacement was required and that a repair solution should be considered.
[Jonathan Evans] confirmed that Almacantar have looked at all viable options.
Almacantar has stress tested different options with Dr Harris and the professional team to ensure we are taking the most reasonable approach.

Almacantar has previously dismissed the option to repair the existing façade as this is more expensive and will be very difficult to obtain a warranty for this work. Dr Harris has always been of the view that a patch repairs is not a solution he would recommend.
…

Dr Harris has finalised a specification for the repair option. That specification has been provided to Almacantar's quantity surveyors (WT Partnership) and they are preparing costings. Once this has been finalised this will be sent to the leaseholders and their appointed surveyor to review. This is not something that Almacantar had previously thought necessary, but we have instructed this exercise to help move matters forward with the Leaseholders.

Following the issuance of this information, Dr Harris has offered to organise a meeting with leaseholders and their appointed surveyor to talk them through this and answer any questions."

98. In November 2021, WTP provided a draft revised costs estimate for the Proposed Scheme **[ExB 1234 – 1259]** and issued pre-qualification questionnaires for return by contractors approached to tender, for return by 25 November 2021 **[EvB 1472 – 1480]**.

99. On 22 November 2021, Dr Harris provided a report to the Applicants regarding the condensation risk in the façade **[EvB 1481 – 1506]**.

100. On 26 November 2021, HML provided a report to leaseholders regarding the leaseholder-proposed patch repair of the façade **[EvB 1511 –**

1518], and made it clear that the Applicants had rejected the possibility of patch repair on the advice of its professional team **[EvB 1507 – 1510]**.

101. On 2 December 2021, BCLP wrote to the leaseholders about decanting, and its phasing strategy for the works. It asked leaseholders to return a response sheet, indicating receipt of the letter, intention to decant, and details of the occupation of the flat concerned **[EvB 1519 – 1522]**. It is unclear if leaseholders responded.

102. At a residents' meeting on 13 December 2021, Dr Harris explained the difference between the Proposed Scheme, a like-for-like replacement, and a patch repair scheme, highlighting the time, cost and disruption differentials captured by the note at **[EvB 1508 – 1510]** provided previously. There are competing minutes from the Applicants and the leaseholders at **[EvB 1521 - 1533]**, revealing that that meeting cannot have been a pleasant one for anyone concerned. The leaseholders' former expert continued to advocate (we use that word advisedly, as that was what he was indeed doing despite avowing otherwise) for a patch repair scheme, and continued to suggest there was insufficient evidence to support the Proposed Scheme. Rather surprisingly, without any obvious evidential foundation, that former expert appears to have asserted that Dr Harris was being "controlled by" BCLP, such that he was not neutral, and he required to see evidence that pre-dated Dr Harris's involvement **[EvB 1529]**. He posited, again without any obvious evidential foundation, that the problem with the façade was a lack of trickle ventilation. He disputed that service life of a system had any relevance to disrepair or what could be done to put a system into repair. It is evident that at the date of that meeting, 11 flats still had not secured their windows.

103. By letter dated 23 December 2021, BCLP responded to the representations made by leaseholders in reply to the section 20 Notices of Intention **[EvB 1535 - 1545]**. That letter made clear that 4 responses had been received to pre-qualification questionnaires: from Iconic Build ('Iconic'), Dako Construction, MCD Group, and Claritas. Tenders would be invited, and on receipt of returns the Applicants would share feedback from the contractors on the Proposed Scheme as regards cost, phasing, decant, timeframe and anticipated programme. The historic documentation regarding the state of the façade was shared by a file transfer link, and BCLP set out in summary that the façade had been on "borrowed time" for some years. It was made clear that five options for putting the façade into repair had been considered, but that the advice from professionals was that the best option was the Proposed Scheme, which the Applicants considered was the best value and most reasonable option, and did not amount to an improvement. Patch repair had been rejected for many reasons, including cost, time, the need for a 100% proof test, and the ongoing need for regular and expensive intrusive maintenance into the future.

104. In January 2022, WTP provided a tender pack for the Proposed Scheme **[EvB 1546 - 1767]**.

105. Tender returns were received from Claritas **[ExB 1264 – 1745]** and from Iconic **[ExB 1746 – 1842]** on 5 April 2022 **[EvB 1768 – 1769]**. At a

residents' meeting on 23 May 2022 **[EvB 1770 – 1775]**, the leaseholders were informed that a post tender review was being carried out. It was made clear that, so far as the Applicants were concerned, they had answered all of the questions put to them by the leaseholders' former expert.

106. Various post-tender interviews were carried out **[ExB 1843]** and queries answered **[EvB 1783 – 1789]**. WTP provided its tender report analysis for the Proposed Scheme on 20 September 2022 **[ExB 697 – 759]**. In it, WTP explained the reason why only two tenders were received; of the 19 contractors approached, four had expressed an interest. The remaining contractors had broadly indicated that they considered that the contract was not worth enough money, or that the risks were too high. Low-profit-high-risk was not attractive **[ExB 2334]**.

107. Of the four who has expressed an interest, MCD had not been able to provide evidence of the required experience (as we understand it, due to being under NDAs). Dako Construction had been preparing its tender submission but dropped out a matter of days before the closing date due to being offered another opportunity elsewhere. Claritas's submission was not compliant as they had refused to offer a phased alternative, and they had failed to specify the Raico system indicated. They had proffered an alternative Raeyners system instead of, rather than as well as the Raico one. The Raeyners system would project too much from the concrete frame. They had not taken up the referrals to WTP's supply chain notified by the addendum during the tender period, preferring to use their 'own trusted supply chain' for the alternative product. They had also indicated that they were not interested in continuing negotiations unless they had a realistic chance of being appointed. Claritas's initial bid was £1,786,566 higher than Iconic's. Post-bid negotiations had consequently been entered into only with Iconic.

108. The negotiations had resulted in increased contract sums, but they were no longer heavily caveated, or provisional, and were substantially fixed (save for the cost of the Raico system itself – 14.6% of the tender value – which was subject to an inflation mechanism) until 15 October 2022. There was also a phased reoccupation option available. Iconic's bid for a full decant option was, by the end of the process, £7,041,410.92, or for a phased reoccupation option £7,347,015.00. WTP provided a reconciliation between its pre-tender estimate and the tender submissions **[ExB 723]**. It explained that it needed to adjust its own pre-tender estimate to ensure a like-for-like basis (including inflation and an allowance for a novated design team), and that its updated pre-tender estimate (full decant basis) would therefore be £6,116,104.94. It considered that the reasons for the circa £925k difference between its updated figure and Iconic's bid included the unprecedented tender price inflation brought about by macro-economic factors, including Brexit, Covid-19, and the war in Ukraine, and logistical access issues presented by the peculiarities (particularly the location) of the site.

109. The tender report prepared by WTP was sent to leaseholders under cover of letter dated 30 September 2022 **[EvB 1790 – 1803]**. In summary, BCLP reiterated that appropriate professional advice had been sought and received by the Applicants; that that advice was that the Proposed Scheme was

required to be undertaken in pursuit of the Applicants' repairing covenants; that the Proposed Scheme did not go beyond the Applicants' repairing covenants and was not 'improvement'; that any proposed patch repair scheme was not technically or practically evidenced, costed, or programmed, and the Applicants did not consider it viable for multiple reasons as set out; that there was no alternative realistic option to the Proposed Scheme; that programming of the works on a full or phased decant basis had been considered and a full decant was to be pursued; that the Applicants could assist with relocation as a rechargeable service-charge cost; and that unless unanimous agreement to the Proposed Scheme was obtained by 7 October 2022, an application would be made to the Tribunal before contractors were engaged, which would likely result in the project requiring re-tendering and increased costs. The letter noted that it remained the case that some leaseholders had not secured their windows. It also proposed mediation so long as all leaseholders were involved. BCLP encouraged careful review of the documents provided to the leaseholders to date, of which it provided a schedule **[EvB 1804 – 1810]**.

110. 1985 Act section 20 Notices of Estimates, together with a summary of observations received and responses, were given to leaseholders on 7 October 2022 **[EvB 1816 – 1837]**. Evidently, the Applicants did not achieve the unanimity that they considered was required, and this application was made in January 2023.

(d) The Issues

111. Against that background, the issues to be decided by us can be put relatively succinctly:
   (i) If costs were incurred for the Proposed Scheme and QLTA, would a service charge be payable in principle; and
   (ii) By whom would it be payable?

112. Those questions are those as set out in section 27A(3) of the 1985 Act. The second question, which arises under section 27A(3)(a), necessitates a determination of whether paragraph 8 of schedule 8 of the Building Safety Act 2022 ('the 2022 Act') applies.

113. The more specific matters, including the legal principles to be applied, we deal with in the relevant sections below.

(e) If costs were incurred for the Proposed Scheme and QLTA, would a service charge be payable by the Respondents to the Applicant?

Introduction

114. The determinations we must make are confined by the application that has been made. The overarching decision we must make is whether, if costs were incurred for the Proposed Scheme, those costs would be payable by the some or all of the leaseholders (taking into account any finding we make in respect of the application of the 2022 Act) as service charges.

115. The sub-issues of that question were identified in the directions following the PTR. Some of those issues have now fallen away. For example, no leaseholder pursues any argument now regarding apportionment of the Proposed Scheme between the residential and commercial parts of CPH, as it is now accepted that the works will not benefit the commercial area. We find it convenient to group others of the remaining questions into the broad themes below.

116. In part one, we deal with the primary question under the 1987 Act, which is: "whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs".

117. We pause consideration of by whom to part two, where we will consider the effect of the 2022 Act on the question.

118. We pause consideration of an additional submission that set-off falls to be considered to part three. It is said to engage the question in section 27A(3)(e) - the manner of payment of any such sum as would be payable.

PART ONE

(1) Preliminary issue – Amount of any Service Charge for the Proposed Scheme and QLTA

119. At the outset of the hearing, as we had done at the emergency CMH the previous week, we raised with the Applicants the problem we perceived with their application as framed, as it asked us to identify a specified amount that would be payable in the future (pursuant to section 27A(3)(c)).

120. The only evidence we had before us was that which showed what the contract price would have been, if it had been let in October 2022. There was no indication on the evidence in the bundle that Iconic were still willing and able to undertake the Proposed Scheme, when, or at what price. To the extent it appeared from **[ExB 1262]** that WTP had carried out an inflation calculation of the Iconic sum using WTP's own in-house indices for central London, taking the figure to Q3 of 2024, the calculation itself set out that "[t]*he above is a forecast of inflation only and is yet to be evidenced by tender returns*". We had no evidence that Q3 of 2024 is the correct date for any inflation calculation (and we note that at least one of the ASTs granted by Mr Savage appears to have no break clause, with the fixed term due to expire 19 September 2024 **[CB 163]**) and nothing by which to assess WTP's in-house indices. No section 27A(1) application had been made in respect of the reserve fund demands such that we could engage with the question of whether the sums demanded were a reasonable estimate in accordance with section 19(2) of the 1985 Act. The application was brought only looking to the theoretical future rather than the crystalised past.

121. It seemed to us that therefore the Applicants were faced with two options. Either, knowing that the sum calculated by WTP was in all likelihood unreliable, exercise its choice and commit itself to a fixed position that the costs would be that sum, which we would have to decide whether we could

make a finding on, or be content with a determination under section 27A(3) that was in more general, 'in principle' terms. The Applicants elected the latter approach.

122. All parties indicated that they wished us to give the market testing question consideration. We made it clear that, because we would be looking at a past contract sum, in respect of which there was no evidence the contract was still available to let and in respect of which there was no section 27A(1) application, our indications thereon would be no better than *obiter* and could not be relied on in any future application that might arise under section 27A(1). Indications would not be 'findings', and no appeal would lie against them. We were encouraged to view the question as one that might 'put to bed' (our words) some of the disputes between the parties. We therefore agreed to proceed on that basis, but our indications in the 'Market Testing' section below therefore come with that strong user-warning.

(2) Is a service charge payable in respect of the Proposed Scheme and QLTA in principle?

123. The first question we turn to is whether the Applicants have the obligation to carry out the works that are encompassed in the Proposed Scheme, and if they do, does the Applicant have the right to demand, and do the Respondents have the obligation to make, payment for them. There are three questions that arise in consideration of the question: does the lease permit of recovery for works of repair to the façade in general; is the façade in repair in accordance with the covenants in the lease; and does the Proposed Scheme encompass works within those terms.

(i) Is maintenance of the façade within the Applicants' obligations in the leases?

A. Evidence

124. A copy of the lease for Flat 1, one of those belonging to Mr Ogilvie, is included in the bundle **[CB 134]**. We understand that the leases for the other flats are in identical terms. In that lease, the relevant provisions are as follows:

> **1. DEFINITIONS AND INTERPRETATION**
>
> 1.1 In this lease where the context so admits the following expressions shall have the following meanings respectively:
>
> "**Apartment**" means the Demised Elements of those parts of the third and fourth floors of the Building shown edged red on the plan…
>
> …
>
> "**Demised Elements**" means and includes in relation to any premises (for the purposes of obligation as well as grant):
>
> (a) The internal surfaces of all walls (both internal and external) floors and ceilings bounding or within such

premises and the air space within the same and the whole of all window and door frames and doors thereof (other than such of the surfaces thereof as form part of the exterior of the Building) and the glass in such window frames…

…

"**Retained Parts**" means the remainder of the Building not comprised in the Apartment the Demised Elements of the other apartments within the Residential Premises the Common Parts or the Demised Elements of the Commercial Premises

…

3. The Tenant **hereby covenants** with the Landlord at all times during the said term as follows:

…

3.3 Well and substantially to repair maintain clean and keep the Apartment including where necessary or otherwise required hereunder the renewal or replacement of any fixtures and fittings and plant forming part thereof…

3.10 To permit the Landlord and the tenants or occupiers of any premises in the Building and their respective employees agents and surveyors with or without workmen and others and those authorised by them after reasonable notice in writing and at reasonable business hours (except in emergencies) to enter upon the Apartment or any part thereof in the exercise of such rights as are excepted and reserved unto them pursuant to schedule 2

…

3.21

3.21.1 To pay to the Landlord in the manner hereinafter described the Service Charge

3.21.2 The Service Charge shall be 1/36 of the amount expended in each service charge year… by the Landlord providing the services and fulfilling the obligations set out in part 1 of schedule 3 and a fair proportion of like amount in regard to part 2 of schedule 3

4. The Landlord **hereby covenants** with the Tenant as follows:

…

4.2 Subject to the payment by the Tenant of the Service Charge (and the advance payments relating thereto) to fulfil the obligations and to provide the services details whereof are set out in schedule 3 provide that the Tenant shall have no rights of claim against the Landlord on account of the non-provision or non-fulfilment thereof due to any cause outside of the Landlord's control

...

SCHEDULE 3

...

Part 2

1. To keep the Retained Parts in good and substantial repair and condition and free from pests including where necessary the arrangement of suitable maintenance contracts in connection with and the testing and replacement of the Conduits fixtures and fittings and similar items forming part of the Retained Parts provided that where items are replaced the Landlord shall ensure that the replacements are of an equal standard to those currently installed

2. To redecorate or treat as appropriate the parts of the Retained Parts which are usually or which ought to be so treated whenever necessary with suitable materials of good quality in a good and workmanlike manner and so often as may be necessary to clean the external brickwork and other facings or cladding of the Retained Parts.

B. Decision

125. As can be seen from the combination of the definitions and clauses above, in simplistic terms the leaseholders are responsible for the repair of the internal surfaces including window frames and the glass in the window frames. The external parts of the window frames are retained, as is the remaining structure on which the glass and frames sit. The spandrel zones, where the glazing and its construction are not accessible from within the flats, are 'exterior' and therefore retained.

126. In relation to those retained parts, the Applicants have the obligation to keep the retained parts in good and substantial repair and condition. The obligation to 'keep…in good and substantial repair and condition' is also an obligation to 'put' the retained parts in good and substantial repair and condition, if the retained parts are not in that condition (*Saner v Bilton* (1877-78) LR 7 Ch.D 815). In legal terms, this is usually referred to as 'to (put and) keep' as a shorthand. We will adopt that shorthand.

127. The Respondents have the obligation to pay a fair proportion of the service charges for those works, the Proposed Works being ones that fall within the Applicant's obligations in part 2 of schedule 3.

(ii) Is the façade at CPH in good and substantial repair and condition?

A. Evidence

128. It is Ms Stedman's pleaded case **[CB 39 - 52]** that the Applicants' section 27A(3) is a cynical application driven by corporate greed, to improve the cosmetic look of CPH for the benefit of their wider business interests in the Centre Point estate. The Applicants had a plan, she says, from the minute they bought Targetfollow out of administration, to undertake a redevelopment project in respect of the whole Centre Point estate. Leaving CPH in a "*tired and rundown*" state in the middle of the "*upscale eateries, redeveloped iconic Centre Point Tower, the adjoining 'Link' turned into an upmarket restaurant village and the lower levels of CPH itself turned into a vast array of shiny, gleaming new retail/commercial outlets*", next door to the "*golden*" redevelopment at St Giles High Street/Denmark Street/Charing Cross Road, and mere metres away from all of the new Crossrail development including new buildings, a new theatre, and new access to public transport, could never have been in the Applicants' plan. Her position is that the Applicants are attempting to get leaseholders to pay for the redevelopment of CPH is, in effect, a ruse (our word) to get the Consented Scheme works done even though the leaseholders' did not accept it unanimously. It was the Applicants' fault that unanimity was not achieved, because of the selfish conditions the Applicants' put on the leaseholders' acceptance of the Consented Scheme which would have deprived the leaseholders of their contractual and common law rights. The Applicants were now trying to "*rewrite history*" to disguise their "*long-running, commercially driven, desire for the façade to be improved by replacement of 'tired' and dirty with clean*."

129. Ms Stedman considered that any attempt by the Applicants to prove that the CPH façade was or is faulty or in need of repair would be a "*legal sleight of hand*". Their master plan had nothing to do with any part of the façade being in decay or danger. She had not been presented with "*evidence that unequivocally convinces me that there is an actual need for these works*". The whole focus of the Applicants was improvement. The state of the façade is still "*open to debate*" and the Applicants' only motivation is to improve CPH so it is more appealing when viewed from Centre Point Tower and to increase the value of the retail units below.

130. Ms Stedman also submitted that, if CPH was indeed not in repair, that was because of the works in the wider Centre Point estate having caused vibrations and damage to CPH. She considered that the window incident was caused by the Applicants' own neglect of its retained flats. She told the Tribunal her own flat was in perfect condition after the 2010 works, though she could point to no independent evidence.

131. Ms Stedman's oral evidence was brief, firm, and consistent with these themes. Her evidence made amply clear the very strong depth of feeling the

leaseholders have, and what they have had to tolerate living in the middle of, in effect, a building site.

132. In closing Mr Stedman stated that his daughter's proposition was simple. The Applicants should bear the costs of the Proposed Scheme, and the leaseholders should bear none. The Applicants had from the outset wanted to carry out the Consented Scheme not because they knew about the state of the façade - about that knowledge, Mr Stedman suggested Mr Waite and Mr Evans were lying - but for their own commercial interest. They had only been unable to do so because of the outrageous conditions that they had put on agreement to the Consented Scheme, and the requirement for unanimity. The costs that the Applicants now seek are the very definition of unreasonable and disproportionate. His daughter was a representative 'everyman' – she was a teacher with two children, earning a teacher's salary, who was unable to pay the extraordinary sums demanded as an average citizen. The application failed the reasonableness test.

B. Decision

133. We do understand how living in the middle of the Applicants' construction in relation to the other buildings on the estate, including while they were breaking through the floor slabs immediately below at CPH to develop the commercial premises, must have been deeply intrusive. That was exacerbated by the Crossrail development and the building works next door. We are not surprised that Ms Stedman felt the need to move out, as did Mr Ogilvie.

134. However, while we have sympathy with Ms Stedman's position, as we explained to Mr Stedman at the PTR and again at the emergency CMH we are only able to make decisions on the basis of the evidence before us. We do not wish to undermine Ms Stedman's or Mr Ogilvie's lived experience, but we can only make our decision on the basis that we can be satisfied on the balance of probabilities that Ms Stedman's position is correct.

135. There is no expert report or other independent evidence that supports Ms Stedman's position. The expert reports of Dr Harris and Mr Gray, and the background as set out in part **(c)** above, firmly establish that the works undertaken in 2010 did not put CPH into perfect condition – indeed Targetfollow appears to have instructed that such works as did take place (the extent of which remains unknown to this day) should only have the effect of extending the life of the façade for between 7 – 10 years, because they intended to either demolish or redevelop CPH **[EvB 63 at 1.3]**. That decision was made in the full knowledge that the façade was already beyond its design life and already suffering from those problems identified later by Dr Harris **[EvB 63 at 2.4]**. The reports from the party wall experts **[EvB 701 *et seq*]**, retained by the leaseholders and the Applicants respectively in the course of the wider estate works, identify no damage to the façade as a result of movement or vibrations, such that the poor condition of CPH (which Ms Stedman continues to reject the existence of) could be considered to have been caused by the Applicants' development works. While it is possible that Ms Stedman's flat has no observable indicators internally of what is occurring in

the façade, that does not lead to the conclusion that the façade is in perfect condition. Ms Stedman's position is in the face of the evidence, and we must therefore reject it.

136. There is no objective evidence to support Ms Stedman's conclusion that the façade works are motivated by corporate greed and that the Applicants, in bringing the application, are engaging in some cynical legal sleight of hand. That is an allegation tantamount to fraud, and cogent evidence is required to enable us to make such a finding. We do not have any evidence except for Ms Stedman's strength of feeling, developed in the context of a relationship that has increasingly soured from 2011, exacerbated by the works occurring around CPH. We acknowledge her feelings, but we cannot be satisfied by feelings alone that the application is anything but genuinely motivated by the need for the Applicants to meet their repairing obligations, in light of the evidence before us.

137. We are satisfied that the Consented Scheme and Proposed Scheme are sets of works that are differentiated and are not the same as suggested. Although there are naturally some elements that will appear similar, for example the replacement of the façade, as both schemes are and were concerned to achieve that outcome, the Consented Scheme went substantially further in what was proposed for the 'wrap' around CPH, including its balconies. The differences are reflected in the drawings provided by MICA at **[EvB 972 – 974]**.

138. In the circumstances, and in light of the expert evidence of Dr Harris **[ExB 16 *et seq*]** and Mr Gray **[ExB 127 *et seq*]**, and in accordance with the independent reports and other documents commissioned by the successive landlords prior to the acquisition of it by the Applicants' parent company **[EvB 9-289]** we find that the façade at CPH is not in good and substantial repair and condition, has been inherently defective from the date it was completed, and its physical condition has deteriorated over time as a consequence.

139. As regards Mr Stedman's final submission (the reasonableness test), in the application that has been made to us we have not been given the jurisdiction to decide whether the sums demanded for payment to the reserve fund are reasonable or proportionate. That matter must be left for another day if it becomes necessary.

(iii) Is the façade replacement as set out by the Proposed Scheme work of to put the façade into good and substantial repair and condition?

140. In reality, by the end of the hearing no leaseholder, save for perhaps Ms Stedman, actively maintained that maintenance of the façade, including the windows, was not within the Applicants' repairing obligations. Mr Ogilvie made clear he considered that the works needed to be done, and that his main grievance is the Applicants' lack of consideration of the fact that they are demanding sums of money be paid with no consideration to the means of the Respondents to pay them as demanded.

141. We do not consider that Ms Stedman's case is concerned with quite the same question. It is her position that the Proposed Scheme is works of improvement as the facades are not out of repair at all. We have dealt with that in our decision above.

142. Initially, in their Skeleton Argument provided after the CMH at which we made clear that the question would not be reopened without good reason, the leaseholders represented by Mr Negyal maintained that the Proposed Scheme included elements of improvement outside of the Applicants' obligations in the lease. In advance of his closing submissions, Mr Negyal handed up to us an amended Skeleton Argument, in which he removed those paragraphs and stated the point was conceded.

143. Mr Weeks and Mr Negyal nevertheless expressed discontent, in cross examination of the Applicants' witnesses, at the way that their former expert had been treated by the Applicants, such that he could not give them the advice he had promised, 'good or bad', to conclude the matter. The position they took was that the Applicants, or their solicitors, had been heavy-handed, rude, and obstructive in the resolution of this case in informing their then-expert that (to paraphrase) legal questions should be put to a lawyer, through a lawyer. They also took the view that Dr Harris had been personally rude and obstructive to their former expert in terming the questions he posed 'scattergun' and refusing to answer reasonable questions. They took the view that the Applicants had thereby obstructed the leaseholders in coming to a resolution of the issue.

144. We provide our observations on this issue to the leaseholders, as we believe that the leaseholders need some reassurance that they have made a proper concession. It is also convenient to deal with it if, to any extent it forms part of Ms Stedman's case.

145. We have real concerns about the advice that the leaseholders obtained from their former expert. There has been a good deal of consideration and comment in higher courts recently on experts overstepping their expertise or roles (we are aware of no fewer than 20 in the past 24 months, the most recent being *Balachandra v The General Dental Council* [2024] EWHC 18, and amongst which *GKE v Gunning* [2023] EWHC 332 (KB) and *Rowbottom v The Estate of Peter Howard & Anor* [2023] EWHC 931 are prime examples of, respectively, the wrong expert being chosen for the expert evidence required, and the expert's inappropriate failure to take into account any evidence that did not support their own conclusions). We consider it apparent that the leaseholders' former expert fell into similar error **[EvB 1158]**.

146. We will not name that individual, as he has not had the opportunity to provide an explanation for his conduct. Nevertheless, we can identify no fewer than 27 paragraphs of his report to leaseholders in which the former expert gives legal advice, or in which he goes beyond his expertise. An example of the former appears in the following paragraphs:

> "*5. The tenants have an obligation to repair, maintain and clean their Apartments (which effectively means the Demised Elements, so*

includes the glass in the windows plus the window frames - except the external surfaces of the window frames).
6. The landlord has an obligation to keep the Retained Parts (which includes the external surfaces of the window frames) in good and substantial repair and condition.
7. The relationship between these definitions and obligations should be considered. Firstly, given the design of the cladding, what would be considered to be a window frame, and what would not? Ultimately this is a legal question but these sorts of issues which I have to consider frequently in my practice.
8. Reference to Dowding and Reynolds *does not provide much assistance in this instance. They refer to the case of* Twinmar Holdings v Klarius *(which considered whether roof lights in an industrial building were windows – they weren't). They include the following extracts from the judgement:*

> *"31 … In the context of a lease, I consider that the essential characteristics of a window are that it is a glazed panel in a frame that is set into the external envelope of a building (although sometimes there can be internal windows to allow the passage of light within a building), the purpose of which is to let in light and, usually, to enable those in the building to see out. However, sometimes windows are specially treated, for reasons of either privacy or security, to prevent someone outside the building from seeing in. But in my view this does not mean that it is no longer a window: it is just a particular type of window. Further, it is reasonably clear that a window does not have to be in a vertical plane: opening glazed roof lights (such as the "Velux" type window) are in my view properly described as windows.*
>
> *Whilst many windows are capable of being opened, this is not an essential characteristic of a window.*
>
> *"32 For the purposes of this case I leave out of consideration the modern glazed curtain wall, or similar structures, where glass panels may be mounted on a metal frame. These are not windows in the sense of being glazed panels set into a frame, but whether they are to be regarded as windows or part of a curtain wall is a question that would have to be decided by reference to the terms of the relevant lease if and when the point arises."*

9. It therefore appears to be an open legal question as to the extent to which the curtain walling would be described as a 'window'. Those parts of the curtain walling which provide light to the Apartments would, at least in the first instance, presumably be regarded as windows (and would be demised to the tenants – except the external surfaces of the frames thereof), and the spandrel panels which do not provide light to the apartments would not be regarded as 'windows' (and therefore would be retained by the landlord).
10. It might also be the case though, given that Sandberg indicate that the framing of the windows and of the spandrels is structural (because that timber framing supports the spandrels and windows) that the timber framing is actually a Retained Part, and just the opening parts

of the windows (within that timber framing) are demised to the tenants.
11. I proceed on the basis that this assumption is correct, because it seem [sic] *more logical for the long leaseholders not to be responsible for structural parts of the building*."

147. We are also concerned that the former expert appears to have given insufficient consideration to whether he had the relevant expertise on façade systems to proffer the advice he was giving on repair options. He identified himself that he was not a cladding expert, but nevertheless continued to posit that the façade could be repaired by a patch repair scheme, and the condensation issue resolved by trickle ventilation. That does not appear to have been based on any knowledge or understanding of the façade, or indeed on his understanding of Dr Harris's reports.

148. He appears to have taken that view on the basis that he mistrusted Dr Harris simply because he was the Applicants' expert. In this he appears to have fallen into error, by adopting the leaseholders' own then-position that the only reason for the Proposed Scheme was to 'improve the performance and appearance of the building', rather than to meet its repairing covenant. That impression is further underscored by the fact that he recites at paragraph 71 that Dr Harris does not appear to have considered any other options, even though (i) Dr Harris says explicitly in his reports that he has (and recounts them), (ii) the evidence was provided to the former expert, and (iii) the expert has no reason to disbelieve Dr Harris's own statement. That tends to indicate he has not cast himself in an expert role, but has indeed taken on the role of advocate for his clients. This is further identifiable in the questions he later put to Dr Harris, which were focussed not on a resolution of what were the technical problems with the façade as a matter of differing expert opinion (it does not appear that he provided any such opinion), but are more apt to be described as a cross-examination of the circumstances in which Dr Harris had come to his conclusions. In a prime example, he demanded Dr Harris identify what was the wind speed was at CPH on 15 March 2021 (the night the window fell out). Dr Harris googled the available nearby records, the closest of which was City Airport. The former expert then criticised Dr Harris for doing as he did and described his answer as evasive, but no part of that question was a question for a façade expert.

149. Ultimately, the conclusions reached by the former expert appear to have been based on an incomplete understanding of both the law and of the façade system. In his letter to the leaseholders, he failed to consider or understand the nuances of disrepair versus inherent defect, the interrelationship between the concept of 'put and keep', 'good and substantial condition', 'repair' and 'improvement', the 'equal standard' provision in the lease, and the relationship between the windows and the façade as a whole. Nor does he appear to have appreciated that any Tribunal, endeavouring to give proper and practical effect to the landlord and leaseholders' covenants, would be keen to ensure that, so far as the lease permitted, the result should not be some kind of dawn stand-off between the obligations of each. He appears to have fallen directly into the trap of becoming a subjective

participant in the dispute rather than an objective expert on matters within his expertise.

150. The impression that the leaseholders were consequently left with is most unfortunate. They persisted in their argument that the Proposed Scheme is an improvement that the Applicants were not entitled to carry out. The leaseholders relied on their former expert's advice in good faith and cannot be faulted for that – the very reason for obtaining expert assistance is to gain a better understanding of those things one does not have the tools to understand. The flaws in the former expert's approach and advice were 'unknown unknowns' to them. They had received a recommendation for the individual concerned by a party wall expert, and were not to know that the expertise they were engaging was not a match for the task at hand, nor that the advice they were given traversed the role of an expert. It was for the former expert to properly point out that he was not the appropriate expert for the job, and to avoid overstepping his expert role.

151. In short, and the parties will forgive a large tin of gloss in one hand and a broad brush in the other, there is voluminous caselaw going back decades as to the extent of the obligations to (put and) keep something in 'good and substantial repair and condition'. The obligation goes beyond mere repair, and may, if the circumstances require, result in something better being put in place of something that is inherently, in order to put the state of the building into 'good condition', although there may well be a degree of overlap between the two concepts of 'repair' and 'good condition' in any given case.

152. Each case turns on its own facts, but, for example, as we said in the hearing, the Court of Appeal has held that where a front door was inherently defective by design because it had no weatherboard at its foot, so that it allowed rainwater to penetrate into the property, it was not in disrepair and so the landlord was not liable for the water penetration. When the door itself came to be in disrepair owing to the extent of the water penetration, however, the landlord was entitled to repair it by 'improving' it in such a way as to prevent future water penetration, as it was the only practicable way to prevent further continuous disrepair. The local authority in that case installed an aluminium self-sealing door (*Stent v Monmouth District Council* (1987) 19 HLR 269 (CA)).

153. Write that proposition large onto the façade of CPH and the Applicants find themselves in the same position – the interstitial condensation caused by the defective design of the façade is now damaging the fabric of the façade, including the supporting structure of the windows, the window stays, and decoration of some of the flats internally (as was Mr Ogilvie's evidence). In order to fix that problem (i.e. to put the façade into good and substantial repair and condition), Dr Harris and Mr Gray agree that the only practical solution is the Proposed Scheme. That Proposed Scheme will, in effect, create a new curtain wall stuck on the existing façade, so that the existing structural parts of the facade will no longer have a structural function. There will, as a consequence, be no further danger of the collapse of the facade due to the decay or rot in the residual timbers. That will put into good condition and substantial repair the facade as it stands, and eliminate the continuing effects

of the inherent defects on the façade. The side effect is the additional consequential improvements in the thermal properties of the design in consequence of the system being a modern curtain walling system with double-glazing.

154. The suggestion that the Applicants have no right to install the Proposed Scheme on grounds that the internal parts and glazing of the windows within that façade system are demised is, put simply, wrong. If it is not possible to cure the design defect that is the cause of disrepair without causing a measure of improvement, for example by the installation of new windows in consequence of the design of the Proposed Scheme, that will not fall outside of the Applicants' repair obligations unless the works change the fundamental nature of the building so that it is wholly different from what was demised (*Ravenseft Properties Ltd v Davstone Holdings Ltd* [1980] QB 12 (CA) and *Quick v Taff Ely Borough Council* [1986] QB 809 (CA)). The words in the lease "*Landlord shall ensure that the replacements are of an equal standard to those currently installed*" represent a minimum standard any repair works should meet, not the only standard. The Applicants' obligation is not to repetitively carry out futile work which will not remedy the underlying defect causing the facades to be out of 'good condition and substantial repair' (see *Elmcroft Developments Ltd v Tankersley Sawyer* (1984) 270 EG 140 (CA), in respect of installation of a damp proof course). Neither does that course have to be the cheapest option, as long as it is a reasonable option (*Manor House Drive Ltd v Shahbazian* (1965) 195 EG 283 (CA), and (closer to home) *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45 (CA)).

155. In consequence, had we have had to decide the issue (and if to any extent Ms Stedman requires us to decide the issue), we would have determined that the works comprised in the Proposed Scheme are not works of improvement of the nature the Applicants would be proscribed from undertaking, even if a consequence of carrying them out does in fact improve the condition of the facade. They are works to be carried out in pursuit of the Applicants' repairing covenants to (put and) keep the façade in good and substantial repair and condition.

(iv) Was the market adequately tested?

156. We agreed with the parties that we would deal with the question of whether, in its 2022 tender exercise, the Applicants properly tested the market so that the contract price obtained from Iconic for the Proposed Scheme was within the range of reasonable prices obtainable on the open market at that time. We reiterate that we can only make observations, not binding decisions on the issue. We will not set out the evidence we have heard in full. No appeal would lie against these observations because they are not within the section 27A(3) decision we must make, and we make these observations only at the invitation of the parties. We will therefore keep our comments as short as appropriate.

157. The contract price is not the only factor for the landlord to consider when determining to whom to award a contract at the end of a tendering process. It

is for the landlord to decide which is the most appropriate contractor to whom to award a contract taking into account a range of factors, *including* price. As long as the decision to let the contract to the particular contractor was a reasonable one in light of the relevant factors to that decision, even if the contract price was not the lowest available, the decision would nevertheless be within the range of reasonable decisions that the landlord could make.

158. Pausing there, that is also true of the decision in what way any scheme of works should be achieved – in this case, the question of the full or phased decant. We know that it will be of disappointment to the leaseholders (who we note in any event disagree amongst themselves), but the Tribunal does not have jurisdiction to direct that a landlord take one path or another. The decision is for the landlord alone. All the Tribunal can decide is whether, a landlord having made its decision, that decision was or was not within the range of reasonable decisions open to it in the circumstances of the particular set of works proposed and the range of factors to be considered. There is rarely only one reasonable decision open to a landlord.

159. Returning to the question of the works, as part of that decision making process the landlord is obliged to obtain quotations as part of the consultation process. The Applicants' tender process in this case was in pursuit of that requirement.

A. Evidence

160. We have considered, and heard, all of the evidence on this matter on which the parties relied. We have particularly considered the WTP Costs Estimate **[ExB 614]**, WTP's Tender Report **[ExB 697 *et seq*]**, WTP Costs Estimates of 24 November 2021 **[ExB 762]** and the RICS Guidance Note on Tender Strategies **[ExB 871 para 3.11]**, together with the reports of Mr Nutland **[ExB 283 *et seq*]** and Mr Sullivan **[ExB 247 *et seq*]**, and the oral evidence of Mr Nutland and Mr Blowey. The parties should be assured that we have heard all of the arguments and mean no disrespect if some are not included below; we simply consider it appropriate to focus on the main arguments in that context.

161. The Respondents' position is that that tender process was flawed. They point to the estimate for the Proposed Scheme provided by WTP in Q2 of 2019 setting out that its estimate of the sums that the Applicants should expect to pay for the works was, at that date, £4,449,000.00. The Iconic final tender price, available until 15 October 2022, was £7,041,410.00 for the full decant option, and £7,347,015.00 for a phased decant option **[ExB 702]**. Those sums were fixed for the whole of the Proposed Scheme save for the Raico system itself, the cost of which would be dictated by market forces (but for which an inflation mechanism was agreed). The main point of the leaseholders' argument in this case is that they say the market was not properly tested. It was suggested by them that the figure obtained from Iconic was an attempt to 'high ball' the Applicants, for various reasons, and not within the reasonable range of prices obtainable on the open market at the time of the tender.

162. Mr Doran's experts (Mr Sullivan for the written report, and Mr Blowey in oral evidence) say that the difference between WTP's estimate in Q2 of 2019 and the final Iconic price in Q4 2022 speaks for itself that the market was not properly tested. Mr Sullivan sets out his own assessment that he says should result in WTP's own estimate being within a lower range of £3,868,993.21 - £4,271,681.47 **[ExB 261]**, thus widening the gap between the estimate and Iconic's contract price.

163. Mr Allison asked whether the fact that Mr Sullivan undertook the exercise at all suggested that Mr Sullivan thought WTP has done something wrong initially. Mr Blowey accepted that he had seen no evidence to suggest that WTP had done anything wrong.

164. All experts agreed that ideally, a minimum of three tender returns should be received in any exercise. All experts agreed that, for a variety of reasons, there might be fewer in fact returned. Mr Blowey suggested that therefore you'd need to tender to four, or five contractors. That appeared inconsistent with Mr Sullivan's and Mr Nutland's reported three-to-six. Mr Blowey contextualised his experience of being in public sector procurement, in which there are rigid rules relating to tender legitimacy prior to public authority approval, because it is taxpayers who pay. We understood the point to be that in social housing, there are no 'leaseholders' to whom to recharge the costs of the works (or indeed the procurement process). He did not disagree that there was a chance that in any procurement exercise that the number of tender returns might fall below the 'magic number' (our words), and that the private sector was not constrained by the public sector rules in that scenario.

165. The Applicant, in preparing for its tender, approached 19 construction firms to complete its pre-tender questionnaires **[EX 733]**. They were a mixture of large and small-to-medium sized companies approached, within the definitions that Mr Blowey appeared to us to agree (Mr Sullivan not having said in his report what he meant by that term). Mr Blowey did not suggest that the small-to-medium sized contractors were inappropriate, rather that he had seen no evidence to show that they *were* appropriate.

166. Responses were received back from all, and all but four indicated that they were not interested, for a variety of reasons (e.g. that the project was not large enough to be of economic interest; the project didn't fit with their risk profile; "others may be more competitive'). Of the remaining four, MCD did not pass pre-qualification questionnaire stage on the basis that they did not give sufficient project detail (the evidence was that they were under NDAs for other projects on which they were working).

167. Tenders were taken forward with Claritas, Iconic and Dako Construction. Mr Blowey agreed that he did not have any evidence to suggest that WTP had done anything wrong in that regard. Neither he nor Mr Sullivan had any evidence to show that there was a fundamental flaw in the tender process, but he did not have enough evidence to conclude there was not. He recognised that WTP is a respected international Quantity Surveying firm.

168. Less than a week before tender returns were due, Dako dropped out as it had won business elsewhere. Mr Blowey found it difficult to put himself in the position of the Applicant in terms of what he would have done in that scenario, but on questioning conceded he probably would have let the exercise run its course to see what the returns were, it being so close to the deadline.

169. Mr Sullivan took the view that there was only one valid tender return. Mr Blowey took the view that there were no valid tender returns, because the tender required fixed-price contracts. Mr Sullivan suggests in his report that the Claritas return was rejected because it did not specify for the Raico system but for an alternative system. Mr Blowey agreed that the tender required specification for the Raico system and, if a contractor though there was an alternative product, that could *also* be put forward. The alternative suggested by Claritas was unsuitable because the additional distance the system would project out from the building frame, given CPH's listed status. He appeared to maintain Mr Sullivan's interpretation that that was the only reason Claritas was considered non-compliant and rejected by the Applicants.

170. The leaseholders also assert that Iconic knew or it must be inferred they came to know that it was the only remaining runner (our words) and may have exploited that situation to inflate its prices. Negotiating with one contractor was against RICS guidance. Negotiation with one contractor is not negotiation at all – it leaves a contractor in a position to exploit a landlord's lack of choice.

171. Again, Mr Blowey agreed that there was no evidence that had happened, but there was also no evidence that it had *not* happened. Both Mr Blowey and Mr Nutland accepted that an energetic contractor can put out feelers and be left with suspicions.

172. All the experts also recognised that there was, in 2022, what might be referred to as 'a perfect storm' in the market. The Ukraine war had just broken out. The Building Safety Act 2022 had just been shuffled up the Parliamentary timetable by a full year. The effects of Grenfell, both on the industry and on the national psyche, remained palpable (as they do to this day). Brexit and the Covid-19 pandemic remained significant factors in the availability of materials. The energy crisis had just begun (and of course was to deepen).

B. Observations

173. Were we to have been in a position to decide whether the Applicants had adequately tested the market, and that therefore that the Iconic contract sums proposed for either the full decant or phased decant options were within a reasonable range of those available on the open market, we would have rejected Mr Doran's experts' arguments and preferred the expert evidence of Mr Nutland. We would have come to the conclusion that the market was adequately tested and, in the conditions that prevailed between April – October 2022, the Iconic prices were within the range of reasonable prices available for the Proposed Works at CPH obtainable on the open market.

174. Had we have been in a position to decide the issue, we would have been satisfied that, although not ideal, the fact that only two tender returns were

received did not invalidate the tender, that those received were in consequence of an appropriate tender invitation, that the Applicant had appropriately sought to engage 19 players in the market, and that the Applicants had fully expected returns from the three identified contractors because of the preparations they had made. We would not have accepted Mr Blowey's approach to the evidence that, even being unable to identify that WTP had done anything wrong, because he had seen 'no evidence' that what was done was right either - that the tender was done properly, or that post-tender interviews were conducted appropriately, or that Iconic did not know that they were the only remaining contractor in negotiations - we could properly infer that the answers to those questions are in the negative. If the leaseholders wished to rely on a firm allegation, they needed to say what it was. It would be inappropriate for us as a Tribunal to draw negative inferences from hints or suspicions that are not evidenced or firmly alleged. The only proper inference to be drawn, were we able to draw it, is that the tender was conducted appropriately, in light of the evidence that is available. No one points to any fault on the part of WTP. WTP were faced with the market they were in at the particular date.

175. We note that the outcome of that process was that the Applicants obtained from Iconic a fixed price for the majority of the works that was still substantially below what had been Claritas's tender return, whether on the full or phased decant option. In those circumstances we observe that if there is anyone to be described as a 'highball bidder' it was Claritas, but again there is no evidence to demonstrate that Claritas's bid *was* in fact a highball bid, rather than a bid within the higher range of the reasonable range of estimates for this particular set of works on this unique site at the date of the returns and in the conditions the market was then operating.

176. We observe that the gloss put by Mr Sullivan on the rejection of the Claritas return is simply not borne out by the evidence. The WTP tender analysis is thorough and detailed. Claritas had refused to specify for a phased decant option. Their estimated price was more than £800,000 higher than Iconic's just for the full decant option. Claritas indicated that they weren't interested in negotiating if they were unlikely to get the job. These were all factors in deciding not to continue in negotiations with Claritas.

177. The evidence runs contrary to Iconic having put in a highball bid. We are told it remains keen to carry out the work, as the project was seen as an enviable addition to its portfolio, both because of the iconic site and because of the Almacantar's prestige (likely to reflect well on Iconic if the job is well done). It was in any event the lowest bidder. It remained actively in negotiations and fixed the majority of the contract price, which is something that falls at its own risk. There is no evidence that Iconic knew, or suspected, it was the only remaining runner, and no evidence that, even if it did know, it took advantage of that position. It's Rev C tender remained significantly lower than Claritas's.

178. We should say that, even had that not been our conclusion, we would not have accepted that either WTP's Q2 2019 estimate or Mr Sullivan's unreliable recalculation was the correct cost for the works. Regarding the latter, there are various problems with that calculation. Firstly, Mr Sullivan

uses unidentified in-house indices, such that no investigation of his base data can be made. He did not provide us with the base material on which it relied. Secondly, other parts of the base material on which he relied were the out-of-date figures from WTP in 2019 which he did not inflate to 2022. It was Mr Nutland's unchallenged evidence that that failure made a substantial difference **[ExB 325]**, with the effect that the higher range figure even on Mr Sullivan's recalculations (both of which were lower than WTP's own by significant sums) would in fact be £5,190,092.97 **[ExB 335].** As recounted in the background above, WTP's own updated estimate was £6,116,104.94 in September 2022. Thirdly, we would have agreed with Mr Nutland that, in giving no variance for the unique issues faced by constructors for the Proposed Scheme at CPH, any such benchmarking data as Mr Sullivan used is skewed, and any indices less reliable. Finally, we would have agreed that giving no weight at all to the tender returns received from Iconic and from Claritas further skews any such assessment. There is a more nuanced approach than 'all or nothing' to those returns.

179. It also does not follow that an estimate is anything other than just that. Without market testing, there is no way to see whether an estimate is in the ballpark (our words) of what the price will in fact be. We have no doubt that if Mr Sullivan's company were to give an estimate alike that of WTP, its own estimate would also be hedged around with the same user warnings regarding its reliability when it came to price, as is the only sensible approach by any reputable QS. The estimate is not the reasonable cost of the works, as the works have to be tendered in the marketplace. We would have placed no reliance on Mr Sullivan's alternative calculation.

180. We note that WTP carried out its own reconciliation between its pre-tender estimate and the tender submissions **[ExB 723]**. It adjusted its own 2019 pre-tender estimate to ensure a like-for-like comparison, which provided a revised figure of £6,116,104.94. Neither Mr Sullivan or Mr Blowey appears to have taken that revised inflated calculation into account in coming to the much lower figures.

181. WTP considered that the reasons for the difference between its revised figure and Iconic's bid included the unprecedented tender price inflation brought about by macro-economic factors, including Brexit, Covid-19, and the war in Ukraine, and logistical access issues presented by the peculiarities of the site. We agree with that assessment. Both the unique logistical challenge and the heritage status of CPH present additional risks to contractors. Add in the perfect storm of Brexit (and its impact on the labour market), Covid-19, the war in Ukraine, the start of the energy crisis, and the introduction of the 2022 Act, and the additional risks will have been uppermost in the mind of contractors. Given what was happening around cladding remediation, with the advent of the 2022 Act, a glut of work had just been made available. It was not a 'buyer's market'.

182. We consider that to be the explanation why so few contractors were interested in undertaking the work, when measuring the risk against reward. We agree that the contract was tendered during a 'perfect storm', such that the WTP estimate was not achievable when tested on the market. We recognise

that it was far from ideal that only two tenders were returned, that Claritas's was uncompliant, and they were (seemingly) uninterested in negotiating or providing a compliant bid. However, we accept that, in this volatile marketplace caused by the perfect storm of events, the only thing an additional bid was likely to do (and the experts agree, three would have been enough) was to increase the range of the tender returns (thus giving a wider spread). The receipt of only two returns did not invalidate the whole tender process, as appears to be suggested by Mr Sullivan and Mr Blowey.

183. We therefore conclude that the Iconic bid was within the range of reasonable contract prices at which the Proposed Scheme could have been let on 17 October 2022.

184. The range of reasonable prices at which any particular set of works can be let is only properly obtainable from market testing. That is why the section 20 process requires the landlord to obtain estimates from the market. What would have resulted, if we had concluded that the market had not been adequately tested, is that the landlord would have had to go back to market.

185. It may be that the Applicants take the view they have to go back to market now, a year and a half later, to obtain the updated market price for the works. There are of course risks to doing so. There is a cost to retendering. Indices used by the industry do not show that prices are lower or in a downturn (or indeed static) since 2022, and it must be recognised that it is to those indices that contractors will turn rather than to ONS data (as Mr Weeks suggested). There is the additional factor of further international conflicts to consider, with the resultant effect on availability of and lead times on materials. The 2022 Act remains in the forefront of the industry's mind, given the introduction of Part 4 of the 2022 Act. There remain issues arising from Brexit, particularly as regards available labour force.

186. Conversely, it is possible that the market has settled down since 2022 and is less risk-averse in respect of such projects, which Mr Blowey suggests is his experience. There is a risk involved in not retesting the market and rather simply accepting an updated price from Iconic. Going to market only ever tests the market conditions at a particular moment in time. If the conditions that prevailed at that time were extraordinary, that may well mean that something that was within the reasonable range of prices obtainable then is not reflective of the reasonable range of prices obtainable now.

187. It is for Applicants to balance those risks and make its election as to the approach it must now take. What they must make is a reasonable decision, from the range of reasonable options open to it.

(3) Part One conclusions

188. We conclude that if the works encompassed within the Proposed Scheme and the QLTA were to be carried out at CPH, they are works and services that fall within the Applicants' repairing covenants, for which in principle a service charge would be payable.

189. The only caveat is that the Applicants' decisions now, in order to finally undertake the works, must be within the range of reasonable decisions open to it. It is plain that the Applicants cannot avoid all risk.

PART TWO

(4) By whom is the service charge payable?

190. We next turn to the question in section 27A(3)(a) – by whom the service charge would be payable.

191. Ordinarily it would follow, in leases that are all in the same terms, that all of the leaseholders would be liable to pay the service charges to be incurred in the Proposed Scheme and QLTA. However, in this case, a number of the leaseholders rely on paragraph 8 of schedule 8 of the 2022 Act.

192. It is not disputed that CPH is a relevant building within the meaning of sections 117 and 118 of the 2022 Act.

193. Paragraph 8(1) of schedule 8 provides that no service charge is payable under a qualifying lease in respect of cladding remediation. At the hearing, the Applicants stated that they had not been provided with proof that the relevant leaseholders held qualifying leases. However, it was common ground that they had not called in leaseholder certificates in accordance with paragraph 13 of schedule 8, and therefore the presumption in paragraph 13(2) that the leaseholders hold qualifying leases has not been rebutted. Forsters had provided a list of qualifying leases for those it formerly represented on 12 December 2023 **[CB 162]**, showing that there are 10 qualifying leases in the building held amongst the leaseholders that Mr Negyal now represents. Mr Weeks' mother's flat also qualifies, as does that of Mr Doran. There is no evidence to demonstrate Ms Stedman does not qualify and the presumption therefore also applies to her (as we understand it her flat at CPH is the only flat she lets). We believe that leaves 13 flats of which the leases are non-qualifying.

194. We heard from Mr Ogilvie that none of his flats qualify any longer, which is a matter of great distress to him in the context of the reason he no longer occupies one of his four flats, and we understand that distress. While we have sympathy with Mr Ogilvie's position, unfortunately we cannot assist him in this matter by this part of our decision, as all we can do is make findings in accordance with the legal protections as they exist.

195. There appear to us to be a series of five questions on which we must make findings, in order to come to a conclusion. We address each of them in turn below.

(i) <u>Does CPH, as a building, fall within the scope of the 2022 Act?</u>

196. We must start with this question, as the Applicants have suggested in paragraph 185 of their skeleton argument that the proposition that the leaseholders should not have to pay for these works, even if they are in respect

of cladding that is unsafe within the meaning of paragraph 8 schedule 8, is "*miles from Parliament's intention, looking at the apparent purpose of the BSA 2022 and the context in which it was passed… with the result that the Applicants must then bear the costs which would otherwise have been borne by whoever holds a 'qualifying lease'*."

197. That argument is no further elaborated in the skeleton argument, and was not fleshed out orally, perhaps because of the necessary time constraints we imposed on what was a difficult hearing in order to ensure fairness between all the parties. Nevertheless, we had already noted that sections 120 and 122 of the 2022 Act were included in the Applicants' authorities bundle. We asked questions of Mr Allison in his closing in regards the relevant building question (CPH having been built in the mid-1960s, and the parties appearing to agree that there have been no 'qualifying works' to it in the last 30 years). We also asked questions about the potential 'floodgates' arguments in relation to older buildings.

198. It is therefore right and proper that we address the underlying 'intention' that the Applicants call in aid of their argument, however widely.

A. Argument

199. We asked Mr Allison to develop this argument in closing. We asked that he address the 'floodgates' argument in particular, on the basis that it seemed to us that there was a possibility that the words in paragraph 8 of schedule 8 might lead to apparently unintended consequences, if interpreted as he suggested. Buildings of significant age with poorly maintained 'cladding' might tip over to 'unsafe' condition and as such be caught by the 2022 Act, despite not being within the class of developments that it seemed to us had precipitated the 2022 Act (namely, those converted or constructed in the last 30 years in which there are 'relevant defects' because of poor industry practice over that period). We had in mind that an argument might run that cladding, although separately provided for in schedule 8, might nevertheless be required to meet the 'relevant defect' condition in order to engage paragraph 8 (as foreshadowed in the wording of sections 116 and 122), and that the intention was that it was *only* provided *that* condition was met that unsafe cladding remediation should never be paid for by qualifying leaseholders – therefore the intention of paragraph 8 being limited in scope to an effect similar to paragraph 1 of schedule 8, such that qualifying leaseholders need not go through the waterfall provisions of paragraphs 2 – 7. The result of Mr Allison's argument might be that paragraph 8 would seem to drive a coach and horses through landlord and tenant obligations as set out in the covenants of the leases between them, in circumstances where the landlord was neither the developer nor an associate of the developer and any such body was long gone in the annals of time such that the landlord had no prospect of recovery of those sums.

200. Mr Allison submitted that the wording of paragraph 8 of schedule 8 is not itself ambiguous – the words it uses should be given their ordinary and natural meaning. Parliament could have chosen to limit the scope of the paragraph by use of the other terminology in the 2022 Act, for example

'relevant defect', but did not do so. The 30-year retrospective longstop from 14 February 2022 simply does not apply. Although he acknowledged that paragraph 8 was substantially changed by House of Lords amendment just less than a month before Royal Assent and did nor precipitate a debate when returned to the Commons before its third reading, Mr Allison further contended that paragraph 8 is entirely consistent with the DLUHC press release in January 2022 ('the Press Release') in which Michael Gove "*guaranteed that no leaseholder living in their own flat will have to pay a penny for unsafe cladding*" **[R1 AB 162]**.

201. Mr Negyal supported those contentions, as did Mr Weeks. Mr Stedman also supported that interpretation, though we observe that Ms Stedman's pleaded case does not take this point.

202. Mr Hutchings KC pointed out that the Press Release is not, of course, a ministerial statement. He provided us with the *Hansard* reference (Volume 706 Monday 10 January 2022 commencing 3.34pm).

203. In closing, we asked Mr Hutchings whether we might conclude that the intended operation of paragraph 8 was to preserve the contractual rights between parties to a lease for so long as any relevant cladding was in disrepair but nevertheless remained safe, but tipped over at the point at which it became unsafe with the outcome that landlords would at that point (and no sooner) become liable for the sums involved to remediate the consequent condition. The landlord was effectively on a countdown at the end of which time would have run out to repair within the covenants of the lease, and must take the burden themself of the consequence of the building being allowed to deteriorate so far. Was that not in accord with the purpose of the whole of the 2022 Act – to signal that landlords and developers must prioritise, and be responsible for, safety above all?

204. Mr Hutchings KC invited us to consider that the effect of such an interpretation might lead to landlords carrying out repairs before they were due or warranted, so as to avoid the condition of the building falling off the cliff-edge. The consequence to leaseholders would be that they would end up paying for repairs before they were needed or justified. That would result in absurdity.

B. Decision

(i) The legal position on statutory interpretation

205. The parties were agreed that *R (The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin) was the starting point in statutory construction. The parties were also agreed that *R (on the application of O (a minor, by her litigation fried AO)) et ors v Secretary of State for the Home Department* [2022] UKSC 3 sets out at paragraphs 29 – 32 the weight to be given to external aids to construction, and the primacy to be given to the words of a statute themselves.

206. In the *Good Law Project*, giving the judgment of the court, Lord Justice Leggatt set out the following passages regarding statutory interpretation:

> ***Statutory interpretation***
>
> *33. Save for one point, there is no dispute about the principles of statutory interpretation. The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation. It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined.*
>
> *34. It is also generally reasonable to assume that Parliament intended to observe what* Bennion on Statutory Interpretation *(7th Edn, 2017) in section 27.1 calls the "principle against doubtful penalisation". This is the principle that a person should not be subjected to a penalty – particularly a criminal penalty – except on the basis of clear law. As noted earlier, incurring referendum expenses in excess of the prescribed limit and, in the case of a permitted participant, failing to report referendum expenses correctly are potentially criminal offences. In these circumstances counsel for the Electoral Commission and Vote Leave both submitted that the definition of "referendum expenses" should be construed strictly and any ambiguity or doubt about its meaning resolved in favour of the narrower interpretation so as to avoid doubtful penalisation.*
>
> *35. In response, counsel for the claimant cited* R (Junttan Oy) v Bristol Magistrates' Court *[2003] UKHL 55; [2003] ICR 1475, para 84, where Lord Steyn described this principle of statutory interpretation as one of last resort. Other authorities confirm, however, that that description of the principle understates its continued vitality: see e.g.* R v Dowds *[2012] EWCA Crim 281; [2012] 1 WLR 2576, paras 37-38. We think the position was fairly stated by Sales J in* Bogdanic v Secretary of State for the Home Department *[2014] EWHC 2872 (QB), para 48, when he said:*
>
> > *"The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight."*

207. In *Re O (a Minor)*, Lord Hodge set out the judgment with whom the other Supreme Court Lord- and Ladyships agreed. At paragraphs 29 – 32, he set out as follows:

28. Having regard to the way in which both parties presented their cases, it is opportune to say something about the process of statutory interpretation.

29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG *[1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:*

> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."*

*(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd *[2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in* Spath Holme*, 397:*

> *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the*

Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in Spath Holme*, 396, in an important passage stated:*

> *"The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."*

208. Those authorities might be seen to have their origins, in terms of the legal principles, set out in *Pepper v Hart* [1993] AC 593, which held that where legislation is ambiguous, obscure or might lead to absurdity *Hansard* might be relied on by a court in interpreting legislation, on the condition that the statements relied on in *Hansard* are, themselves, clear.

> *(ii) Are the words of paragraph 8 of schedule 8 clear and unambiguous, and would it be absurd if the result of giving them their clear and unambiguous effect would mean relevant buildings outside the relevant 30-year period are protected?*

209. Part 5 is a self-contained chapter of the 2022 Act, and was the first to be brought into force on 28 June 2022. In section 116, the scope of section 117 – 125 and Schedule 8 are set out as follows:

> 116 Remediation of certain defects
> (1) Sections 117 to 125 and Schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings.
> (2) In those sections –
> (a) Sections 117 to 121 define 'relevant building', 'qualifying lease', 'the qualifying time', 'relevant defect' and 'associate';
> (b) Section 122 and Schedule 8 contain protections for tenants in respect of costs connected with relevant defects, and impose liabilities on certain landlords…

210. Sections 117 and 118 sets out the meaning and requirements of a 'relevant building', and section 119 sets out the meaning of 'qualifying lease'

and 'qualifying time'. No issue is taken by any of the parties that CPH meets the meaning and requirements of sections 117 and 118.

211. Section 120 sets out the meaning of 'relevant defect' "*for the purposes of sections 122 to 125 and schedule 8*", as follows:

> (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 works were completed in the relevant period;
> (c) works undertaken after the end of the relevant period to remedy a relevant defect by virtue of this paragraph (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 a building or part of it;
>
> 'conversion' means the conversion of the building for use (wholly or partly) for residential purposes;
> 'relevant landlord or management company' means 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 a landlord or as a tenant.

212. Section 122 is in the following terms:

> 122 Remediation costs under qualifying leases etc
> Schedule 8 –

(a) provides that certain service charge amounts relating to relevant defects in relevant buildings are not payable, and
(b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it).

213. At first blush then, it might appear that schedule 8 is only concerned with relevant defects in relevant buildings.

214. Turning then to schedule 8, it contains a series of protections that apply to qualifying leases. Some of the sections build on each other, and are plainly in respect of relevant defects in relevant buildings. For example, paragraphs 3 – 7 identify what practitioners have been terming a 'waterfall' of liability that, where relevant measures are required to remediate relevant defects, the parties work through to identify who pays and in what amounts.

215. Notably however, in a departure from what the overall introductions in 116(1) and 122 might lead one initially to believe, the 'waterfall' is not limited in all its paragraphs by the terms established by sections 117 – 121 of the 2022 Act. For example, in paragraph 2 of schedule 8, although the terminology 'relevant defect' and 'relevant building' remain, there is no reference to a 'qualifying lease'. Starkly, where a relevant landlord is responsible for, or associated with a person responsible for, a relevant defect in a relevant building, no service charge is payable. There is no question of having to make use of the remainder of the sections. No leaseholder pays, regardless of their residential or portfolio status.

216. Paragraph 8, with which we are concerned, makes no use of the term 'relevant defect'. It is stark in its language. While the proviso is made that the paragraph applies only to 'qualifying leases' (and in order to have a qualifying lease, that lease must be in respect of a 'relevant building' within the meaning of section 117 and 118), the simple wording at paragraph 8(1) is that "no service charge is payable… for cladding remediation". Cladding remediation is then defined in 8(2), and again simply does not use the terminology 'relevant defect' with which the waterfall in schedule 8 is concerned.

217. Consistently with that use of different language, paragraph 10(2) of schedule 8, (which in paragraph 10(1) is stated to supplement paragraph 8, and which might be described as a quasi-interpretive rather than a stand-alone provision) 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 service charge payable under the lease, or
>
> (ii) are to be met from the 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).
…

218. 'A thing' must have been intentionally used in paragraph 10(2) in order to encompass not just defined 'relevant measures' applicable to other parts of the waterfall - otherwise it would have said 'relevant measures' - but also to acknowledge and encompass 'a thing' of a different nature outside of that definition. Cladding remediation would fall squarely within its wide ambit.

219. Paragraph 11 of schedule 8 then protects leaseholders with non-qualifying lessees from any increased service charge.

220. We are satisfied that the ordinary and clear meaning to be given to the words of paragraph 8 is that cladding remediation is to be treated as a distinct protection outside of the waterfall, not contingent on there being a 'relevant defect' and therefore not incorporating the requirement that the cladding in question needs to have been put on the building within the relevant period - the 30 years preceding 14 February 2022 - as section 120 is not engaged. The use of the words 'a thing' in paragraph 10(2) is entirely consistent with there being another 'thing' than a relevant defect. "*They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained*".

221. We therefore need not go to *Hansard*, though had we have had to do so, we note that Michael Gove said in his ministerial statement, at paragraph 16 of the written transcript at 3.34pm, that "*I can confirm to the House today that no leaseholder living in a Building above 11 meters will ever face any costs for fixing dangerous cladding and, working with Members of both Houses, we will pursue statutory protection for leaseholders and nothing will be off the table. As part of that, we will introduce immediate amendments to the Building Safety Bill to extend the right of leaseholders to challenge those who cause defects in premises for up to 30 years retrospectively*."

222. As may be perceived, that statement poses some difficulty. The first half of it is consistent with the clear and unambiguous wording of paragraph 8 of schedule 8. The second half, at first blush, appears to elide the concept of 'never' with '30 years', and 'dangerous cladding' with 'defects', and therefore is capable of creating ambiguity.

223. Consistently with the second part of that statement, the Building Safety Bill was amended to include what was to become sections 134 and 135 in the 2022 Act. Material to the 30-year promise, section 135 increased the limitation period in section 1 of the Defective Premises Act 1972 (properties unfit for habitation) to 30 years retrospectively, and 15 years prospectively, from claims accruing (before or on/after 28 June 2022 respectively).

224. As Mr Allison identified, as originally drafted, paragraph 8 of schedule 8 in its current form did not exist in the Building Safety Bill. It was in its passage through the House of Lords that it was inserted (in fact, if one looks at Lords amendment 184, the entirety of schedule 8 replaced a precursor that had something else in mind entirely). It may be that therefore the equation of 'never' and '30 years', and 'dangerous cladding' and 'defect' had been intentional until that point. Nevertheless, with the amendment passed back to the House of Commons, that amendment was accepted without challenge. It might therefore be thought that the addition was to ensure clarity where up to that point Mr Gove's statement was either unclear or not reflected in the Bill. The amendment is reflective of the speeches made by others in the House on 10 January 2022, calling for unlimited liability in respect of cladding.

225. What is the effect of the ordinary and natural meaning of the words used in paragraph 8? Primarily, that no qualifying leaseholder will ever have to pay for unsafe cladding remediation. That is neither unclear or ambiguous, and does not lead to absurdity. It accords with the schema of the 2022 Act.

226. We are satisfied, in light of the above analysis, that CPH as a building is within the provisions of paragraph 8 of schedule 8. However, our task does not stop there. We must go on to consider what the meaning of 'cladding remediation' and 'unsafe' are, to determine whether the qualifying leaseholders in CPH take the benefit of paragraph 8.

(ii) <u>Does CPH have 'cladding' within the scope of the 2022 Act?</u>

A. Evidence

227. We heard first heard from Mr Evans. Two Building Safety Fund ('BSF') applications had been submitted for CPH but refused (twice). There was no reason given in the email rejecting the applications. He told us that all that is known for certain from that email is that the BSF accepted that CPH is a tall building. That is a matter of some regret, as the guidance given on .gov.uk suggests that a landlord is to tell its leaseholders why an application is refused, and a landlord cannot be in a position to do so unless it has a response with some detail. That in turn fosters additional distrust, as it has done in this case.

228. We next heard from Mr Wood, who is the Architect on the Applicants' team for the Proposed Scheme (as he had been for the Consented Scheme), working for MICA. In his witness statement at paragraph 14 he expressed the view that the façade at CPH is not properly called cladding, on the basis that: "*The professional team does not describe the project as a cladding project… 'cladding' is better defined as a skin or layer applied to the outer surface of the external wall of a building to provide a degree of thermal and weather resistance and improve its appearance. At CPH, however, the Proposed Scheme incorporates an external walling system, which comprises glazing and intermediate spandrel panels that combine to form the external wall itself. Thermal and weather resistance, fire stopping and visual appearance are brought together as a unified system*" **[CB 226]**.

229. Pausing there for a moment, it is clear from that passage of his witness statement that Mr Wood was in context talking about the Proposed Scheme, not the current façade.

230. In oral evidence, Mr Wood agreed that **[SK024]**, **[SK025]** and **[Sk026]** accurately represented his understanding of the existing make-up of the façade, and that the red-hatched area was what was intended to be removed. In the course of questioning, Mr Allison suggested to Mr Wood that a lay-person looking through the bundle would see lots of references to the façade as 'cladding', and that in reality the reason for that is that there is no definitive answer, even amongst construction specialists, to what cladding in fact is. Mr Wood's response was: "*Pre-Grenfell, cladding was used as a euphemism for anything that is stuck on a building. Post Grenfell, it is a term that is much more emotive. I was in a meeting with Jonathan Evans where we filled out the form for the Building Safety Fund. As we were filling out the form it became clear that there was very strict guidance on what* [the BSF] *consider to be cladding. They are talking about a building with any ACM*."

231. Mr Allison suggested that if the current system does not present a fire safety risk, then it would not fall to be considered under the BSF guidance, but under a different scheme, which Mr Wood accepted was possibly true – "*that's the question*". When asked what he thought the current system was, Mr Wood stated "*it's glass*". He accepted that if that was correct, it was not combustible, and agreed that in those circumstances the BSF did not apply and there was no definition of cladding to be drawn from its guidance.

232. Mr Allison took Mr Wood to the drawings. Mr Wood agreed that located on **[SK024]** could be seen a large, hatched rectangle that represented a block-work or concrete wall. He agreed that an external face could be seen – the external opaque glass spandrel panel. He agreed that if one looked at the build-up of the façade that was an external panel to keep the weather out, backed with 1-inch of polystyrene insulation. He agreed that there was then a gap followed by a concrete wall, and that the glass was attached by what would be called a simple ladder frame (albeit that some of the horizontal members were taking some attachment at points).

233. Mr Allison suggested that therefore this was similar to other cladding projects – it was a non-structural element of the building keeping the weather out with insulation behind it and blockwork or concrete. Mr Wood disagreed – he considered that he was looking at an early version of a curtain walling system in timber rather than metal, because there was no internal leaf. Mr Allison again identified the inner skin, cavity, and spandrel, and suggested to Mr Wood that at the very least that was cladding restrained by an inner skin. Mr Wood was adamant that there should be an entire 'inner leaf' – a timber or metal frame onto which 'cladding' was fixed. This was an early curtain walling system. The horizontal timbers were fixed into the concrete walls and acting as a beam and supporting the windows behind.

234. Mr Allison again took Mr Wood through the component parts. Mr Wood accepted that the spandrel zones supported nothing but themselves – they were not structural. He accepted, when put to him by Mr Allison, that it

was not a prerequisite that cladding has to provide a degree of thermal performance, and that glass or aluminium would not on its own provide such performance but could nevertheless be used in a cladding system.

235. Mr Wood accepted, when Mrs Bowers asked him his view, that a curtain walling system could itself be a cladding system.

236. Mr Negyal, by reference to the **[SkelA ¶172]** (citing the Oxford English Dictionary definition of cladding), and the description in paragraph 53 of the letter from BCLP dated 23 December 2021 **[CB 275]** in which the façade was described as a "*glazed envelope*", asked Mr Wood how he could maintain that was not therefore an 'external skin' of CPH 'providing shelter from the elements'. Mr Wood agreed that it was true that the façade is non-load bearing *per se*, but said that the timber framing is supporting itself, and other parts of the external wall. While it was not supporting the building, it was supporting itself. It was a secondary structure, bolted on and supporting the weather protection. It was fixed to the concrete frame and therefore became support for the curtain wall - the façade is non-load bearing, but is "*supporting the external wall of the building*". Mr Negyal put to Mr Wood that if the façade was taken away, the building would not fall down. Mr Wood agreed.

237. We next heard from the structural experts. Both Dr Harris and Mr Gray agreed, in evidence, that there was no universal definition of a 'cladding system' or indeed 'cladding' in the construction industry.

238. Dr Harris was invited by Mr Hutchings KC to identify whether the timber members, which may or may not be retained in the Proposed Scheme, were an active part of the façade? Dr Harris replied that they would not be part of the weathering building envelope in the Proposed Scheme, in effect they would be no different to a reveal board. It would in any event be more convenient were the timbers to be removed in the course of constructing the Proposed Scheme, on grounds that if they were it would be easier to insert the fire stopping into the new system. He explained that he was not talking about timber behind the wall elements, he was talking about the external timbers, that he had originally thought could support the plant-on system. He and Mr Gray were nevertheless uncertain about whether regulation 7 of the Building Regulations 2010 (as amended) would apply to them, as it depended how Building Control (now the Building Safety Regulator) interpreted the façade of the building if the timber was retained inactive in the system. There was contradictory advice on the issue.

239. Mr Allison took Dr Harris to **[SK024]** and proposed that the red-hatched area was that to be removed and replaced with the Proposed Scheme, with which Dr Harris agreed. Dr Harris agreed that the timber mullion in the spandrel zone came down behind the windows at a gap of about 45mm in certain vertical elevations, and that there were angle brackets fixed to the floor slabs. The brackets would not necessarily need to be removed for the Proposed Works. The retention or otherwise of the timbers needed to be decided by the contractor who carried out the works and the others in the Applicants' team on the regulatory and logistical side of things.

240. Mr Allison went through the construction of the façade with Dr Harris. Dr Harris agreed that for some flats the façade included blockwork, and others cast concrete – generally described as 'dwarf walls'. He also agreed that his working theory was that those had been built after the frame had been placed, as the glazing had been inserted into the framing first. The dwarf walls were performing a structural function, whether intentionally or not, because they were holding the weight of the glazed façade through having been constructed in that way. His hunch was that it was intentional. **[SK024]** was inaccurate in that it did not show that there were two floor slabs that had been inserted at the horizontal member. There would be a gap between them to allow differential movement – one frame above the frame below. He agreed that **[SK024]** showed in cross section that the construction was made up of (outside to in) 6mm annealed glass, a 12.7mm polystyrene insulation insert, and a gap of at least 30mm before the blockwork or dwarf wall. He did not agree that what that showed was two 'leaves' as one would see in ACM cladding, although he accepted that you could argue that there was an outer 'layer' and an inner 'layer', and that it was similar in that regard, though the performance or function from that system was different. If we were looking at a rainscreen it would be hanging on a rail system. A rail system was analogous to the timber frame, in that it was fixed to the structural wall behind for the benefit of winds loads. Whilst it kept the water out, and he did not disagree that this could be called an 'external skin', there were lots of ways in which one could put it. Different systems worked in different ways. There had been lots of discussion between façade experts as to what 'cladding' and 'façade' mean. The terms have been used interchangeably and that has not mattered in the past. Now that everyone had to decide what cladding was, Dr Harris had looked at a lots of government guidance and statements, including the PAS9980 and the MHCLG Building Safety Fund Guidance Notes. The guidance in those statements often contradicted each other, and (internally) itself. The MHCLG Guidance seemed to indicate there literally had to be twin systems. The PAS9980 was unclear as it was inconsistent and there was conflicting guidance.

241. Mr Hutchings KC suggested to Dr Harris that Dr Harris's Expert Report described the various elements of the facade as a 'curtain walling system'. He asked Dr Harris is what was being replaced was a curtain walling system or something else? Dr Harris stated that the system currently on CPH is a timber-framed glazing system, as close to a curtain wall system as it could be given its age. It was not separate systems, but one *composite* system. The existing facade is a complete system in its own right. He understood the system as an entirely self-contained structure and weathering system. Mr Hutchings KC suggested to him that there was no primary and secondary structure. Dr Harris described a main structural frame, to which secondary things could be added. His evidence was that the dwarf wall could be secondary – that was indeed probable as the glazing system was sitting on it and it was carrying the glazing's weight. The frame was sitting on the slab which was lifting it up. The dwarf wall could be a secondary structure, and the glazing system self-contained, save for that it had to be hung on the building somehow.

B. Argument

242. In closing for Ms Stedman, Mr Stedman belatedly adopted the argument regarding cladding remediation put forward by her co-lessees. Of course, Ms Stedman's primary case runs contrary to the notion that there is any disrepair in the facade. However, that does not inhibit the legal protection applying to Ms Stedman as a matter of law if she meets the required conditions, and we note from the Applicants' Skeleton Argument that they were on notice that Mr Stedman would adopt the argument on his daughter's behalf **[SkelA para 162]**.

243. Mr Negyal, on his own behalf and that of all of the leaseholders he represented, submitted that the ordinary and natural meaning of the words 'cladding remediation' should be given full effect. There is no universal definition, and Mr Wood and Dr Harris had confirmed that a curtain wall system could be cladding. The rejection emails from the BSF had not been disclosed to the leaseholders, and in any event the BSF qualifications were more restrictive than schedule 8 of the 2022 Act. They simply weren't equivalent, and should not be construed so as to be the same. BCLP's own letter of 23 December 2021 at paragraph 53 **[CB 275]** described the cladding at CPH as a 'glazed envelope', which matched the Applicants' definition from the Oxford Dictionary of Construction, Surveying and Civil Engineering relied on in paragraph 172 of their Skeleton Argument. Dr Harris had also described the cladding as a "weathering building envelope". The 2006 Arup Report **[Ev 55]** and Malcolm Hollis 2011 Report **[Ev 344 and Ev 364]** refer to the "cladding system" at CPH. The Proposed Scheme was, on any measure, cladding remediation.

244. Mr Allison submitted that Mr Wood had conceded that a curtain walling system could be a cladding system (despite his desire to distinguish the term on the basis of the necessity of an 'inner leaf'), conceded that there was no necessary precondition that any such cladding improve the thermal quality of the facade, and accepted that there was no definition of cladding used universally within the construction industry. Mr Allison submitted that Dr Harris had distinguished in his evidence between 'rainscreen cladding' and other cladding systems, but accepted that **[SK024]** showed a classic cross section makeup of outer layer – insulation – gap – wall/blockwork that such other cladding systems comprise in the spandrel zone at CPH. Dr Harris had also confirmed that in the past people in the construction industry had been less keen to identify a distinction.

245. In **[SkelD ¶31]** Mr Allison drew attention to a number of references in the bundle to the use of the term 'cladding', even by the Applicants' own witnesses. Of particular note were the 2006 Arup Report in which the facade was referred to as 'cladding' and a 'cladding system' **[ExB 489-490] and [EvB 55]**. The contract sum analysis document at **[EXB 611]**, a document to which Mr Sullivan adds his commentary but appears to have its origin with WT Partnership, describes at 3.03 a provision to "*Remove existing cladding including to upstands*".

246. Mr Allison's primary contention was that the entire facade is cladding within the meaning of paragraph 8. His secondary position was that at the

very least the spandrel zones were cladding. The fixed opaque glazed panels formed the outer wall, and part of their function was to keep out the weather. They were part of the entire system. They were fixed to a horizontal timber frame, had a thin layer of insulation, then an air gap before the inner skin – the dwarf wall being the structure of the building. If we were looking at an ACM panel in place of the spandrel, we simply wouldn't be having the debate. He invited us to dismiss an overly-technical approach in favour of 'stand back and look'. The entire system met the definitions that the Applicants had set out in their Skeleton Argument. Reliance on PAS 9980 and the BSF was incorrect – those definitions were looking purely at 'fire risk', and paragraph 8 was not so confined. Those documents did not tell us what Parliament intended in a different context – unsafe cladding unrelated to fire risk.

247. In closing, Mr Hutchings KC focussed on the terminology of paragraph 8. 'Cladding remediation' meant 'removal or replacement of any part of a cladding system' that 'forms the outer wall of an external wall system'. The cladding system must form the outer wall of an external wall system – that requires two identifiable systems. We should look at **[SK024]** and identify what is there and see whether what is there fits the ordinary and grammatical meaning of those words.

248. In CPH, the system in place *is* the external wall system – that is the system to be removed and replaced – and it is not good enough to point to one part of the wall. There has to be a system that is the outer layer of another system. To identify a separate part of that external wall as a 'cladding system' would strain the natural meaning of the words where what the facade is, is an integral whole as close to a curtain walling system as anything else; one composite system. Both Mr Wood and Dr Harris were of the view that this is one composite structure with no cladding system, in which the glazing *is* the external wall. Mr Hutchings KC referred us to the words Dr Harris used in his expert report at **[ExB 37 and 50]** - this is a "*hybrid timber-framed glazing system with screw-fixed aluminium clamp-strip to the outside which retains the glazing*"; "[t]*he existing glazing system was not a standard design and represents a half-way house between traditional timber windows and modern metal-framed curtain walling systems"*. Mr Hutchings KC disputed that use of ACM in the system would be relevant. Even if it was used at the spandrel zones, it would not render the system or those parts of it cladding. The role of the spandrel panel was no more nor less than an external panel of the curtain walling system. The make-up of the spandrel areas could not render them a separate cladding system, they remained just a component of an external wall. Mr Hutchings KC referred us to **[ExB 375 – 379]** depicting the facade modules and ladder frames. At **[ExB 378]** it showed that the glazing was fixed to the timber frame and that what resulted was an integral whole, including the spandrel panels. They could not be separated out from the framing section. We had to be able to distinguish a separate part if we were to find that there was a separate part to which the service charge exemption applies. Mr Allison's argument ignored the requirement for there to be an 'external wall system'. Neither expert had referred to any part of the existing system as 'cladding'. Dr Harris had referred to 'over-cladding' in the context of over-cladding the existing timber framing system and sticking something else on.

249. Mr Hutchings KC further submitted that there was no ambiguity in the wording of paragraph 8. To interpret it as Mr Allison argued would disincentivise landlords – if they had any concern that they would be able to recover sums through the service charge, they would undertake repair in overzealous pursuit of their repair obligations. Mr Hutchings reminded us that the Press Release relied on by Mr Allison was not a ministerial statement. *Hansard* would not help us on the point. Taking a 'stand back and look' approach, the Applicants were not seeking to be overly technical. Cladding was meant to denote something akin to an outer panel or coating applied to a wall, rather than the wall itself – a skin stuck on, a cladding system plus an underlying external wall. There is no second system at CPH. There is only an external wall. The danger of Mr Allison's argument was that it sought to reverse engineer something to find a separate part that met the definition of 'cladding' because the external wall system is unsafe.

250. Mr Hutchings KC submitted that we could derive some assistance from the documents surrounding the BSF and PAS 9980. They were not irrelevant despite only dealing with fire risk. Those definitions were very close in time to the 2022 Act receiving royal assent. The decision to be made was of huge consequence. Was it really Parliament's intention that the provisions of paragraph 8 of schedule 8 be applied to a glazing system? It was much more likely that Parliament's intention was that paragraph 8 apply to unsafe ACM cladding, whether identified now or in the future.

C. Decision

(a) Does CPH have 'cladding'? The general question

251. 'Cladding' is not defined in the Act. Neither Dr Harris nor Mr Gray was prepared to be drawn to a conclusion, in written or oral evidence, in respect of whether the external wall system at CPH comprises (wholly or partly) cladding to which the 2022 Act applies, for understandable reasons – that is a decision for us. Dr Harris considered that the 2022 Act had "s*tirred things up again*", and that such guidance as there is (for example, PAS 9980) is itself conflicting.

252. Dr Harris did however make various key points in his evidence that touch on the question of whether CPH might have 'cladding'. Firstly, as set out above, although Dr Harris sought to distinguish between rainscreen cladding and other cladding systems, he quite properly told us that what **[SK024]** depicted was what might be termed classic cladding 'make-up' (our word). He also confirmed that you could argue that, in parts there was an inner 'layer' and an outer 'layer'. There were parts (notably where the spandrels are) composes of internal and external timbers, and the dwarf walls could be described as a secondary structure.

253. We have no hesitation in accepting that there is no universally accepted definition of cladding in the construction industry, as the professionals told us. We consider that is perfectly appropriate - as buildings differ enormously one to the next, there can be no 'one size fits all' definition. Taking CPH for example, it is agreed by Dr Harris and Mr Gray, and indeed by Mr Wood, that

its design was experimental (and perhaps even an early pre-curser to a modern curtain walling system). We are also prepared to accept the proposition made by all parties, absent identifiable comparables, that CPH is unique in its construction. Richard Seifert, the architect, was renowned for just that (for which he remains revered and reviled in equal measure).

254. That explains the difficulty Mr Wood found himself in in trying to distinguish what is on CPH from a 'definition', as the definition he has adopted is a narrow one that appears in PAS 9980 for the purposes of assessment of fire safety, rather than a 'universal norm'. It is of note that, prior to making the BSF applications, he was content to make not just one but two applications on the very basis that CPH comprised cladding. We will come further to Mr Wood's evidence in the section denoted 'the specific question' below.

255. Insofar as there is a starting point for a definition, the Oxford Dictionary of Construction, Surveying and Civil Engineering's definition of cladding ('the ODC'), on which the Applicants rely, is that cladding is "*the non-load-bearing external envelope or skin of a building that provides shelter from the elements. It is designed to carry its own weight plus the loads imposed on it by snow, wind and during maintenance. It is most commonly used in conjunction with a structural framework.*"

256. In their Skeleton Argument, the Applicants contended that cladding "*refers to the outer skin, applied to a high-rise building, to increase thermal efficiency or improve aesthetics, while not adversely affecting weather resistance. The cladding element is not load-bearing, which means it is not structurally integral to the building itself*". That is said to derive from the RICS Advice and Guidance Article dated 21 June 2022 contained in the Applicants' authorities bundle.

257. The RICS Guidance appears at **[AAB 516]**. The remainder of the quotation that follows is:

"*Cladding can be either retrofitted to an existing building or incorporated into the design of a new building.*

What are the different types of cladding?
There are many different types of cladding systems available, ranging from traditional looking brickwork or rendered systems to more modern looking metallic rainscreen systems or curtain walls made from glass. Cladding systems can be complicated constructions with voids, breather membranes, cavity barriers etc but the two main cladding materials are the thermal insulation and front facade panel…

Facade panels can be made from a wide variety of materials including wood, metal, brick or vinyl, and are often made from composite materials. Two types of composite which have been highlighted in the news are ACM and HPL."

258. The opening paragraph relied on is therefore much narrower than the wider description of cladding systems in the following paragraphs. It should not be looked at in isolation. Mr Wood accepted that cladding does not in fact have to offer increased thermal efficiency, and there are numerous cladding materials that do no such thing.

259. We are of the view, given the evidence that we have both heard and seen, including the drawings **[SK024] [SK025]** and **[SK026],** and our site visit, that the façade at CPH meets those definitions, both the broader ODC and the narrower RICS when read in light of its following paragraphs. There is an underlying structural framework – the concrete building. Onto that framework have been fixed the timber ladders, in preassembled blocks one storey x 3 metres into which the glazing has been inserted. The facade has then been built up, by inserting a wall or blockwork that has taken some of the weight of the fenestration (whether by accident or design). After that blockwork is a gap, an insulation panel, and spandrel inserts. Onto the glazing have been screwed aluminium clamp strips, which have been over-sealed. The ladder frame system is tied back to the concrete frame with metal ties. That makes up the building 'envelope' at the east and west elevations. The function served by the whole is to keep the elements out. The design is to transfer wind load to the concrete structure, not to support that concrete structure. The dwarf walls do not provide structural support to the building as a whole, though may provide some support to the envelope. The metal ties tying back the timber ladders to the concrete are also not providing structural support, but do help to transfer wind-load. That design, it seems to us, is apt to meet the description of cladding.

260. That is no doubt why, at a date before the term was so imbued with additional meaning because of the tragedy at Grenfell, Malcolm Hollis gave this description of CPH: "*The upper podium residential block is also concrete framed but its envelope is a curtain wall type cladding…*" **[EvB 350]**. It is not the concept of cladding that has changed, but a reluctance to use the term that has.

261. We consider that the Applicants thought the same, when twice applying to the BSF. The decision of the BSF does not change the nature of the thing that is on the building. To the extent that anything is clear about the rejection, it is clear that the only cladding to which the BSF applies is 'unsafe ACM' as referred to in the footnotes to Annex A: Technical Guidance for applicants for building safety fund via PAS 9980:2022 **[AAB 488 – 515]** ('the Technical Guidance'). 'Unsafe ACM' is not a term used by the 2022 Act, which one might expect to have been used if that is what the 2022 Act meant by 'unsafe cladding', in particular given the tests carried out in 2017 resulting in an identified list.

262. We are therefore satisfied that the external façades on each of the East and West facing elevations are 'cladding' in the generic sense.

263. However, that is not a full answer to the question, as paragraph 8 of schedule 8 gives its own definition of cladding. We therefore move to that question next.

(b) *Is the cladding CPH has within the scope of the 2022 Act ? The specific question*

264. We start with the words of the 2022 Act. We must first look at whether the cladding at CPH 'forms the outer wall of an external wall system'. There is no reference in the wording of the 2022 to a 'skin' 'layer' or 'leaf'. Neither does the 2022 Act state in terms, as argued for by the Applicants, that there must be two systems. The wording of paragraph 8 does not proscribe the outer wall and inner wall being formed by one external wall system that is of itself cladding. No interpretation paragraph is provided to describe what might be 'inner', 'outer' or 'wall'. To that extent it is therefore unclear.

265. No further definition is provided in the 2022 Act. The parties are agreed that *Hansard* also does not assist us on this point.

266. We turn next to the Explanatory Notes accompanying the 2022 Act. Note 1747 *et seq* provide as follows:

"*1747. Paragraph 8 provides for protections for qualifying leaseholders from the costs associated with remediating unsafe cladding by providing that no service charge is payable under a qualifying lease in respect of cladding remediation.*

1748. Sub-paragraph (2) defines "cladding remediation". Cladding remediation means the removal or replacement of unsafe cladding from the outer part of an external wall."

267. That note appears to support the above analysis of paragraph 8(2,) that the cladding can be the outer part of the external wall system *itself*, and is not limited to a separate additional wall, skin or layer fixed on the external wall system. The cladding might form *part of* the external wall system. If it had to be a separate wall, skin or layer, that might be more prone to be described as "removal or replacement of unsafe cladding from the external *face* of an external wall".

268. The Applicants invite us to consider various guidance provided by the BSF and PAS 9980. They say that, firstly, the Technical Guidance makes clear that:

'*The building must have cladding, using the definition of cladding set out in the PAS 9980:2022 guidance. (If you have buildings that have external walls that comprise only masonry or concrete construction, or in which combustible materials are limited to insulation within the cavity of double skin masonry walls you should consider whether you need to procure an FRAEW given that these systems will usually present an acceptable risk in terms of life safety)*" **[AAB 490]**.

269. We note that does not indicate that the construction types in brackets are not cladding; rather that they are potentially not *unsafe* cladding.

270. The Applicants then refer to PAS 9980 and refer to the definition of cladding and accompanying note as follows:

"*3.1.4 system of one or more components that are attached to, and might form part of the weatherproof covering of, the exterior of a building*

NOTE: Such systems are normally attached to the primary structure of a building to form non-structural, non-loadbearing external surfaces and can comprise a range of facing materials/cladding panels, including metal composite panels or non-loadbearing masonry, along with insulating materials, rendered insulation systems…and insulated core sandwich panels, which are attached to the substrate. Combinations of, for example, cladding panels and insulation form cladding systems, and such systems might include cavities, which can be ventilated or non-ventilated. The cladding system also encompasses the supporting rails and bracketry, as applicable to attach the cladding to the building and cavity barriers where applicable. Systems that constitute the entire thickness of the external wall, by definition, cease to be cladding systems and are the external wall, e.g. curtain walling" **[AAB 482]**.

271. We note the use of the word 'normally' in that section. That must allow of there being cladding to which the PAS9980 would apply even if it were abnormal. We note the unique construction of CPH.

272. Moreover, straightforward as that definition and note appear initially to be, we note that on page 2 of the document the following are stated to be in scope of the PAS 9980:

"*Wall build-ups within the scope of this PAS include, but are not limited to:*

1) external walls incorporating a rainscreen cladding system, with or without insulation within any associated cavity;
2) external thermal insulation composite systems (ETICS), particularly those comprising rendered insulation;
3) composite panels, including insulated core ("sandwich") panels;
4) glazed façades with infill/spandrel panels;
5) substrates or backing walls, including concrete blockwork, brick, steel framing systems (SFSs), timber framing and structural insulated panels (SIPs); and
6) curtain walling.

It also covers attachments to the external walls of buildings" **[AAB 480]**.

And later at part 4:

"*COMMENTARY ON CLAUSE 4*

…

e) No specific definition of an external wall was previously included in building regulations or relevant editions of ADB, although a definition was introduced when the Building Regulations 2010 were amended in 2018. The effect of the amendment is that all components from the wallpaper or other

finish on the face of the wall internally within the building (but not including the wallpaper or other finish) to the facing of the external wall on the outside of the building are now to be considered part of the external wall construction for the purpose of the Building Regulations. However, such a definition was not applied in any UK guidance before this time, and as a result it is not uncommon to encounter combustible materials within the external wall construction, in particular the inner leaf/backing wall. Given that this PAS applies to existing buildings pre-dating the 2018 amendment to the Building Regulations 2010, use of this PAS assumes that remediation of these inner leaf/backing walls is, in the majority of cases, unlikely to be risk-proportionate" **[AAB 486]**.

273. It would therefore appear that the composite glazed façade at CPH is within scope of PAS 9980 as it is a glazed façade with infill/spandrel panels, and/or has concrete blockwork backing walls with timber framing. All of the words after "*However, such a definition…*" make it plain that there are constructions in which materials may be part of the external wall that may nevertheless fall within a remedial category, even if such remediation is unlikely to be proportionate "*in the majority*" of those cases (again, leaving scope for minority outliers in which it *will* be proportionate). That, and the words "[i]*t also covers attachments to the external walls of buildings'*, suggesting that it might cover the external walls themselves *as well as* an attachment to them, rather undermine the earlier certainty that a system comprising an external system cannot by definition be cladding. There is no consistent definition in PAS 9980, and there is uncertainty created by having to interpret what is cladding by reference to an absence rather than a presence. Dr Harris's description of the PAS 9980 and guidance as inconsistent perhaps relates to those paragraphs.

274. Finally, included in the Applicants' authorities bundle but not mentioned in their Skeleton Argument are the Financial Assistance (Aluminium Composite Material (ACM) Remediation Fund) (Private Residential Properties over 18m) Regulations (Northern Ireland) 2021 **[AAB 524 – 528]**. It is not known in what respect the Applicants wished to draw this material to our attention. However, we note with interest that these are regulations applying to what might be identified as a similar fund to the BSF in Northern Ireland ('the NIBSF'). The regulations make clear that the NIBSF applies only to ACM cladding. The NIBSF excludes from its scope unsafe non-ACM cladding systems (regulation 5f), by which it recognises that cladding systems that are unsafe for a reason other than ACM exist. Cladding system is defined as follows:

"*the components that are attached to the primary structure of a building to form a non-structural external surface including the weather-exposed outer layer or screen, fillers, insulation, membranes, brackets, cavity barriers, flashing, fixing, gaskets and sealants*" **[AAB 526]**.

275. That is a definition that is clearer than the Technical Guidance, PAS 9980, and RICS Guidance. It is not, however, the wording of the 2022 Act, which has inserted no such definition. It is itself also limited to NIBSF funding

applications, which are, again, concerned only with fire and the additional risk of its spread ACM cladding poses to the safety of residents.

276. As this Tribunal said in *Waite v Kedai Limited* LON/00AY.HYI/2022 0005 and 0016 (9 August 2023) at paragraph 66 (Judge Timothy Powell and Mrs Helen Bowers MRICS), albeit in respect of a different regime within part 5 (remediation orders):

Section 1(1) of the BSA states that the Act "contains provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings." The focus of the BSA, therefore, is on building safety and the improvement of standards.

277. As observed there (paragraph 69), while other regimes and materials might inform the Tribunal's deliberations, we are not bound or prescribed by them. "*We are dealing with a statutory remedy in simple terms, arising from certain limited criteria being satisfied*." That observation accords with the principles of statutory interpretation and the value to be put on external materials as set out in *R (O (A Minor))*.

278. Paragraph 8(2) of schedule 8 is widely drafted. It does not use terminology such as 'second system' or 'separate skin' or 'leaf', which it could have done had that been Parliament's intention. It certainly does not narrow the definition so as to apply only to ACM, and again had that been Parliament's intention one would have expected specific reference to a particular type or types of cladding. The words used are capable of supporting a wide interpretation, to include part *of* an external wall system as well as a separate part affixed *on* an external wall, and the Explanatory Notes support that view. Hansard does not assist.

279. The PAS 9980 also does not assist us in further defining the question of what cladding is. It is specific technical guidance in respect of fire risk appraisals of external walls and cladding of flats. Any definition of cladding within it is confined to that purpose. In any event it is itself unclear. We note that applications to the BSF are exclusively for the purpose of remediating because of the risk to the health and safety of the occupiers of the building by the spread of fire arising from a 'relevant defect'. Such a defect falls within the scope of other parts of the 2022 Act. The BSF is concerned with a very particular cladding arrangement that causes a fire safety risk. Paragraph 8 is drafted more widely than to apply only to a danger arising from a fire safety risk, and is not limited to a relevant defect. Paragraph 8 does not confine itself to any particular risk, contrary to the more confined 'relevant defects' in section 120.

280. We understand why Mr Wood has formed the view he has, based on interpolating from the questions he had to answer and the rejection of the applications (without reasons) to the BSF, but the view that Mr Wood has formed in light of that experience does not conclude the issue.

281. We return to the meaning of the words of the statute itself, and it is our task and ours alone to seek to identify what those words mean and to give

them effect. We are satisfied that the words 'forms the outer wall of an external wall system' are capable of describing the composite system identified by the experts as comprising the East and West "early precursor to a curtain wall" systems on CPH. The design was, we are told by the experts, defective from the beginning as water is allowed into hidden parts and cannot escape, creating interstitial condensation. For condensation to be 'interstitial', by definition to it has be in an intervening space or segment, between an outer and inner construction. Dr Harris identified that in paragraph 3.6.2 of his Expert Report **[ExB 51]**. That accords with the RICS description of "*complicated constructions with voids, breather membranes, cavity barriers etc"*. That also accords with the difficulties that Dr Harris has experienced in being able to identify the degree of rot and damage caused across the facades as a whole, and the reason why the extent of rot and damage, and consequences to the structural integrity of the facade thereof, could not be identified without opening up the entirety of the facade on each elevation from the *exterior*, any interior opening up (insofar as it is possible) not allowing for sufficient observation of the elements.

282. We are satisfied that finding accords with the general words of paragraph 8(2), and the schema of the 2022 Act. Where the system is a composite one, it seems to us that the outer part of the external wall system must extend to all parts of that system. We do not agree with Mr Hutchings KC that such a finding would strain the meaning of paragraph 8. We are satisfied that it is capable of that construction. Nor do we agree that landlords carrying out such works as they are obliged to do under a lease to prevent a cladding system falling from a state of disrepair into a state of unsafety, in order to avoid the bite of paragraph 8, is an unintended consequence of that construction. Landlords being driven to address problems in a timely manner so that their residents' safety is procured (and maintained) seems to us to be the principal driver of the 2022 Act. Given that landlords will still have to consult over major works, justifying their requirement in order to satisfy their leaseholders or the Tribunal that they have acted reasonably in incurring costs in respect of them, we do not foresee that there will be a sudden rush of landlords "undertaking unnecessary works" or carrying them out too early.

283. If, however, we are wrong in that, in the alternative we are satisfied that in the composite system at CPH, and in accordance with Dr Harris's own evidence that the spandrel zones are what could be described as a 'classic cladding make-up', then at least each spandrel zone is cladding in part of the building, that forms the outer part of an external wall system, within the meaning of the 2022 Act. The dwarf walls were built up *in situ* after the glazing panels had already been placed in their timber frames. The evidence was that the external wall system was tied into the dwarf walls and in Dr Harris' opinion the dwarf walls are holding some of the weight of the external wall system and in his opinion that was intentional. The construction then has a gap, an insulation panel, and then a glass spandrel on a timber frame in front of it. That is an external part of the external wall system. The timber frames and windows behind are the internal part. That is the part of the wall system that, in its costings for the Proposed Scheme in November 2021, WTP specified to "Remove existing cladding, including to upstands" at an estimated cost of £150,000 for 1,088 square metres **[ExB 1234]**. It is the area that

Claritas estimated £141,328 for undertaking **[ExB 1674]**, and Iconic has estimated at £99,008 **[ExB 1766]**. It is the area that the Applicants are now unsure what they will do about, given the uncertainty of the application of regulation 7 of the Building Regulations 2010 if combustible timber is retained behind the new façade, and therefore unsure whether the scope of work and cost of it will change. Read together with the MICA Scope of Work drawings on **[EvB 1416]**, that clearly relates to the spandrel zones and concrete/blockwork behind.

(iii) Is the cladding that is within the scope of the 2022 Act "unsafe"?

A. Evidence

284. Both Dr Harris and Mr Gray agreed in their expert reports that the facade at CPH had been defective from the point of construction because there are gaps between the pressure plates, and screw holes through them, allowing water to get in (through weather or otherwise), but no drainage channels incorporated into the facade to allow any water that got in to drain or ventilate back out again. Consequently, for a period of now nearly 60 years water trapped in the system has formed interstitial condensation, causing timber within the system to decay and potentially rot. The extent of the decay and rot is not known as the facades have not been opened-up for 100% inspection (which would be the only way of saying for certain how far the problem has extended). It is agreed by both experts that the façade is well beyond its design and service lives, which would have been in the region of 30 – 40 years. The series of agreed matters was helpfully set out in their Statement of Agreed Facts and Disputed Issues **[ExB 228]**.

285. In oral evidence, Dr Harris agreed that he had serious concerns about the façade generally, as evinced in his Expert Report at 1.10, 1.11 and 1.12 **[ExB 25]**. Those passages set out as follows:

> "*1.10 The primary façades to the west- and east-facing elevations of the residential floors of Centre Point House make use of an unusual bespoke hybrid timber-framed glazing system with aluminium clamp strips externally. The timber elements of this system have suffered from internal decay and the metal fixings which secure this system to the building primary structure have been found to be suffering from various degrees of corrosion. Various frame-to-frame joints have also been found to be loose or in the process of separating. As such there are considerable grounds for doubt as to the structural integrity of the glazed facades.*
>
> *1.11 These issues are sufficiently widespread as to convince me that anything short of wholesale replacement or over-glazing of the entirety of both primary elevations would simply act to retain an unacceptable element of risk in those parts of the existing timber-framed glazing that are retained as a functional part of the glazing system.*

1.12 I have therefore advised that in my professional opinion the existing façade can no longer be relied upon to have sufficient structural integrity to retain the glazing or even to remain on the building in high winds. I also do not consider there to be a cost-effective and practical approach to repairing the glazing system in a piecemeal manner and as such have advised that the glazing system must be replaced in its entirety."

286. Mr Allison suggested to Dr Harris that his earlier reports indicated two further concerns regarding the ways in which the glazing might not be retained: (1) the glazing seal material being degraded, and (2) the screws into the timbers not being properly fixed. Dr Harris agreed; it was both in parts. The screws were fixing the clamp strips into timber that they now knew to be decaying and therefore might not hold. If they failed, the glass was effectively 'glued' with an unknown glazing compound of unidentified residual effectiveness. If both failed, it would be sufficient for the glass to be pulled out of the façade. He clarified that when he was talking about the glazing compound, it was that applied in 2010 to seal the façade from water, rather than the adhesion behind the glass he was referring to.

287. Dr Harris made it clear that in windy weather, he was particularly concerned that the glazing would in effect be 'sucked out' from the façade due to the forces operating around the building. There was always some point on the building where the wind would be pushing or pulling, and of course some areas – especially the corners of the building – were more at risk. The spandrels were ordinary annealed glass and, whether a pane fell to the ground or even just broke *in situ*, would break into large and sharp pieces with potential dreadful consequences, whether for the leaseholders or members of the public using the public square below. Dr Harris also agreed with Mr Allison that in high winds the façade as a whole might fail; an entire part of the system might be dislodged. Dr Harris identified that the façade appeared to have been pre-assembled in 1 storey x 3 metre units. There was potential for one of those units to fail, whether wholly or partially. If it did, the failure of the part would increase the load across other parts of the façade, which would lead to a progressive failure. If one went, others could follow soon after. Mr Allison asked whether it would require abnormally strong winds. Dr Harris indicated that the experts could not be satisfied what the as-designed wind load capacity of the façade was. Even supposing it was 50mph, he could not be satisfied what the load-bearing capacity of the façade in its current state is. He'd be very worried if anyone was expecting the façade to stand up to its as-designed wind load capacity. He could not know the residual strength of every part of the façade. In the recent storms, he spent his nights sleeplessly half-expecting a 'phone call to alert him' of something along the above lines. Some areas were potentially a high risk, especially the corners. That had probably been the case since at least 2009 when the Rambol WhitbyBird report was done. His main concern was not the internal timbers – they were not too bad, despite the interstitial condensation problems – but the external ones. By 2018 the fixings were more concerning. Rambol WhitbyBird did not seem to have looked at those fixings.

288. Dr Harris agreed with Mr Allison that it was only luck that, six and a half years after the 2017 Report, so far only one window had fallen out, although he took some comfort from the large opening windows having finally been screwed down or secured since the 2019 incident. If there was the type of storm event that occurs once in every 150 years or so, he'd be extremely nervous, but he knew it would be unlikely to happen imminently. He was grateful that the current application was finally underway. He agreed he was concerned that the façade would not make it into next winter – indeed he was, as he had said, worried even about the recent types of storm that London experienced in January. He is on the cusp, he told us, of saying to the Applicants that enough is enough, the entire building has to be scaffolded. This could not go on for another 2 years. He did not have confidence the façade would last a further year.

289. In re-examination, Mr Hutchings KC endeavoured to take Dr Harris through the individual elements within the red-hatched area that were to be removed. Dr Harris was specifically asked to identify whether those individual parts were ones that were unsafe in his view. Dr Harris 's answers in response were generally framed in terms of parts 'having to go' to make room for the Proposed Scheme. He did not, on each and every item put to him, say that it was or was not unsafe, despite our reminder to him to do so. He confirmed in the course of the itemised lists put to him that the pressure plates were not unsafe in themselves, and nor was the one-inch polystyrene, which would be replaced with firestopping. The glass in the fixed window frames was not unsafe, it was to be removed because there was to be new glass in front.

290. His evidence was that the spandrels would come out. He did not comment in re-examination on whether they were or were not unsafe. He did say that the timber mullions on the spandrels would come out because they were easier to cut out, not specifically because they were unsafe. The timber nosings would be cut back to make more space for the new system.

B. Argument

291. Mr Negyal described the offence the leaseholders took, for the reasons he gave us and which we wholly understand, to the inference they drew from the Applicants' Skeleton Argument that leaseholders were wrongly trying to take advantage of the Grenfell tragedy. We should say that we doubt that the Applicants intended to imply anything personal in their arguments, and we think it is probably a feature of the total breakdown in the relationship between the Applicants and leaseholders that all interactions feel more personal than professional on both sides. I observe (from personal experience, and, occasionally, practice) that lawyers rarely intend a legal argument to be a personal attack, and on those rare occasions they do their language is often in the superlative and any such 'attack' readily identifiable as such. I thank Mr Negyal for the reminder, good for all of us, that language matters, and that even when faced with difficult legal challenges that we must resolve objectively, one never knows where that objective principle might engage with someone's subjective experience.

292. Mr Negyal submitted that the legislation was drafted widely and inclusively precisely to avoid danger to leaseholders from unsafe cladding, plain and simple - to protect leaseholders from corporate bodies who are not safety minded. The cladding on CPH is unsafe in two ways: the glazing, which on the Applicants' own case is so unsafe it is now falling from the building; and the rotting 1 storey x 3m panels, about both of which Dr Harris expressed his continuing significant concerns to us.

293. Mr Allison submitted that Dr Harris had been clear that the existing facade is unsafe and poses an ongoing threat to the leaseholders and public using the square, and has been warning of the urgent need for works on the grounds of safety for some time. The reason that it is unsafe is that it was inherently defective. There was no question of avoiding that result by regular maintenance. The only way to maintain the inherently defective facade was to replace it. Mr Hutchings KC's 'bit by bit' examination of Dr Harris was predicated on an argument that ran along the lines of 'it doesn't matter if the whole is unsafe, if the individual bits aren't intrinsically so'. That could not be the correct approach. It is the system, or part of the system, that needs to be unsafe. Nor could reliance on a definition from the BSF or PAS 9980 dictate what 'unsafe' means for paragraph 8. Those definitions were for a fire risk assessment and nothing else. Those definitions could not assist us with what Parliament intended by paragraph 8 in a different context.

294. In closing, Mr Hutchings KC submitted that in order to be caught within the provision, the thing or part to be removed and/or replaced within the cladding system had to be, itself, unsafe. No individual piece or part of the façade is unsafe.

C. Decision

295. 'Unsafe' is not defined in the 2022 Act. It must mean something more than simply out of repair. It is sufficiently wide a term to encompass a range of threats to the safety of the building or to its residents or nearby members of the public. That is a plain and straightforward interpretation of the language used and no external sources are needed for it. It is consistent with the wide drafting of the 2022 Act and its stated purposes.

296. The definition of 'unsafe' for the purposes of the BSF **[AAB 500]** found in the Technical Guidance makes clear that definition applies only to ACM cladding, and is concerned with combustibility. Paragraph 8 of schedule 8 is not confined to any particular kind of cladding, or danger. Parliament could have confined the paragraph but did not. It must be supposed to have made a deliberate choice in that regard. Paragraph 8 is therefore to be widely construed.

297. It requires a feat of mental gymnastics, in an application brought because the Applicants are concerned that the facade is unsafe and needs wholesale replacement, to permit them then to lean on the piece-by-piece interpretation and conclude that because no isolated element of the façade is unsafe, paragraph 8 of schedule 8 does not apply, so the leaseholders must pay. As the Applicants' witnesses, Mr Waite and Mr Evans, stated in evidence,

the primary motivation behind the section 27A(3) application is they are concerned about the safety of the façade and the dangers it poses to the leaseholders and to the public.

298. To use Mr Hutchings KC's words when he sought to persuade us that the facade on CPH is not a cladding system, "this is a complete system in its own right". It is, as the experts said, a composite system. Dr Harris's clear evidence was that the entire facade is unsafe, indeed he has sleepless nights over it. Mr Evans told us that he also has sleepless nights over it.

299. We are satisfied that it would be inappropriate to break-out all of the individual elements comprised in the cladding system (whether, as we have found, the whole of the facade, or the smaller parts at the spandrel zones) and conclude that because element by isolated element they are not unsafe, the cladding system is not unsafe. The use of the term 'unsafe cladding system' in paragraph 8 must be apt to describe not the individual elements, but the system they make up. Its construction is as important an element as the individual parts. It would not matter if a timber frame is not itself unsafe, if it is constructed without (for example) screws or mullions, so that it would blow over with one heave from the big bad wolf. In the same way, it does not matter that ACM cladding is not unsafe until it meets with a source of ignition. In both cases, the reason the particular cladding system is unsafe is because of the operation of some other force on its parts. In this case, that other force is water leading to the decay and rot in the façade and/or the pressure of the wind that could cause the parts of the system to dislodge and fall.

300. On the basis of the very clear evidence from Dr Harris as to the serious degradation of the condition of the façade including the serious risk to the health and safety of the residents and the public if more of the windows detached because of the detachment of the clamp strip and failure of screws (or indeed one of the annealed (i.e. not safety) glass spandrel panels was to be sucked out by wind force) due to degradation in the timbers or failure of external seals due to the water being let and kept in, we are satisfied that the cladding system at CPH is unsafe.

(iv) If the Proposed Scheme is (wholly or partly) remediation of unsafe cladding within the meaning of the 2022 Act, what is the effect on whether the service charges are payable by leaseholders with Qualifying Leases?

301. In light of the above analysis, we are satisfied that the provisions of paragraph 8 of schedule 8 of the 2022 Act apply to the identified qualifying leaseholders and to CPH, that CPH has cladding, that the cladding system falls within the ambit of paragraph 8(2)(a) of the Act whether as a system entire or for those composite parts of the system that make up identifiable clad 'parts', and that that system is unsafe.

302. It follows that no service charge is payable by those with Qualifying Leases in respect of the Proposed Scheme. We do not consider that it matters which conclusion is the correct alternative (in terms of whether the whole of the cladding at CPH is within paragraph 8(2), or whether only the external identified separate clad parts of the cladding system – i.e. the spandrel zones

do). The agreed expert evidence before us is that the only practical way to remediate is to 'over-clad' the entire façade on each elevation. There is no smaller divisible 'part' of the scheme put forward by the Applicant that might relate only to clad areas if those areas are less than the whole, or a lesser scheme than the Proposed Scheme. To fix those clad parts, the whole façade needs to be replaced. 'Remediation' is a term as wide as it is possible to be - no doubt a deliberate choice by Parliament to ensure that the provision was outcome- rather than remedy-focussed - and in our view includes replacement whether by over-cladding or otherwise. Therefore, the Proposed Scheme would fall within the definition of 'cladding remediation' for which the leaseholders of qualifying flats should not pay by virtue of paragraph 8 of the Act.

303. In the alternative in relation to the alternative finding that only parts of the façade are a 'cladding system' within the terms of paragraph 8, paragraph 10(2) of schedule 8 of the Act (said to supplement paragraph 8 but being more interpretative than additional) states as follows:

> 10
> (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 service charge payable under the lease, or
> (ii) are to be met from a relevant reserve fund…

304. The Proposed Scheme is either completely in pursuit of cladding remediation and therefore is 'that thing', or is partly in pursuit of cladding remediation. Is that other part therefore 'anything else'?

305. That term is as wide as possible. No assistance can be derived from either the Explanatory Notes of Hansard in that regard, but what else could 'anything else' refer to but parts of the self-same works that encompass parts that are 'the thing' and parts that are 'another thing'?

306. If it is partly in pursuit of cladding remediation, and any other part of the Proposed Scheme is not in pursuit cladding remediation but is in pursuit of façade remediation of the same structure of which there is no identifiable divisible set of works that can be done to achieve remediation of the cladding, we consider that other part is something apt to be described as 'anything else'. In our view, 'the thing' and the 'other thing' must have a nexus and be in the pursuit of an outcome that relates to the cladding.

307. That might be to add a gloss to the words used by the statute. We do so intentionally. A wider interpretation, that would nevertheless be supportable on the natural meaning of the words used, would potentially lead to absurdity in the case of unrelated works. If the purpose of paragraph 8 is to ensure that leaseholders do not pay for the remediation of unsafe cladding, the provision

of the protection in relation to 'anything else' must be to ensure that the protection applies to the whole of the works that will achieve remediation of the unsafe cladding, whether or not they also form part of a more extensive scheme of works as part of which the remediation of the cladding will be achieved. It is not to protect leaseholders from costs that are not related. For example, no-one would say that a leaseholder should not pay for garden re-walling works simply because the same contractors were carrying out cladding remediation to a building as part of the same contract.

308. In this case there is no other element of the Proposed Scheme that is not in pursuit of the remediation of the façade that has been left to get into an unsafe state. The nexus in this case is the façade remediation, which comprises cladding remediation. The outcome will be a remediated façade with no unsafe cladding (and which is put into a condition to meet the Applicants' obligations under the lease by being overclad).

309. Therefore, it is our view that whether as a consequence of our primary finding, or (if we are wrong in that) our secondary finding, nothing falls to be paid by the flats 5, 11, 15, 17, 18, 19, 22, 28, 29, 31, 33, 34 and 35.

(v) Is the QLTA 'cladding remediation' within paragraph 8, and/or is it captured by paragraph 10(2) of schedule 8 of the 2022 Act?

310. After the hearing, and while drafting this decision, we identified an additional issue regarding the QLTA that had not been raised by any of the Respondents. No party at the hearing, or in their pleadings, suggested that the QLTA fell within paragraph 8 or paragraph 10(2).

311. On 14 February 2024, I wrote to the parties regarding an issue that we identified in the course of preparing this decision. I identified that issue as follows:

If the Tribunal were to find that (i) there is cladding at CPH, and (ii) the whole or part of that cladding is within the meaning of paragraph 8 of Schedule 8 of the Building Safety Act 2022, such that no service charge is payable for its remediation, it is the Tribunal's preliminary view that paragraph 10(2)(a) of schedule 8 would apply to the Proposed Scheme and would also apply to the QLTA, on the basis that the QLTA is 'and anything else' within the meaning of that paragraph. No Respondent has made this argument, and therefore the Applicant has not had the opportunity to address us on it. The Tribunal therefore invites the Applicant's arguments…"

312. On 7 March 2024, the Applicants replied. In that reply, the Applicants conceded that, if the Tribunal determined that the whole of the façade at CPH was unsafe cladding requiring remediation within the meaning of paragraph 8 of schedule 8, either the term 'remediation' within paragraph 8 was capable of encompassing the QLTA, or, if 'remediation' was to be narrowly construed, the supplemental description of that "thing and anything else" was. Either construction would result in no costs being payable for the QLTA. We agree and so find.

313. The Applicants took the view that if only part of the system is cladding, the position is different. The contents of the reply were as follows:

> *(1) The costs under the QLTA relate to the management of a larger project, only part of which includes "cladding remediation";*
> *(2) Those costs are not "service charge… in respect of cladding remediation" - they are costs in respect of the* [Proposed] *Works, which includes cladding remediation and other works in respect of which service charge is recoverable. On the first construction set out above, paragraph 8 of Schedule 8 to the BSA 2022 would not preclude recovery.*
> *(3) Turning then to paragraph 10(2), that paragraph could in principle prevent recovery of costs incurred under the QLTA which could be said to relate to the "cladding remediation" and thus give rise to relevant costs in connection with that "cladding remediation", on the basis that those costs are "in respect of that thing or anything else" (see the second construction above). However, quite how the Tribunal could make such a finding in this case, based on the evidence before it, is difficult to see (not least because that was not the Respondents' case) and so there is no evidence that the part of the costs under the QLTA relate to the "cladding remediation" element of the Works, if the Tribunal were to make such a finding. The QLTA is for a project manager of the Works which, in these circumstances, would involve works other than "cladding remediation".*
> *(4) There is no injustice caused by choosing not to find that paragraph 10(2) prevents recovery of a particular part of the QLTA costs, since it would be open to the Respondents to mount a reasonableness challenge, in so far as they could prove the costs under the QLTA relate to cladding remediation.*

314. We invited submissions from the Respondents on those last paragraphs only if they considered it desirable, and they were duly filed by Mr Allison for Mr Doran, Mr Negyal for the leaseholders he represents, and Mr Weeks for his mother.

315. In short, we disagree with the Applicants' interpretation. Firstly, we have not be provided with the QLTA proposed contract, but the Proposed Scheme is entirely in pursuit of the installation of the Raico cladding system. The Applicants' argument before us was predicated on there being no cladding at CPH at all. There is no separate and divisible part of either the Proposed Scheme or QLTA that the Applicant puts forward that could be *only* in respect of cladding remediation at the spandrel zones. It is a single system designed to remediate the entirety of the façade. It is perhaps surprising that the Applicants took an all-or-nothing approach, without acknowledging the material from its own clients specifying for cladding removal **[ExB 1234]** and MICA's drawings showing cladding to upstands **[EvB 1416]**, but that was the Applicants' litigation choice to make.

316. While, if CPH is only clad in part, there would therefore be a 'larger project' because the Proposed Scheme is the (now accepted) only remedial option, as we have found above, any part of the 'larger project' is nevertheless caught by paragraph 10(2) because of the nexus between the works and the impossibility of breaking them out into a smaller remedial scheme. Any works over-and-above cladding remediation might well be works 'other than' cladding remediation, but would be on that basis "anything else" because they would be the self-same scheme that pursues an outcome that relates to the remediation of cladding.

317. The same reasoning applies to the QLTA. It would be artificial to suggest that, because the Proposed Scheme will be located over some parts that are clad and others that are not, there is any way in which the QLTA for the delivery of that scheme can be broken out into smaller parcels. The Applicants do not identify how that might be done. Even if it they could, as Mr Allison rightly says, paragraph 10(2) is inclusive not exclusive – it seeks to extend the protections of paragraph 8 to "anything else" related to it, with which it has a nexus (as we have found). It does not say 'the thing and nothing else', as it would need to do to bear the Applicants' interpretation. To read it in those terms would be the direct opposite of the words on the page.

318. It seems to us that paragraph 10(2)(a) - "in respect of that thing *and anything else*"- is also therefore apt to describe the QLTA in respect of which the Applicants also seek a determination under section 27A(3) of the 1985 Act. The Proposed Scheme is the cause of the need for the project manager whose position is the subject of the QLTA – without the Proposed Scheme, no project manager would be necessary. There is no divisible set of works that can be ascribed to only the clad areas – the entire system is the 'thing' that remediates the cladding (it is not simply a question of saying 'the scope of works allows this much for it to be removed', as that takes no account of the end goal – the remediation). We have not seen the proposed contract for the QLTA, but it seems to us that there would be no divisible part of it for similar reasons.

(5) Part Two Conclusion

319. As a result of the above analysis of paragraphs 8 and 10(2) of schedule 8, for the purposes of section 27A(3)(a), the leaseholders of only those flats that do not have qualifying leases would be liable for payment of the costs of the Proposed Scheme and the QLTA, those being Flats 1, 2, 7, 8, 9, 10, 12, 14, 16, 23, 24, 26, and 30.

PART THREE

(6) The Set-Off issue

A. The preliminary issue

320. We raised with the parties at the outset of the hearing, and in light of the Applicants' election of the 'amount' point under section 27A(3)(c), our discomfort with deciding a question of set-off when we:

(a) weren't able to decide a sum that would be payable in the future against which to set anything off,
(b) could not know the full scope, in terms even of an end date, of any such set-off that existed or might subsist until the works have been undertaken,
(c) could not be satisfied that any such set off that might exist or subsist until the works have been completed would encompass any additional set off of a different nature that might arise, such that the resolution of the issue now might be artificial, and
(d) could not therefore be in any position to decide the quantum of that sum.

321. We wondered whether we might consider what we identified as the liability question. Mr Allison reminded us that our jurisdiction derived from section 27A(3). Insofar as set-off fell to be considered under that question, it must be a question of the sum to be paid. It would be unsafe to proceed into the liability question when we were not considering the sum to be paid. We had no jurisdiction to approach section 27A(3) in that way. He referred us to the decision of Chamber President Judge Siobhan McGrath, Regional Judge Tim Powell and Mrs Bowers (LON/00BJ/LSC/2018/0286 18 December 2019) in which the panel identified the following approach:

30. The purpose of an application under section 27A is to ask the Tribunal to decide the amount of costs payable by a tenant. Although an application can be made in relation to a service charge fund payable by a group of leaseholders, it must be possible at the end of the application to be able to ascertain how much each leaseholder will pay by dividing the total amount of the service charge costs by each tenant's individual service charge percentage.

31. For applications under section 27A(3) it is possible for a Tribunal to make a partial or conditional determination. For example, if the Tribunal is satisfied that the specified works fall under the lease clauses and that it would be reasonable to incur the costs, they can decide that service charges would be payable but that the actual cost payable might be assessed again for reasonableness when the works are carried out or the services are provided.

322. At the outset of the hearing, Mr Hutchings KC sought to persuade us that section 27A(3)(e) of the 1985 Act, when it referred to *'manner'* in which any sum in section 27A(3)(c) 'would be payable', related not just to quantum but also to the liability question in a set off argument. *Aviva Investors Ground Rent GP Ltd & Anor v Williams & Ors* [2023] UKSC 6 (SC) supported that interpretation in paragraph 12, in which Lord Briggs (giving the judgment with which their Lordships agreed) stated: "*…section 27A provides for a generously worded jurisdiction of the FtT to determine whether a service charge is payable (section 27A(1)) or would be payable if specified costs were incurred (section 27A(3)). Although there is detail about payability in terms of payer, payee, amount, timing and payment method… nothing is said expressly about the principles the FTT is to apply in determining payability*" **[DAB 57].**

323. We expressed discomfort with Mr Hutchings KC's interpretation, as it seemed to us section 27A(3)(e) was concerned with a method of payment of an identified sum, which is properly a principle of quantum rather than liability. One has to obtain the sum before one looks at method of payment. Set-off would operate to reduce the sum, before the question of payment arose. We indicated that, even were we to be persuaded by his argument and embark on the 'liability' question in relation to any such set-off, we were of the view that the questions of liability and quantum were more properly dealt with together. We were concerned that to decide the question of liability absent an ascertainable sum on either side would be to decide half a question in something of a vacuum, potentially setting an appeal running, in circumstances where it might be that if the liability and quantum were heard together success on the liability point did not necessarily lead to an assessment of the quantum in more than nominal damages, if there have been no contributions to the reserves and Mr Allison's quantum argument is unsuccessful.

324. Nevertheless, at the outset of the hearing, we agreed that we would need to make a fully reasoned decision on the jurisdiction question, and it would therefore be appropriate that we leave open the possibility that Mr Hutchings KC might be able to persuade us in closing that that the 'liability only' approach remained open to us.

325. We therefore heard considerable evidence and argument on the set-off 'liability' points, that we do not set out here for the reasons given below.

B. Argument

326. By the end of the hearing, the Applicants' position was that they no longer wished us to decide any element of the set-off arguments.

327. Nevertheless, Mr Negyal and Mr Weeks were keen that we should decide the set-off issue even if only on a liability basis. We therefore invited Mr Hutchings KC to make the argument he had earlier indicated, that he said supported the fact that we had jurisdiction to make such a decision.

328. The Applicants' argument as we understood it is that a set off is, properly construed, 'payment' by reducing a debt or damages on one party's part by 'paying it off' by a co-extensive or lesser sum of debt or damages on the second party's part. 'Manner' is apt to describe the process by which a thing is done or happens. There is nothing unnatural or absurd in construing section 27A(3)(e) to include set off as a manner of payment. Relying on paragraph 12 of Aviva, a determination on the question of the manner of payment is within our jurisdiction to make in this application, even absent a sum, as it is not the sum that is important but the means by which, when it is ascertained, it will be paid.

C. Decision

329. Lord Briggs goes further in *Aviva*. It should be noted that what the Supreme Court was seized with was consideration of the effect of 27A(6) of the

1985 Act. However, in the passage below, Lord Briggs looked at the overarching jurisdiction in relation to prospective service charges:

14. Generally speaking, the making of a demand upon a tenant for payment of a service charge in a particular year will have required the landlord first to have made a number of discretionary management decisions. They will include what works to carry out or services to perform, with whom to contract for their provision and at what price, and how to apportion the aggregate costs among the tenants benefited by the works or services. To some extent the answers to those questions may be prescribed in the relevant leases, for example by way of a covenant by the landlord to provide a list of specified services, or by a fixed apportionment regime. But even the most rigid and detailed contractual regime is likely to leave important decisions to the discretion of the landlord, such as whether merely to repair or wholly to replace a defective roof over the building, with major consequences in terms of that year's service charge.

…

16. On an application under section 27A(3) in relation to a prospective service charge the FtT might well be invited to exercise its jurisdiction before the landlord made the relevant discretionary management decisions, but the jurisdiction would not thereby be enlarged from that described above merely because of the timing. … the FtT would still be limited to ruling upon the contractual and statutory legitimacy of the landlord's proposal, coupled with a Braganza *rationality review if necessary, which is really an aspect of the testing of contractual legitimacy. And the landlord would have to furnish the FtT with a sufficiently detailed plan of its proposals (including the relevant discretionary management decisions) to enable the FtT to rule prospectively upon the lawfulness of the service charge demand if the proposed works were carried out: see* Kensington and Chelsea Royal London Borough Council v Lessees of 1—124 Pond House *[2016] L&TR 10 [2015] UKUT 395, paras 66—67.*"

330. In *Various Properties at St George Wharf and Battersea Reach* (LON/00AY/LSC/2019/0330 & 038 and LON/00BJ/LSC/2019/0330) Judge McGrath, Mr Holdsworth, and Judge Chris McNall (Tax Chamber) had cause to consider those words. At paragraph 46 of its decision on 9 June 2023, the Tribunal said this:

47. Accordingly, before the Tribunal can consider whether costs have been or will be reasonably incurred, it must first be satisfied that its jurisdiction is properly engaged. In other words, does section 27A permit the Tribunal to resolve the issues that the applicant has brought before it? In Kensington and Chelsea Royal London Borough Council v Lessees of 1—124 Pond House *[2015] UKUT 395, the council sought a determination that they had complied with the consultation requirements under section 20 of the Landlord and Tenant Act 1985. However, because the Tribunal cannot give mere declaratory relief, an application was made under section 27A(3) for a determination that, if costs were incurred, they would be payable. In effect, this was a device to engage the Tribunal's jurisdiction. The Tribunal made*

the determinations sought, but only on the basis that a specific description of the works to be carried out to each of the many properties concerned was available. Putting it another way, the Tribunal would not have had jurisdiction if the ambit of the works had not been described and if there had been insufficient information for the Tribunal to consider that it would in due course be able to make a determination about payability.

Jurisdiction and Prima Facie Case
48. In our view the same considerations apply to section 27A(1). Before the Tribunal can decide an application under either section 27A(1) or (3) it must be satisfied that the question before it engages issues of payability under section 18 of the 1985 Act relating to the contractual or statutory legitimacy of the service charge costs. It may not (per Williams v Aviva*) make declarations* solely *about a landlord's management decisions. A tribunal will need to be satisfied that an application by either a landlord or a lessee gives sufficient information for the Tribunal to consider that it would in due course be able to make a determination about payability.*

331. The section 27A(3) decision we have before us is narrow, in terms of the scope of that section. We do not know, and are no longer invited to make a finding on, what the cost of the Proposed Scheme will be, though we will be able to determine its payability in due course if required to do so. The question we are engaged with is no wider than the very first part of the question as identified by Lord Briggs in Aviva: "the contractual and statutory legitimacy of the landlord's proposal, coupled with a *Braganza* rationality review if necessary, which is really an aspect of the testing of contractual legitimacy".

332. The issue of payability with which this application is concerned is, realistically, no wider than 'if we did these works would the law and the lease allow us to recover the sums from the leaseholders in principle'. The Applicants have accepted that we cannot make a determination as to the sum that would be payable for the Proposed Scheme in the future, for the reasons already outlined. The Applicants have not made any application, as they could have done, in respect of the payability of the reserve fund demands. The sum of those demands may not end up being the cost of the Proposed Scheme, as we do not know at this stage what that scheme will cost. In due course, if the parties do not resolve the issues between them, there may well be the necessity of a section 27A(1) application to engage the section 19 question of reasonableness as it relates to payability. No-one could suggest that, because this application has been determined on the narrow question of payability which it is engaged by the application, a future application on the question of reasonableness would be *res judicata*. When the costs of the Proposed Scheme that are in principle recoverable in law and by the lease are known, it may become our task to determine issues of payability by reference to reasonableness, but that is not something we are able to do within the ambit of this application.

333. We therefore consider that Lord Briggs, when he elided 'manner of payment' with 'method of payment' in paragraph 12 of *Aviva*, was giving proper effect to the provisions of section 27A(3)(e). We do not agree, as the Applicants appeared to suggest, that Lord Briggs had not had what 'manner'

meant in the context of the statutory provision in the foremost of his mind when considering the question.

334. To construe the word 'manner' as wider than 'method' so as to result in set-off being a 'manner of payment' would, we are satisfied, lead to absurdity. If the Applicants' construction of the provision is correct, if a landlord were to make a demand, in order to satisfy that demand a tenant need do no more than simply assert an equitable set off (be it never so vague) with the result that the debt will have been 'paid'. No landlord would consider that the demand had been paid in those circumstances. If that asserted set-off was payment, the landlord could not bring a debt claim on the demand. It would not know how much if anything had been 'paid'. The cart would be before the proverbial horse.

335. We are satisfied that sections 27A(3)(c)-(e) are all questions of the practical method of payment, once the liability of the leaseholders for a sum in services charges for recoverable works has been established. Who would pay, to whom, and in what sum must be established first. (d) follows (c), in that no date for payment can be set unless there is first an amount. (e) also follows (c), in that no manner of payment can be identified for an unascertained/unascertainable sum. Giving the words used their natural meaning, part of the identification of the appropriate manner of payment must depend on the sum involved. Manner is wide enough to include, for example, whether payment might be made by instalments, but that is still a question of method – the practical way in which an identifiable sum of money will move from one party to the other. We therefore find that section 27A(3)(e) is not wide enough to bring within its scope the 'liability question' in respect of set-off.

(7) Part Three conclusion

336. We realise that will be a disappointment to the leaseholders who assert their set-off, although given our decision in respect of paragraph 8 of schedule 8 of the 2022 Act we note that in approximately half those asserting set-off will no longer need to fall back on it. We are only able to make decisions in respect of which we have jurisdiction from the application we have been required to consider.

(f) Our conclusions

337. In the circumstances, and for the reasons given, we conclude that if costs were incurred in respect of the Proposed Scheme and QLTA, those costs would be recoverable from the leaseholders of Flats 1, 2, 7, 8, 9, 10, 12, 14, 16, 23, 24, 26, and 30.

338. If it is necessary to do so because in due course an application under section 27A(1) is made, we will consider the set off arguments on that occasion.

339. We note that the leaseholders have found this process frustrating and exhausting, as well as expensive. It appears to us that they have not been

assisted by those who put themselves in a position to do so to resolve their misunderstandings in the past. We hope that, with this decision, they might understand that (contrary to the impression it seems they were given) the Applicants have not been working against them all this time. We do understand the sums of money that they are being asked to pay are very substantial, and we also understand that giving someone else the control over decisions to be made over the use of those substantial sums of money is extremely difficult. We ask them to remember that, even if what they would prefer is something else, the Applicants will usually have a range of reasonable options open to them, and not every option will suit every individual's needs.

340. We note that, sadly, this decision goes no further than a statement of the rights and obligations already existing in the leases, and use of which the Applicants could, and should, have made use of prior to this. In that sense, it represents no progress for the Applicants, who still have decisions to make and difficulties to overcome.

341. We note that this is both Almacantar's and Mr Waite's first development with any significant element of residential occupation. That may well explain Mr Waite's firm misunderstanding that the Proposed Scheme could not be carried out without unanimous consent, about which he was adamant.

342. That is simply not the case. Management of residential property requires difficult decisions, often in the teeth of opposition. If unanimous consent were always required, residential leasehold management across the country would be at a standstill, and the Tribunal would be inundated.

343. Mr Evans was more circumspect in telling us what he thought the Applicants' rights pursuant to the lease are. He told us that he would "always try to achieve consent where possible". That is admirable, but it is essential to recognise that it is not always achievable. Consent is not itself the end goal. Ensuring the Applicants' adherence to its repairing covenants must be prioritised, especially where the leaseholders (and public) are endangered by delay to obtain unanimous consent.

344. Those decisions may well come with their own difficulties, but at least they would have progressed the works that have been required for a very long time. It may well have been that, if bolder decisions had been made, the consequences of the 2022 Act could have been avoided. Delay is therefore a 'double-whammy' for the Applicant.

345. It is simply not possible to eliminate all risk, which appears to have been the Applicant's approach in bringing this application. We hope that the works might now be progressed with all due celerity, and that the Applicants and Respondents are able, to some extent, to re-set their relationship to work together towards that end. It would appear that if they do not, there could be very significant consequences.

346. Directions for the section 20C application will be provided under separate cover.

Name: Judge Nikki Carr **Date:** 25 March 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).