

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL

BETWEEN:

ADRIATIC LAND 5 LIMITED

Appellant

-and-

LONG LEASEHOLDERS OF HIPPERLEY POINT

Respondents

-and-

**SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT**

Intervener

APPELLANT'S WRITTEN CASE

References herein to the judgment of the Court of Appeal below are shown J&X

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A. Introduction

1. Legal certainty is, and has for a long time been, a fundamental pillar of English law. Part of the underlying rationale is one of elementary fairness: the foundational expectation within any legal system is that the law in force at the time of a transaction or event should govern its consequences, and that individuals should not find their settled arrangements disturbed by subsequent legislative changes (*Bennion* at §7.13). [92/1769]
2. The Building Safety Act 2022 ('the BSA') challenges those principles in some unavoidable respects, given it is both forward and backward-looking. It is probably uncontroversial to describe the BSA as, in certain respects arising from Part 5, a radical piece of legislation (for instance, the retrospective change to limitation periods in s.135). [46/517]
3. The question raised in this appeal is whether, with respect to paragraph 9 of Sch.8 of the BSA, Parliament made sufficiently clear an intention to override those fundamental pillars with respect to the payability of lawfully due service charges arising out of costs that had already been incurred before the Building Safety Bill had been granted Royal Assent. [48/529]
4. Put another way, is it necessary to give effect to the statutory purpose of, and the language used in, the BSA to read that provision as evincing an intention that the service provider (be that a landlord, or named manager, or RTM company) would immediately lose its accrued right under a lease to recover sums it had properly incurred based on an understanding of the law in force at the time, notwithstanding that the service provider being expropriated might carry no culpability for building safety defects at the building in question? Alternatively, is the BSA more properly read in its context as only affecting the position *prospectively* such that it is only costs incurred after the BSA came into force that cease to be payable by the leaseholder?

B. Background Context

5. The facts of this case are well recorded in the Court of Appeal's decision and summarised in the Statement of Facts and Issues. Statutory provisions should rarely, if ever, be construed solely in light of the facts of a particular case. However, certain features of this case can probably uncontroversially be described as far from uncommon in the context of the remediation of buildings affected by building safety defects (of which, there are many): [1/10]

- a. In this instance, the Appellant as landlord is liable for the maintenance, repair and statutory compliance of the common parts of a principally residential block. The Appellant is a commercial entity that holds residential freehold and long leasehold assets and is a subsidiary of entities whose purpose is to issue securities to liability-driven investors (pension funds and life insurance companies) so that the investors can receive the long-dated inflation-linked income for which long leases provide (see J§5). In other words, it exists to provide stable very long-term ground rent investments that underpin (by providing stability to) certain pension funds. The ultimate beneficiaries of the investment thus include many pensioners. [26/246]
- b. At risk of stating the obvious, the landlord in this case is (a) a commercial entity and (b) the party with liability under the flat leases for maintaining the common parts of the block by way of a service, a liability it agrees to undertake in return for the right to recover the cost of the same from leaseholders by way of service charge (see the sample lease at clauses 3.6 and 4.3). However, the landlord will not always be a commercial entity, as it is very common for the party with responsibility for the common parts of a block to be a resident owned non-trading company (whether as named manager in a tripartite lease, or as freehold owner), or a Right to Manage company (see Chapter 1, Part 2 Commonhold and Leasehold Reform Act 2002). [27/322]
[27/332]
- c. The Appellant was not responsible for the ‘relevant defects’ in the building. Again, this is not uncommon. Developers, once they have built out a block or an estate, will typically (but not always) sell the freehold reversion to third-party investors such as the Appellant, or transfer it to residents. The Appellant is no more responsible for the defects than the Respondents. Furthermore, the Appellant’s interest in the Building is limited. As noted at J§85(iii), the Appellant is entitled to ground rents totalling £9,250 per year and has been estimated to have a financial interest of 2.52% in Hippersley Point. The leaseholders have a far greater stake in the building. [26/272]
- d. Following the Grenfell Tower fire, building owners were encouraged by the government to remediate fire safety defects in line with the government’s various guidance notes. Some government funding was put in place (notably, by way of the

initial Building Safety Fund) to assist in that endeavour but, even with that assistance, very substantial sums had to be found by landlords / managers to remediate and, under the terms of their leases, by leaseholders. Partly because of this, remediation of buildings country-wide has been slower than hoped for. Nonetheless, landlords were encouraged by the Secretary of State to ‘do the right thing’ and remediate promptly, and that is what the Appellant sought to do in this case. Many buildings (albeit a minority) were remediated, or partly remediated, prior to the passing of the BSA.

- e. Landlords and managers in some instances (as here) incurred costs toward that aim. They did so in the knowledge and expectation that, subject to the costs being ‘reasonably incurred’ (see s.19 of the Landlord and Tenant Act 1985 (‘LTA 1985’)), [53/578] the costs would be recoverable from leaseholders by way of service charge in line with their contractual rights and the prevailing law at that time. Some landlords sought to and did recover those costs promptly. In other instances (as here) landlords simply protected their contractual right to recover the service charges by demanding the costs (thus making them payable as a matter of law and avoiding the difficulties arising out of s.20B of the LTA 1985), but not enforcing payment of [53/583] those demands pending efforts to recoup the cost from third parties, such as developers – thus aiming to protect leaseholders from the considerable costs of remediation so far as possible.
 - f. Plainly, the landlords that did not press for payment might not have acted in that manner had they known that those demands would subsequently be ‘cancelled’ retrospectively by virtue of the BSA; they would (or at least, could) have enforced payment in the usual way.
6. Whilst the sums in issue in these proceedings are very modest (being just the legal costs of a Tribunal application for dispensation), the financial consequences of the answer to this appeal are significant. The evidence before the court below was that the Appellant and two related entities *alone* had demanded over £87 million in respect of building safety [26/271] remediation costs prior to the BSA coming into force (some of which had been paid). The sums incurred across industry will plainly be higher, albeit (of course) some of those sums

will be (and indeed have been) since recouped from developers via the various routes afforded by the BSA, as discussed below, where possible.

C. The Building Safety Act 2022

7. The BSA represents Parliament's most substantive legislative response to concerns around building safety in taller residential buildings that arose out of the Grenfell Tower fire. As set out in the long title to the BSA, one of the purposes of the BSA is '*to make provision [43/500] about the safety of people in and about buildings and the standard of buildings*'.
8. Whilst the focus in this appeal is upon one particular paragraph in one schedule of the BSA, the terms of the wider statutory scheme are plainly relevant to all parties' cases. Accordingly, it is necessary to consider and understand the statutory scheme, and its context, in some detail before turning to the specific issues in the appeal.
9. The BSA has been described by this Court as both forward and backward looking (*URS [86/1579] Corporation Ltd v BDW Trading Ltd* [2025] 2 WLR 1095 at §85):
 - a. Parts 2 – 4 are forward looking, and were designed to implement the recommendations of the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt. The provisions establish a new regulatory regime for high-rise buildings with the aim of improving safety in the design, construction and occupation of such buildings.
 - b. Part 5, which is headed '*other provision about safety, standards etc*', contains various provisions, some of which are forward looking and some which are backward looking. Those parts that are relevant to this appeal (set out in detail below) are concerned with remediating, and liability to pay for remediation of existing (or historic) safety defects. Part 5 introduces, as part of the wider provisions, a scheme designed to protect certain leaseholders from having to pay, by way of service charge, some or all of the costs of building safety remediation work – colloquially referred to as the 'leaseholder protections'. These protections sit alongside wide-reaching provisions designed to ensure that those actually responsible for building defects are (so far as possible) held liable to pay for their remediation – as this Court considered in *URS*.

10. The provisions in ss.116 – 124 may be summarised as follows:

- a. S.116(1) explains that ss.117-124 and Sch.8 “*make provision in connection with the remediation of relevant defects in relevant buildings*”. [44/501]
- b. S.117 defines the concept (to which most, but not all, protections are tied) of a “relevant building”. Lessee owned buildings are excluded for most purposes, but lessee managed buildings are not. [44/502]
- c. S.118 explains how height is to be measured for the purposes of determining whether a building is a “relevant building” within s.117. [44/503]
- d. S.119 provides the definitions for “qualifying lease” (i.e. those leases that benefit from all the protections) and “the qualifying time” (i.e. “the beginning of 14 February 2022”). [44/503]
- e. S.120 defines “relevant defect”, which term gives the focus of most of the leaseholder protection provisions (paragraph 8 of Sch.8 to the BSA being the obvious exception). [44/506]
- f. S.121 defines “associated persons”. [44/507]
- g. S.122 introduces Sch.8. [44/509]
- h. S.123 makes provision about remediation orders i.e. orders requiring remediation works to be carried out by a “relevant landlord”. [44/509]
- i. S.124 makes provision for remediation contribution orders (‘RCOs’) to be made, requiring specified parties (landlords, developers, and persons associated with either) to pay for remediation works. [44/510]

11. As set out in s.122, Sch.8:

[44/509]

‘(a) provides that certain service charge amounts relating to relevant defects in a relevant building 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).’

12. Accordingly, Sch.8 includes a series of provisions that (for the most part) protect leaseholders who have a ‘qualifying lease’. Before considering Sch.8 in detail, it should be noted that, when the Building Safety Bill was introduced to Parliament on 5 July 2021, it was directed at changing the regulatory regime applicable going forward to high-rise buildings. It was not directed at allocating liability for past defects.
13. As explained at J§29, it was only late in the passage of the Bill that it was amended to [26/254] introduce what became Part 5 and Sch.8. These provisions came about by way of amendments introduced on 14 February 2022 (following a ministerial statement to the House on 10 January 2022 announcing a ‘building safety reset’), without any consultation or impact assessment. On any analysis, the provisions relevant to this appeal were rushed through with only limited debate and, at the time the BSA was enacted, many aspects of Sch.8 were reliant on secondary legislation that did not exist.
14. The main protections introduced by Sch.8 include (by way of summary):
 - a. Paragraph 2 provides that no service charge is payable by any leaseholder in a [48/525] relevant building in respect of a relevant measure relating to relevant defects where the landlord as at 14 February 2022 was responsible for the relevant defect, or is associated with the person responsible. Paragraph 2 is not restricted to the protection of leaseholders with qualifying leases but, instead, applies to “*a lease of any premises in a relevant building*”; that includes commercial premises in mixed-use relevant buildings. The substance of this provision is that no leaseholders will be required to pay a service charge for the costs of remediation where the relevant landlord was responsible for the defect or is associated with the person responsible – being consistent with the ‘polluter pays’ principle. The Appellant was not responsible for the relevant defects in the Building.

- b. By paragraph 3, no service charge is payable by leaseholders with qualifying leases in relevant buildings for the cost of remediating relevant defects where the landlord as at 14 February 2022 met the “contribution condition” i.e. the landlord was considered wealthy enough not to pass on costs to leaseholders. The Appellant did not meet the contribution condition. [48/526]
- c. By paragraph 4, no service charges are payable for the costs of relevant defects by leaseholders with qualifying leases if their property was worth less than a certain amount on 14 February 2022 (£325,000 in Greater London; £175,000 elsewhere). [48/527]
- d. Pursuant to paragraph 5, where a service charge in respect of a relevant measure relating to a relevant defect would otherwise be payable (because paragraphs 2 – 4 do not apply), it is only payable in so far as that charge taken together with the total of the ‘relevant service charge’ that fell due over the prior period extending back to 5 years prior to the commencement of the BSA does not exceed the permitted maximum set out in paragraph 6. Accordingly, for the future (i.e. from the commencement of the BSA), the recovery of costs incurred by way of service charge is limited where the amount of the service charge in the pre-commencement period has exceeded a specified sum. [48/527] [48/528]
- e. By paragraph 7, where a relevant service charge would otherwise be payable, there is an annual cap on service charge contributions relating to the costs of remediating relevant defects for leaseholders with qualifying leases to one tenth of the permitted maximum set out in paragraph 6. [48/528]
- f. Paragraph 8 provides that no service charge is payable by leaseholders with a qualifying lease in respect of “cladding remediation”, as defined by paragraph 8(2). [48/529]
- g. Paragraph 9, the provision that is relevant to this appeal (set out in full below), provides that no service charge is payable by leaseholders with a qualifying lease for legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect. [48/529]
- h. Paragraph 10 supplements paragraphs 2 to 4, 8 and 9 as set out below. [48/530]

- i. Paragraph 11 prevents an increase in service charges for leaseholders as a result of an amount not being payable by other leaseholders by virtue of the provisions of Sch.8. [48/531]
 - j. Paragraph 12 empowers the Secretary of State to make provisions by regulations for and in connection with the recovery, from a prescribed relevant landlord, of any amount that is not recoverable under a lease as a result of Sch.8. The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 ('the 2022 Regulations'), referred to below, were made in July 2022 in the exercise of this power. [48/531]
 - k. Paragraph 13 prescribes the circumstances in which a lease which meets the conditions in paragraphs (a) to (c) of s.119(2) shall be treated as a qualifying lease. [48/531]
 - l. Paragraph 14 prescribes the circumstances in which a relevant landlord shall be treated for the purposes of Sch.8 as having met the contribution condition as defined by paragraph 3. [48/532]
 - m. Paragraphs 15 and 16 empower the Secretary of State to make provisions requiring leaseholders under a qualifying lease and relevant landlord respectively to give prescribed information or documents to prescribed individuals. [48/532]
 - n. Paragraph 17 amends s.21 of the LTA 1985. [48/533]
 - o. Paragraph 18 is an anti-avoidance provision. [48/533]
15. Paragraph 9 provides as follows (although sub-paragraph 9(1A) was inserted later by the Leasehold and Freehold Reform Act 2024): [48/529]

“(1) No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.

(1A) Sub-paragraph (1) does not apply to the extent that the service charge is payable to a management company in respect of legal or other professional services provided to the company in connection with an application or possible application by the company for or relating to a remediation contribution order under section 124.

(2) In this paragraph the reference to services includes services provided in connection with—

- (a) obtaining legal advice,*
- (b) any proceedings before a court or tribunal,*
- (c) arbitration, or*
- (d) mediation.”*

(“Paragraph 9”)

16. Paragraph 10 supplements paragraphs 2 – 4, 8 and 9. Paragraph 10(2) states:

48/530]

“(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing—

(a) no costs incurred or to be incurred in respect of that thing (or in respect of that thing and anything else)—

(i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge payable under the lease, or

(ii) are to be met from a relevant reserve fund;

(b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly (and any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise).”

(“Paragraph 10”)

17. The effect of Paragraphs 9 and 10 read together is that they limit what is payable as a service charge by leaseholders, by preventing costs incurred from being treated as a “relevant cost”, whether funded by way of direct demand or by virtue of an existing reserve fund.

18. In the Courts below, it was doubted whether Paragraph 10 was relevant to any particular extent when considering whether Paragraph 9 has retrospective effect (and, if so, to what extent): J§78 and §153 in the Upper Tribunal. Nonetheless, when construing Paragraph 9, it is the Appellant's case that Paragraph 10 quite obviously cannot be ignored, given Paragraph 10(2) defines the meaning of the key phrase in Paragraph 9 – i.e. 'no service charge is payable'. [26/269] [24/229]
19. The operation of service charge provisions and the legislation governing them is simple to explain at a high level but can be complex to apply in practice. The main provisions governing residential service charges are those in the LTA 1985 at ss.18-30. Where, in Paragraph 10(2), it refers to the "relevant provisions", ss.18-30 LTA 1985 are such provisions: Paragraph 10(3). [53/577]
20. By s.18(2), "relevant costs" are the "*costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*" Paragraph 10 operates by preventing costs incurred in respect of a 'thing' as being regarded as relevant costs for the purposes of ss.18-30 in connection with the matters for which the service charge is payable – hence (presumably) the cost incurred ceases to be payable as part of the service charge. [53/577]
21. The answer to this appeal may, thus, to an extent turn on whether the reference in Paragraph 10 to costs that are incurred in respect of a 'thing' is only to costs incurred after the BSA came into force (the usual meaning, it might be observed); it is, on the Appellant's case, from that date that the incurred costs are regulated (noting that the words incurred or to be incurred are not expressed as relating to costs already incurred pre-commencement).
22. Paragraph 9 must be construed by reference to the mechanism in Paragraph 10. That mechanism regulates by reference to the incurrence of costs in the context of ss.18-30; on the Appellant's case this is significant. It explains, in part, the reason why the Appellant's principal case is that it is the date when costs were incurred (pre or post enactment) that forms the dividing line delineating which costs are 'caught' at the point the BSA came into force. The Appellant's secondary case is that, instead, the dividing line is whether the costs incurred in respect of the 'thing' had become contractually payable (i.e. had crystallized into a lawfully due debt) – 'payable' / 'fell due' being the other reference point

used in Sch.8. Whilst there are other formulations that would secure absolutely no retrospective outcomes (e.g. such as to capture pre-BSA contractual liabilities to pay in the future) – which the Appellant of course would not oppose – the Appellant’s suggested construction is tied to the words expressly used and the mechanism adopted by Parliament.

23. Sections 18-30 contain a number of references to costs being incurred. As well as s.18, ss.19 and 20B regulate ‘incurred’ costs by way of statutory overlay to the contractual agreement contained in the lease. S.19 provides (amongst other things) that:

[53/578]

“relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.”

24. Perhaps more relevantly, s.20B(1) LTA 1985 provides that:

[53/583]

“If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.”

25. S.20B thus ensures that leaseholders are not taken by surprise by late demands for sums incurred in prior years. That continues to be the case after the BSA came into force with respect to any costs incurred pre-commencement (which answers Nugee LJ’s point at J§202 about ongoing liabilities relating to costs incurred pre-commencement arriving for a “wholly unpredictable time”; they will be short lived and, indeed, predictable).

[26/308]

26. As is set out at J§38:

[26/257]

“In Burr v OM Property Management Ltd [2013] EWCA Civ 479, [2013] 1 WLR 3071 (“Burr”), the Court of Appeal held that “costs” are “incurred” for the purposes of sections 18, 19 and 20B of the L&TA 1985, which are concerned with service charges, when the landlord either is invoiced or pays. “[A] liability must crystallise before it becomes a cost”: “costs are not ‘incurred’ within the meaning of section 18, 19 and 20B on the mere provision of services or supplies to the landlord or management company”: see Burr, at paragraphs 11 and 15, per Lord Dyson MR.”

27. At J§95, Newey LJ expressed the view that “incurred” must bear the same meaning in [26/276] Sch.8 of the BSA (or, at least, Paragraph 10) as it bears in ss.18-30 LTA 1985. It is understood that this is also common ground between the parties.

The 2022 Regulations

28. The 2022 Regulations were made in July 2022 (and amended on 5 August 2023 by the [49/535] Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations [50/554] 2023/895) pursuant to the power in paragraph 12 of Sch.8. In broad terms, as set out in §J23 – 26, regulations 3, 4 and 5 enable a landlord (which includes for the purpose of the [26/252] 2022 Regulations an RTM Company or named manager), who is unable to recover service charges as a result of Sch.8, to pass on costs to other landlords (if any).
29. In reality, the 2022 Regulations only achieve a limited (often non-existent) route to recoup service charges which, as a result of Sch.8, are not payable by leaseholders:
- a. In most cases (i.e. where paragraphs 2 and 3 of Sch.8 are not engaged), it is only regulation 5 that is engaged. That will always be the case with Paragraph 9 costs because they are not ‘relevant measures’ relating to ‘relevant defects’. All regulation 5 achieves is splitting any costs that can no longer be recovered from leaseholders between the landlord that incurred the cost and any other landlords.
 - b. Regulation 5’s utility is going to be chiefly in larger, more complex, developments where headleases are in place - of which there are plenty of examples, but it is far from the norm. The outcome that usually results from the application of regulation 5 is that the landlord bears all the shortfall as there is no other landlord (as here).

- c. The other purpose which regulation 5 achieves is to enable managers in tripartite leases to recover the irrecoverable costs from the landlord. Arguably this is more important and certainly in day-to-day practice is the greater effect; managers are usually entirely funded by way of service charge income so, if it is removed from the service charge income stream by Sch.8, they have to have an alternative source of income, otherwise required works cannot be funded (which would be contrary to one of the statutory purposes). Of course, if the leaseholder protections operate retrospectively, then the great difficulty for managers (including RTM companies) and asset-light landlords is that they may have incurred large sums of money on remediation that they would not (post-BSA) now be able to recover if demands have not been paid. That would in all likelihood result in an insolvency event, absent a successful cash call on members (save the limited instances where regulation 5 will assist) and thus is very unlikely to have been intended. The inability to plan for the effect of such unknowable retrospective statutory provisions results in, of course, considerable unfairness in this situation, and potential loss of management altogether.
- d. The difficulty in practice is that the value of most freehold reversions will be very limited compared to costs of remediation (as the evidence in this case demonstrated). But it is accepted that on average landlords are more likely to have more resources than a manager, as most managers will be non-trading entities with zero income or assets. That said, many, but not all, landlords affected by Sch.8 will have a modest ground rent income stream (as resident owned buildings are exempt from Sch.8 due to the definition of ‘relevant building’ in s.117). However, that is [44/502] far from a complete or satisfactory answer to the difficulty of how RTM Companies and managers might avoid insolvency if they are unable to recover sums incurred pre-Act. The ability to seek an RCO under s.124 will assist in some, but not all, [44/510] instances.

Other relevant provisions

30. As set out above, s.124 empowers the First-tier Tribunal to make an RCO requiring specified bodies corporate to make payments to meet costs incurred or to be incurred in remedying relevant defects in relation to a relevant building if it considers it ‘just and equitable’ to do so. In *Triathlon Homes LLP v Stratford Village Development Partnership* [85/1490]

[2026] 1 WLR 1922 (*Triathlon*), the Court of Appeal concluded that s.124 allows an RCO to be made in relation to costs incurred and defects arising prior to the BSA coming into force.

31. If that position is maintained in this Court, that would provide leaseholders with the ability to recoup their outlay (by way of service charge) in respect of remediation carried out prior to the BSA coming into force in circumstances where it would be just and equitable to do so; there thus appears to be no need for Paragraph 9 to have retrospective effect if it is considered that protection of leaseholders from the cost of remediation incurred prior to the BSA coming into force is an essential purpose of the BSA (which, for the avoidance of doubt, is not accepted by the Appellant given the lack of any clear indication of the same in the wording or the material that was before Parliament when the bill made its way through).
32. S.130 provides that the High Court may make a “building liability order” (‘BLO’) if it [45/515] considers it “just and equitable” to do so. A BLO extends the liability of a body corporate to associated companies in respect of “relevant liabilities” (being a liability that is incurred under the Defective Premises Act 1972 or s.38 of the Building Act 1984 or as a result of a building safety risk) even where those liabilities arose pre-BSA. The wording of s.130 expressly provides that it is to have retrospective effect; a “relevant liability” means a liability “whether arising before or after commencement”.
33. S.135 extends (retrospectively) the limitation period for claims under s.1 or 2A of the [46/517] Defective Premises Act 1972 and s.38 of the Building Act 1984. [51/572] [51/575] [42/498]
 - a. S.135(3) provides that the ‘*amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force*’. [46/518]
 - b. S.135(5) provides that ‘*where an action is brought that, but for subsection (3), [46/518] would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant’s Convention rights.*’

34. S.149 introduces a new liability for past defaults relating to cladding products which have rendered buildings unfit for human habitation. By virtue of s.149(8), for the purposes of s.10B(2) of the Limitation Act 1980, the right of action is regarded as having accrued when construction or the works were completed – i.e. it too is expressly retrospective in effect. Similarly to s.135(5), s.149(9) requires a court hearing an action that, but for s.10B(2) of the Limitation Act 1980, would have been barred by that Act, to dismiss an action if satisfied that it is necessary to do so to avoid a breach of Convention rights. [47/521]
35. It will be noted by contrast that Sch.8, and Paragraph 9 in particular, do not contain any saving to temper unfairness resulting from a retrospective application of their provisions; there is no ‘just and equitable’ test, nor any protection of Convention rights. That is a significant indicator in the context of this appeal.

Government funding and the Developer Remediation Contract (wider context)

36. In addition to the BSA, the Government introduced funding programmes to address the costs of remediation, e.g.:
- a. The ‘Building Safety Fund’ (‘BSF’) was announced on 11 March 2020, to fund the remediation of cladding on high-rise residential buildings.
 - b. The BSF was replaced from 1 September 2025 by the ‘Cladding Safety Scheme’.
 - c. A Waking Watch Replacement Fund, now the Interim Measures Alarm Fund, meets the costs (or part of the costs) of fire alarm installation to replace or mitigate the need for waking watch measures in certain circumstances.
37. Despite the funding available, there are many ‘relevant defects’ which do not qualify for any government funding – in particular, internal compartmentation defects, which can be extensive.
38. As well as government funding, the government wrote to major housing developers on 30 January 2023 saying that it expected them to sign the ‘Developer Remediation Contract’ (‘DRC’). The DRC requires developers to take responsibility for remedying all life-critical fire safety defects arising from the design and construction of buildings 11 meters and

over in height that they developed or refurbished in England in the 30 years prior to 5 April 2022. Many larger developers have signed a DRC. However, this is far from a universal position, and there are many buildings with safety defects that require remediation that are not covered by a DRC (including commonly where the developer no longer exists).

D. Retrospectivity: Applicable Legal Principles

General approach to construction

39. The general principles of statutory construction are settled and are well summarised in [66/1009] *News Corp UK & Ireland Ltd v Revenue and Customs Comrs* [2023] UKSC 7; [2024] AC 89 at §27. The court’s objective, when interpreting a statute, is to give effect to the intention of Parliament as discerned by considering the ordinary meaning of the words used in their statutory context, with regard to the purpose of the provision and the consequences of rival interpretations.

The presumption against retrospectivity

40. It is also a well-established principle of English law that, save in respect of purely procedural matters, legislation is presumed not to operate retrospectively (*Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at §186). [89/1742]
41. As noted above, the underlying rationale is one of elementary fairness. As Willes J [68/1074] observed in *Phillips v Eyre* (1870) LR 6 QB 1 at §23, retrospective legislation is “*contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.*”
42. A statutory provision is regarded as retrospective where it alters the legal consequences of acts or events which occurred prior to its commencement (*Bennion on Statutory Interpretation*, 9th Ed at §7.13). The authorities explaining the distinction between retrospective and prospective effects are well set out at J§57-59, including in particular by [92/1769] reference to the comparison given by Lord Scott at §161 of *Wilson* in a landlord and tenant [26/263] [89/1736] context.

43. The presumption is not absolute. Parliament undoubtedly possesses the power to legislate with retrospective effect. The presumption is plainly not engaged where legislation is expressly retrospective. As set out above, the BSA contains a number of examples where it is expressed to have retrospective effect. However, where (as in the case of Paragraph 9) there is ambiguity as to whether legislation is intended to have retrospective operation, the starting point is that, unless a contrary intention appears with reasonable certainty, an enactment is presumed not to have been intended to operate retrospectively.
44. The presumption is commonly expressed in terms requiring it to be necessary to give a provision retrospective effect (or words to similar effect):
 - a. *"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."* (*In re Athlumney; Ex parte Wilson* [1898] 2 Q.B. 547, 551-552, cited in *L'Office Chérifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 495A) [79/1387]
[63/905]
 - b. *"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."* (*Maxwell v Murphy* (1957) 96 CLR 261, 267, cited in *Wilson* at §187) [64/946]
[89/1742]
 - c. *"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used."* (*Yew Bon Tree v Kenderaan Bas Mara* [1983] 1 AC 553 at 558F) [90/1760]

- d. *“It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction;” (Lauri v Renad [1892] 3 Ch 402 at 420, cited in URS at §272).* [62/892]
[86/1623]
- e. The basic principle requires a court *“in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose” (Arnold v Central Electricity Generating Board [1988] AC 228, 275B (Lord Bridge), cited in URS at §273).* [54/652]
[86/1623]
45. More recently, however, the strength of the presumption has been clarified such as not to be as rigid as may initially appear from the above, but to be one that varies according to the degree of unfairness that would result from a retrospective reading. The greater the potential unfairness, the clearer the statutory language must be in order to rebut it. The presumption will generally be at its strongest in the criminal sphere – one should not be punished for conduct that was not criminal when committed.
46. We see this in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at §724 where Staughton LJ stated (cited in *Wilson* at §19): [82/1458]
[89/1697]
- ‘the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.’*
47. The presumption was weak in that case. Mrs Tunncliffe sought to retain money received by way of state benefits to which she was not (ever) entitled (see p720 at h) and, given the simultaneous repeal of the predecessor provision, the statutory intent was relatively clear cut. [82/1454]
48. In *L'Office Chérifien*, Lord Mustill characterised the basis of the presumption as ‘no more than simple fairness’. His Lordship endorsed the formulation of Staughton LJ in [63/935]

Tunnicliffe at §724 set out above. Accordingly, Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned, unless the contrary intention appears; it is not simply a binary question of classification but, instead, a matter of degree, with greater unfairness demanding greater clarity of language.

49. At §525, Lord Mustill further explained that evaluating the degree of fairness in any given case requires the court to weigh several interacting factors: [63/935]

‘Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.’

50. Accordingly, the degree to which the statute has retrospective effect; the value of the rights affected and the extent to which they are diminished or extinguished; the resulting unfairness and the corresponding unlikelihood that Parliament intended such a result; and the clarity of the statutory language read in light of its surrounding circumstances are all factors that must be considered together to determine whether reading the statute with the suggested degree of retrospectivity would be to give effect to Parliament’s intention.
51. Given that the proper construction of statutory provisions cannot vary upon the facts of a particular case, the value of the rights affected in any given case must be viewed in the sense of the generality of the rights which Parliament must have contemplated would be affected if the section took effect retrospectively: Lord Mustill at 528D. With respect to [63/938]

Paragraph 9, the general right in question is the contractual right of a landlord or manager (in each instance, a trustee of a lessee owned service charge fund) to be indemnified by the leaseholders against the cost of undertaking works of repair or maintenance, or in order to secure statutory compliance (as the case may be) so as to keep the occupiers of buildings safe. Necessarily, that general right is affected prospectively as a result of Paragraph 9 and other provisions within Sch.8. However, the *specific* right that is affected by a retrospective construction is the right to be repaid for expenditure already incurred in reliance upon that right. That is self-evidently a very valuable right – the cost of building remediation is very significant indeed, hence the statutory intervention by way of Part 5 of the BSA in the first place.

52. Notwithstanding what appears (correctly) from Lord Mustill's explanation above to be a generous degree of flexibility in establishing the degree of retrospectivity intended by Parliament – described as 'vague and imprecise' by Lord Nicholls in *Wilson* at §19 - the [89/1697] undoubted effect of the long established authorities on the operation of the presumption is that "*the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have a retrospective effect*" (per Lord Mustill at 524G). [89/934]
53. That accords with the considerable importance of ensuring fairness and legal certainty; those two concepts carry much greater weight where it is suggested that rights which were acquired prior to statutory provisions being enacted should be altered (or here, lost entirely) retrospectively: *Wilson* at §98 per Lord Hope. This reflects the overlap of this [89/1717] principle with the presumption against retrospective interference with property rights, considered below.
54. The continuing relevance of the underlying presumption against retrospectivity (albeit emphasising that it is just that – 'only a presumption') was recognized recently by this court in *URS* at §272-274 per Lord Leggatt when considering s.135 of the BSA – a [86/1623] provision that is expressly retrospective in effect and central to the policy underlying the BSA that the 'polluter pays'.
55. Two further cases merit mention at this point.

56. Considerable reliance appears to have been placed below by Nugee LJ upon *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230 and *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 (see J§135 and J§138 respectively) when giving the majority decision. In respect of both cases, Nugee LJ's reliance (or at least the strength of the reliance, in light of the other authorities highlighted both above and below) was wrong:
- a. In respect of *Odelola*, Nugee LJ relies on the passage at §55 which states the presumption against retrospectivity is “*not some sort of substantive or even procedural legal right... it is a rule of construction, or perhaps, more accurately, a factor to be taken [i]nto account when interpreting a statute or rule*”, which appears to significantly water down the presumption. However, that case did not concern any accrued right at all and, hence, the decision did not in truth turn on retrospectivity. [67/1035] [83/1460] [26/290] [26/291]
 - b. As to *Sunshine Porcelain Potteries*, Nugee LJ relied on the statement of Lord Reid at 938 that the presumption against retrospectivity “*may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it*”. However, that is not how the law has been restated on multiple occasions since that decision. Moreover, a retrospective interpretation was necessary in that case otherwise the purpose of the relevant legislation (to ensure that workers disabled by diseases of slow onset, such as silicosis, could obtain compensation irrespective of when the causative employment took place) would have been entirely undermined and because of the express language used (employment “at any time”); as explained below, that is not the case here. [67/1049] [83/1471]
57. Finally, two further corollaries deserve mention. First, the presumption does not operate in isolation from other principles of statutory interpretation and must be weighed alongside other relevant interpretative factors (*Bennion* at §7.14). Secondly, where it is clear that legislation was intended to have some retrospective effect, it should not be given a greater degree of retrospectivity than is necessary to fulfil the legislative purpose (*URS* at §273, by reference to *Arnold* at 275B). [93/1772] [86/1622] [54/652]

The presumption against retrospective interference with property rights

58. As stated above, the presumption against retrospectivity is closely allied to the distinct presumption that legislation should not be construed as interfering with, taking, impairing, or endangering a person's property or other economic interests, save under clear authority of law.
59. The principle is underpinned by the broader doctrine of legality, which requires that any interference with established common law rights must be expressed in clear terms. As stated in *Bennion* at §27.1: [94/1775]

‘(1) It is a principle of legal policy that any interference with established rights and principles recognised by the common law should be expressed in clear terms. The principle forms part of the context against which legislation is enacted and should be taken into account when interpreting legislation.

(2) The principle gives rise to a more specific presumption that “fundamental” common law rights cannot be overridden by general words but only by express words or necessary implication.’

60. Under this doctrine, “fundamental” rights (which include economic interests - *Bennion* at [95/1777] §27.6) cannot be overridden by general or ambiguous statutory language; they can only be displaced by express words or by necessary implication. As Lord Hoffmann explained in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at §131, [78/1367] the principle of legality demands that Parliament squarely confront any encroachment upon fundamental rights and accept the political cost, rather than effecting such encroachment through words whose full implications may have passed unnoticed in the democratic process.
61. The threshold for rebuttal is high: in *R (Ingenious Media plc) v Revenue and Customs Comrs* [2016] UKSC 54, Lord Toulson stated that “*the more general the words the harder it is likely to be to rebut the presumption*” that they were intended to be read subject to the basic rights of the individual. [72/1133]
62. In the specific context of property rights, even where some degree of interference is clearly intended, the courts will construe the relevant legislation as interfering with proprietary

rights no more than the statutory language and purpose strictly require (*S Franses Ltd v* [81/1440] *The Cavendish Hotel (London) Ltd* [2018] UKSC 62 at §16). Further, in *Methuen-Campbell v Walters* [1979] QB 525 at 542F, Buckley LJ held that in the case of a "dispropriatory" Act, any ambiguity should be resolved in favour of the party whose property is at risk of being taken.

63. The principle carries particular force where, as in this case, no compensation is provided for the interference in question. As Brett MR stated in *Attorney-General v Horner* (1884) [55/257] 14 QBD 245 at §257:

"...it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."

64. In other words, the courts should not construe legislation as interfering with a person's rights without compensation, unless it is necessary to do so.

The strength and purpose of this rule was stressed by e.g. *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 (HL) at 529, where Lord Reid confirmed that the principle derives from the recognition that Parliament seldom intends to take property without compensation, and that the courts should therefore be "*sure that that was really intended*" before attributing such an intention. More recently, this Court has described the rule as "*an early example of the principle of legality*": *DB Symmetry Ltd v Swindon Borough Council* [2023] 1 WLR 198 (SC) at [41], per Lord Hodge.

E. Submissions on the Appeal

The rival constructions

65. There is no dispute as to the prospective effect of the leaseholder protections in Sch.8. From the date the BSA came into force, landlords and managers cannot pass on the costs they incur with respect to remediation etc. to leaseholders by way of service charges, save

to the extent permitted by Sch.8 as set out above. Any costs incurred will be borne by them, subject to their ability to recoup funds from third parties or through receipt of grant funding. The key point of construction is how does the BSA apply to costs already incurred by landlords and managers prior to the BSA coming into force?

66. Whilst this appeal is concerned with Paragraph 9, the Court of Appeal recognised (and it is understood this will be common ground between the parties) that the decision on retrospectivity is “*likely to apply*” to the other Sch.8 provisions (see J§177) and, hence, [26/300] the case has wide implications in relation to the recovery of costs of remediation works.
67. By the time of the hearing in the Court of Appeal, there were at least four alternative constructions being advanced by the parties:
- a. The Appellant’s primary case was (and is) that Paragraph 9 only ‘bites’ on costs that were incurred after the provision came into force. It has no application to costs which were incurred before 28 June 2022. As Newey LJ put it below J§94: “*In effect, paragraph 9 should, as it seems to me, be understood to mean that no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred after 28 June 2022 as a result of a relevant defect.*” That would accord with the focus on costs being incurred, the language used in paragraphs 9 and 10 of Sch.8 and the LTA 1985, as explained above. [26/275]
 - b. The Appellant’s alternative position was (and is) that, even if Paragraph 9 may apply to costs that were incurred before the provision came into effect (such costs therefore, being in principle recoverable, such than an identifiable certain contingent right to recover had arisen as a matter of law prior to that date), it does not apply in so far as service charges arising from the costs had in fact become payable (due) by that date by way of the service of a contractually and statutorily valid service charge demand.
 - c. The Intervener’s position was that Paragraph 9 applies to costs that were incurred and had fallen due before the provision came into force, i.e. including those that were already enforceable debts. Her position was that leaseholders who had already

paid were not entitled to claim back money already paid, but that, from 28 June 2022, no leaseholder has liability to pay any service charge in respect of the services described in Paragraph 9, irrespective of whether such a liability existed prior to 28 June 2022. It is unclear how this construction would operate, or at least be rationalised, in the context of an application to determine payability under s.27A(1) [53/598] Landlord and Tenant Act 1985, as it is hard to see on what basis different answers could be arrived at when answering the statutory question as to payability depending on whether or not the service charge has in fact been paid given the terms of s.27A(2) and (5).

- d. The Respondents' position, by the time of the hearing of the appeal, went further. The Respondents argued that leaseholders were not only relieved from any existing or future liability, but also that, as the sums were retrospectively deemed not to be payable no matter when incurred, leaseholders were entitled to recover, or receive credit for, sums already paid in respect of such costs no matter when those sums were paid. In other words, the credits might be sought in respect of works undertaken 10 or 20 years earlier, there being no strict limitation period applicable where recovering by way of equitable setoff or (probably) with respect to the making of a s.27A(1) application.

68. The majority held that the Intervener's suggested interpretation was correct. The consequence of the majority's decision, if upheld, is that Paragraph 9 would have the effect of retrospectively extinguishing a landlord's accrued rights to recover in respect of expenditure they had incurred (and were the beneficiary of an actual or contingent legal right to recover in respect of) prior to 28 June 2022. Whilst the sums involved in this case are modest, the considerable wider importance is borne out by the evidence recited in the Court of Appeal's decision. For the reasons set out below, the Appellant's position is that the court (by a majority) was wrong to find that Paragraph 9, correctly construed, prevents costs which were incurred before the BSA came into force from being payable by way of service charge, and that Newey LJ's analysis and conclusions were correct.

69. Given the unanimous rejection of the Respondents' proposed construction asserted below - described by Newey LJ as "*so outlandish that it is impossible to believe that Parliament [26/302] intended the protections for leaseholders in Sch.8 to lead to a re-opening of past*

transactions in this way”: J§186 – this written case does not address such a construction further; it is quite obviously wrong.

The correct approach to construction

The wording of Para 9 and 10

70. The phrase used in Paragraph 9 is “*no service charge is payable...*”. Paragraph 9 is given effect to by Paragraph 10(2), where the legislation states that the phrase ‘no service charge is payable’ means that no costs “*incurred*” or “*to be incurred*” are to be regarded as “*relevant costs*” and nor can they be paid out from any monies held on account (as discussed above at paragraphs 17 to 22).

71. The language used is plainly ambiguous. In Paragraph 9, “*no service charge is payable*” does not make expressly clear whether that applies to sums that were already payable prior to the BSA. As to Paragraph 10, does the mechanism apply only to costs incurred or to be incurred after the BSA comes into force, or does it relate to costs already incurred prior to that date too? The use of the present tense in both provisions suggests that the mechanism does not apply to sums incurred pre-commencement.

72. The language of Sch.8 more widely is ambiguous as to whether it was Parliament’s intention that its provisions should have retrospective effect. In contrast (for example) to s.135, Paragraph 9 is not expressed to be retrospective in its effect in that it is not expressly stated to have effect prior to 28 June 2022, or to be treated as having always been in force. Accordingly, the presumption that an enactment was not intended to operate retrospectively is engaged (*Wilson* at §187).

[89/1742]

73. Of particular (if obvious) note is the point that, where Parliament intended Part 5 of the BSA to operate with retrospective effect (namely, ss.130, 135 and 149), it made that plain; the potential exception to this is s.124, which is a matter for this Court to consider in *Triathlon*. However, there are clear distinctions between s.124 and Paragraphs 9 and 10 in terms of how they sit in the overall scheme. If Parliament intended Sch.8 to have retrospective effect, it could be expected to have said so. And if the Secretary of State at the time had *wished* for it to have retrospective effect, he should have said so, not merely asserted as much after the event.

74. It is striking that no such wording appears in Paragraph 9, given the evident care with which Parliament has considered and weighed the competing interests where there was plainly an intention to affect accrued legal rights elsewhere in the same legislation. It is significant not only because the distinction between construing legislation that is silent on retrospective application and construing legislation that expressly and unambiguously provides for an intended retrospective effect is clear (e.g. *Wilson* at §161-162), but it is [89/1736] important in the context of Parliamentary drafting: specific consent must be obtained from Parliamentary Law Officers to any retrospective provisions: Para 12.2 of the Cabinet [97/1807] Office's Guide to Making Legislation.
75. Even within Sch.8 itself, it is evident that Parliament has used clear and express language where it intends for the protections to apply in a retrospective manner. As set out above at paragraph 14(d), paragraphs 5 and 6 of Sch.8 introduce a cumulative cap to limit the maximum amount that any leaseholder with a qualifying lease might pay towards the costs of remediating relevant defects (where the other parts of the 'waterfall provisions' at paragraphs 2-4 have not caught such liabilities). Paragraphs 5(1)-(3) make explicit that, when calculating the cap, one is to take into account service charges that "fell due" (i.e. are payable) in the 5 years prior to the commencement of the provision.
76. The contrast between Paragraph 9 and these other provisions in the BSA where retrospective operation, or retrospective calculation is spelled out in clear terms, supports an interpretation that Parliament did not intend Paragraph 9 to operate similarly. To ignore these contextual indications would be to fall foul of Lord Briggs' and Lord Leggatt's warning against "*tunnel vision*" in statutory interpretation: *Rossendale BC v Hurstwood Properties (A) Ltd* [2022] AC 690 (SC) at §16. As Lord Hodge noted in *R (O) v SSHD* [73/1154] [2023] AC 255 (SC) at §29: "*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*".

Application of the presumption to Paragraph 9

77. Both the majority and Newey LJ accepted that the presumptions against retrospective legislation and retrospective interference with property rights were engaged (see J§83 and [26/270])

J§195). Applying the authorities set out above, this court ought to approach the process of [26/305] construction with a very strong disposition that Sch.8 is not intended to have retrospective effect and ought not give the legislation retrospective effect unless it is necessary to do so. Moreover, as a retrospective interpretation would result in uncompensated dispropriation, the threshold for rebutting the presumptions is high.

78. The interaction between the two presumptions is of considerable practical significance. Where legislation not only operates retrospectively, but does so in a manner that deprives individuals of property rights which had already vested before its commencement, both presumptions operate concurrently and thus with reinforcing effect. A truly retrospective deprivation of vested property rights represents a higher degree of unfairness, and accordingly demands particularly clear statutory language before such an intention will be attributed to Parliament. Nugee LJ failed to give sufficient weight to these principles of interpretation.

79. Overall then, clear language is needed and the obvious ambiguity should be resolved in favour of the Appellant as the party whose proprietary interest is at risk of being dispropriated (*Methuen-Campbell v Walters*); uncompensated substantial dispropriation is at the far end of the 'unfairness scale'.

80. At J§135 Nugee LJ characterised the presumption as merely "*a rule of construction, or, [26/290] perhaps more accurately, a factor to be taken [i]nto account when interpreting a statute or rule*", relying on Lord Neuberger's observation in *Odelola* at [55]. However, this relegation of the presumption to a mere factor is inconsistent with the weight of authority, which treats it as giving rise to "a very strong disposition" against retrospective effect: *L'Office Cherifien* at 524–525 per Lord Mustill (see above).

81. By treating the presumption as a mere factor to be weighed in a general balance, Nugee LJ was able to conclude that the presumption yields to evidence of a "sufficient" intention drawn from the overall statutory purpose and scheme. He was wrong to take this approach. Newey LJ, by contrast, correctly applied the presumption: given that the language of Paragraph 9 is expressed in general terms and that there is nothing in the language itself

to displace the presumptions against retrospectivity and interference with property rights, the presumption should prevail.

Fairness

82. As set out in the authorities above, Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned, unless the contrary intention appears; greater unfairness demands greater clarity of language. Given the significant level of unfairness that would arise from retrospective operation, the presumption against retrospectivity leans heavily in support of a prospective approach to Paragraph 9 and the clarity of language required to displace it is simply not found in the BSA.
83. Newey LJ identified several factors relevant to fairness at J§84 and 85. Factors to be [26/271] highlighted include the following:
- a. *Appropriation from landlord to leaseholders of millions of pounds* - That Parliament is unlikely to have intended Sch.8 to have retrospective effect is evident when one considers the consequences of such a construction. It would apply, for example, in circumstances where the landlord of a block with combustible cladding carried out cladding remediation works in 2020 (i.e. at a time before the BSA was contemplated) and lawfully demanded in 2021 the costs of those works from leaseholders through the service charge under the terms of their leases, but held off (as the Appellant did here) from enforcing repayment of those demands whilst it sought third-party funding in an effort to protect leaseholders from having to immediately bear the full cost. The consequence of a retrospective construction would be that the landlord would not now be entitled to those sums despite an enforceable debt having accrued long before the BSA was enacted. The appropriation from landlord to leaseholders (collectively) in this scenario would be millions of pounds – unravelling rights and obligations that in many respects crystallised long before the BSA was even contemplated.
 - b. *Lack of compensation scheme* – A retrospective interpretation is particularly unlikely in circumstances where the BSA does not establish any compensation

scheme to mitigate against the substantial appropriation of property (likely to be hundreds of millions of pounds across the sector) which would have resulted from the retrospective operation of Sch.8 (a pointer to the strict application of the presumption against appropriation – see *Horner* at paragraph 63 above).

[3/59]

- c. *Loss to landlords and managers may be out of all proportion to the extent of their financial interests in the relevant buildings* – As explained by Newey LJ at J§85(iii), [26/272] ‘the present case illustrates the point... *Adriatic* is entitled to ground rents totaling £9,250 per year and has been estimated to have a financial interest of 2.52% in *Hippersley Point*. The tenants have a far greater stake in the building.’ Ground rent income is very modest and not intended to meet the cost of maintaining a building.
- d. *Landlords and managers may have acted differently* – A retrospective interpretation undermines the foundational expectation that the law in force at the time of a transaction or event should govern its consequences. Landlords, including the Appellant, may have acted differently had they known that Sch.8 would render incurred costs irrecoverable. That is particularly unfair where a landlord or manager incurred the entire cost (as the government encouraged) in the expectation it would, in the usual way, be indemnified by the leaseholders. On the facts of this case (albeit, as stated, they cannot govern the proper construction of Paragraph 9), the retrospective operation of Paragraph 9 would mean that legal costs and other professional fees that were incurred in pursuit of the application for dispensation in good faith and which were, at the time, potentially recoverable from leaseholders under the terms of their leases, would no longer be recoverable. The Appellant could not have known at the time when it brought the dispensation application before the FTT that its costs would be barred under Paragraph 9 because, at that time, the BSA was not even contained in a draft Bill. Had the Appellant known that the recovery of its legal costs (and indeed the entire cost of the remediation works that the application related to) would be substantially barred by Paragraph 9, then the Appellant may have taken a different course. The Appellant was entitled to rely upon the law as it stood at the time of the dispensation application. As such, altering the position retrospectively is unjust and contrary to the rule of law.

- e. *Unintended harsh and anomalous results*: This produces unjustifiable results that the court should be slow to find Parliament would have intended. For example, a landlord that incurred legal and professional costs prior to 28 June 2022, but did not demand them from leaseholders because they hoped to recover them from third parties and wanted to minimise the distress caused to leaseholders, so instead protected recoverability of such costs by the service of a notice pursuant to s.20B(2) [53/583] LTA 1985, will now be unable to recover those costs as a service charge from leaseholders with qualifying leases. Conversely, a landlord in the same scenario who demanded contributions from leaseholders and enforced those payment obligations immediately (such that the sums were paid) will be better off. Equally, leaseholders who received service charge demands for sums that were lawfully due prior to 28 June 2022 and paid them, will be worse off than those leaseholders who refused to pay but at the time had no lawful basis to do so. Such an outcome would be perverse. As pointed out by Newey LJ at §85(x), ‘*if Parliament deemed that fair, [26/272] it is not obvious why it should have considered it unfair that tenants should remain liable for some service charges after that date*’.
- f. *Lack of fault* - A retrospective interpretation is particularly harsh on landlords, like the Appellant, who were not responsible for the defects.
- g. *The purpose of protecting leaseholders is still met* – Applying a prospective only interpretation to Sch.8 still affords leaseholders substantial protection from service charges that they would otherwise have been liable to pay under their leases. The court ought not lose sight of the significance of the prospective impact of the Act. However, the Court of Appeal’s decision in *Triathlon* means that leaseholders who have paid service charges in respect of costs incurred in connection with relevant defects can apply for an RCO. Such an order could be made against a landlord to whom service charges have been paid if the FTT considers it ‘just and equitable’; it may, for example, be just and equitable if, unlike the Appellant, the landlord was responsible for the defects.

Whilst the Appellant takes no specific position with respect to the issues in the *Triathlon* appeal more generally, a retrospective construction of s.124 would achieve the ‘polluter pays’ purpose of the BSA without it being necessary to

construe Sch.8 retrospectively. Moreover, the ‘just and equitable’ test provides a safeguard against unfairness that is not achieved by a retrospective interpretation of Paragraph 9. Given the clear concern to address potential unfairness in all of the expressly retrospective provisions in Part 5, the lack of any safeguard against unfairness in Sch.8 is a clear pointer to the proper construction of the provisions.

- h. *Recovery options for landlords, managers and RTM companies limited* – Unlike leaseholders who can always seek an RCO against their landlord (if *Triathlon* is upheld), the scope for landlords to pass on liability is limited. As is the case for the Appellant, there will often be no other landlord with whom a landlord can seek to share the costs under the 2022 Regulations. Further, the developer and associates may no longer exist or may not be financially able to meet the costs of remediation, and government funding may not be available. Importantly, as highlighted above at [3/48] paragraph 29, where managers and RTM Companies have incurred costs pre-Act, if they cannot recover those sums, they are likely to find themselves in an insolvency position; Parliament is unlikely to have intended such an outcome, and the statutory scheme contains no provision to guard against such an outcome.

84. Of course, there are also factors pointing in the other direction, as identified in the Judgment. As to those identified at J§84: [26/271]

- a. Yes, a non-retrospective approach would leave leaseholders “*facing bills which they could not have anticipated and which they might not be able to afford*”. However, that is the position they were in *anyway* pre-commencement and reflects the contractual bargain struck by way of the lease. It is not inherently unfair.
- b. It is worth bearing in mind that building owners and occupiers have been aware of the potential need for remediation for many years and, where remediation work was put in train years prior to the BSA, the subsequent bills for costs incurred as a result are not ‘out of the blue’ but the result of works which took some time to plan and upon which leaseholders will have been (or ought to have been) consulted.

- c. As acknowledged above, landlords will sometimes (as here) be better able to bear the costs than the leaseholders. However, the same cannot be said for managers and RTM Companies, which are generally non-trading and do not have any assets. The provision applies equally to all.
 - d. Whilst the financial impact on landlords will sometimes be mitigated by the BSF and DRC, the BSF only covers certain re-cladding costs (and not retrospectively), and the DRC only applies where a developer is a signatory to the same and actually complies with its terms (and in any event post-dates the Act, and so is not obviously relevant to the exercise of construction). Equally, whilst the ability to seek an RCO (if retrospective in effect) or claim over a wider historic period under the Defective Premises Act 1972 is created by the BSA, they will not always provide any effective remedy. There are plenty of examples where no mitigation will exist (such that nothing that might be argued to be ‘compensation’ would exist).
 - e. It is, of course, to be accepted that the effect of Paragraph 9 is not such as to prevent *all* remediation costs from being payable – only those payable by leaseholders holding a qualifying lease. In many cases, however, that will be a significant majority (as here).
85. Applying the principle in *Tunncliffe* that “*the greater the unfairness, the more it is expected that Parliament will make it clear*” if retrospectivity is intended, the factors set out above demonstrate the significant unfairness that results from a retrospective interpretation which demands clear language, even taking into account the countervailing points. The presumption is not rebutted. That would still be so even if (contrary to these submissions) this Court considered that the relative fairness as between the two potential constructions were more finely balanced.
86. The judgment of Nugee LJ fails to give any, or any sufficient, weight to the degree of unfairness and the lack of any compensation for the lost accrued rights. Having correctly acknowledged at J§136 that “*the greater the degree of retrospection and the more [26/290] unfairness involved, the more potent the presumption [against retrospectivity] becomes*”, he was wrong to find in J§203 that the “*unfairness of depriving landlords of accrued [26/308]*

rights” does not add “*very much*” by comparison with the unfairness resulting in any event to landlords *prospectively*. It fundamentally undermines the principle of legality.

87. That comparison (see in particular J§196-198) is not a valid way to assess the unfairness [26/306] of a retrospective construction. The prospective effects are a given, and are effects that a party will operate and arrange its affairs in the knowledge of. They are not relevant to assessing a retrospective taking of accrued rights. It is hard to see how a construction that results in many millions of pounds of lawfully accrued debts being written off, when compared to the alternative of a prospective only construction, does not add “very much”.
88. There is a fundamental difference between the position of a landlord that:
- a. Incurs costs and holds off (potentially for years) on recovery whilst it pursues third parties (an approach encouraged by the government of the day), but doing so in the knowledge that, if need be, it can recover its outlay pursuant to its contractual entitlement by way of service charge from leaseholders in due course;
 - and one that:
 - b. Incurs costs post-BSA in a world where: (a) service charge recovery is very limited, (b) government mandates a more risk proportionate (cheaper) approach to remediation and (c) developers can more readily be forced to undertake remediation at their own cost (pursuant to the Developer Remediation Contract).
89. The unfairness to the landlord in the former example is quite obviously much more significant than the unfairness to the landlord in the latter example. In the former position, the landlord had a legitimate expectation that it would be able to recover from leaseholders in due course in accordance with its established legal rights and chose, rather than pursuing the leaseholders immediately, to seek to minimise the burden to leaseholders by pursuing third parties first. In the latter example, any costs the landlord incurs are with the knowledge of the state of the law and funding can be planned accordingly. All three Judges recognise this unfairness, e.g. J§195, but the majority failed to give this fundamental [26/305] distinction between the prospective and retrospective positions enough weight.

90. The presumptions are also not displaced by other circumstances sufficiently strong to displace them. The majority in the Court of Appeal was wrong to hold otherwise.
- a. It clearly is not necessary for Paragraph 9 to have retrospective effect such that it renders costs already incurred prior to the BSA no longer payable. And a retrospective construction does nothing to speed up the pace of remediation or hold those responsible for defects to account (indeed, it probably would achieve the opposite).
 - b. Parliament's intention to relieve leaseholders from such costs is substantively met even with a prospective construction, given the operation of Sch.8 and given the other remedies afforded to them by Part 5 generally.
 - c. More specifically, to the extent the purpose can be sufficiently clearly made out in this respect, it can be met via s.124 of the BSA (as construed by the Court in *Triathlon*) with the 'just and equitable' safety valve (s.124(1)) ensuring fairness and protecting against potential A1P1 breaches, mitigating the otherwise perverse and unfair outcomes that arise if Sch.8 operates retrospectively. [85/1531]
91. As to Nugee LJ's point at J§197, whilst it is accepted that there is (on the Appellant's primary case) a retrospective effect in the instance where contracts are entered into, but no costs have been incurred as at 28 June 2022, the answer to that is that it demonstrates a further potential unfairness if the provision is construed to operate retrospectively – and that this is in order to give full effect to the words used in Paragraph 10. Nugee LJ, having disregarded the relevance of paragraph 10 of Sch.8 of the BSA (J§78), should either (a) have found that, properly construed, Paragraph 9 does not relate to *any* legal liabilities entered into prior to the BSA coming into force or (b) found that the further unfairness that results from contractual liabilities where costs have not been incurred is a degree of unfairness that can be tolerated (subject to the proper operation of the presumption, of course). The answer is not to conclude that 'it's all unfair anyway'. [26/306] [26/269]

In practice, as a matter of logic, the instances where contracts were entered into pre-BSA but costs had not been incurred by 28 June 2022 will be limited, and often such contracts

would have been entered into after the relevant amendments were introduced to Parliament on 14 February 2022 or after the government’s announcement of the ‘building safety reset’ in January 2022 – mitigating any unfairness.

Explanatory Notes, Hansard, and other materials

92. Relevant to establishing the statutory purpose behind Sch.8 is the significance of the Explanatory Notes and the difference in treatment between explanatory notes that were available when legislation was being enacted and those which come into existence subsequently is set out in J§65-70 and the authorities referred to therein. It is assumed [26/266] Newey LJ’s conclusions on this point (with which the majority agreed) will be not controversial before this Court.
93. As set out J§34, **this Court’s references to the post-BSA explanatory notes in *URS*** [26/256] **must (with respect) be reconsidered;** the passages cited at §105 (leading to the [86/1584] conclusion at §106) of the *URS* decision are from the explanatory notes produced some months *after* the BSA received Royal Assent – which were not and cannot have been considered by Parliament during the passage of the Bill.
94. Nothing in the explanatory notes that were available at the time of Parliamentary [96/1780] consideration of the Building Safety Bill (see J§33) supports the argument that it was [26/255] Parliament’s intention for Paragraph 9 to operate retrospectively. This is significant in light of the principle of legality – one would not expect retrospective legislation to be introduced without scrutiny and/or transparency.
95. Relatedly, Ministers expressly addressed Parliament during the legislative process as to the extent to which Sch.8 was to have retrospective effect (albeit to a limited extent¹). [99/1839]
96. This is entirely consistent with what is apparent on the face of the provisions; where a degree of retrospectivity was intended (as in the case of the permitted maximum) this is

¹ Hansard, HL 28 February 2022, Vol 819; Column 264GC. The reference to dealing with the specific issue raised by Lord Leigh of Hurley appears to be a reference to one of the matters addressed in Lord Greenhalgh’s subsequent letter of 10 March 2022 to Baroness Hayman, to which Lord Leigh was copied. The position expressed in that letter is consistent with that provided in the House.)

spelled out clearly. It does not, however, provide support for the view that Sch.8 was generally intended to have retrospective effect.

97. If retrospective application to remediation costs already incurred was intended to achieve the purpose of the BSA, it is odd that there was no debate around retrospectivity, there was no mention of the same in the Explanatory Notes such as they were, there are no express words making that intent clear, there is no suggestion the guidance for Parliamentary draughtsman on retrospective provisions was followed and that the only reference in debate was to the permitted maximum.
98. One other point deserves mention at this point, that being the relevance of the evidence given on behalf of the Secretary of State before the Court of Appeal with respect to the development and purpose of the BSA from the government's perspective. This evidence (given by way of a witness statement from Mr Jonny Murphy) was received by the Court of Appeal solely in the context of the AIP1 challenge, which is not before this Court.
99. Of course, some of the content of that statement contained detail of relevant contextual background arising out of matters that were and are in the public domain. However, to the extent it went further than this, and strayed into matters which were not well known and publicly available, it would be wrong to take them into account when determining this appeal, for the reasons expressed by Nugee LJ at J§150. This Court is not, of course, bound [26/294] by the observations of Singh LJ in *R (DK) v Revenue and Customs Commissioners* [2022] [70/1102] EWCA Civ 120, [2022] 4 WLR 23 at §44. The Appellant's case is that Mr Murphy's statement ought not be received by this Court in the context of this appeal (nor indeed Mr Andresen's). The material parts of those statements, so far as they influenced the decision below, are set out in the Court of Appeal's Judgment.

Alternative case

100. Whilst the Appellant's primary case is that Paragraph 9 only applies to costs that were incurred after that provision came into force, which is tied to the words used in Paragraph 10, as noted at paragraph 18 above, the courts below have doubted the relevance of Paragraph 10 to construing Paragraph 9. Hence, the Appellant's fallback position is that

Paragraph 9 does not apply in so far as service charges had in fact become *payable* (fallen due) by the date that Paragraph 9 came into force.

101. The arguments set out above apply with equal force to the Appellant's alternative position, albeit a notably greater degree of retrospectivity would arise (principally, where costs had already been incurred by 28 June 2022 but where those costs had not yet been included within final year accounts and final sums demanded in line with contractual machinery such as to arrive at a crystallised debt due by leaseholders).
102. This interpretation, whilst not obviously consistent with the mechanism in Paragraph 10, would give greater focus to the words used in Paragraph 9, namely that 'no service charge is payable', by ensuring that any sums becoming payable after 28 June 2022 would not be payable (a literal reading of Paragraph 9), whilst still ensuring a degree of consistency with the presumptions.
103. Furthermore, this interpretation would be consistent with the focus on when costs became payable by leaseholders as used in paragraph 5 of Sch.8. As set out above, paragraph 5 limits the amount of service charges recoverable by reference to the total of the 'relevant service charge' that 'fell due' over the prior period extending back to 5 years prior to the commencement of the BSA and the amount that 'falls due' after commencement, rather than being tied to when costs are incurred or, indeed, whether or not the sums that fell due pre-BSA were in fact paid. The total service charges cannot exceed the permitted maximum set out in paragraph 6. Whilst the proper construction of paragraph 5 is not in issue in this appeal, it is far from obvious it was intended to have retrospective application given it operates by reference to sums falling due in the past (whether or not paid) and thus ought to only regulate matters for the future (i.e. future service charge demands). It could be read consistently with the Appellant's primary case, but it is accepted the language is different and that Paragraph 10 does not apply to it, such that different factors might apply.
104. With respect to Nugee LJ's point at J§200, paragraph 5 of Sch.8 of the BSA was not [26/307] discussed in oral argument other than peripherally but, in any event, it is possible for paragraph 5 to operate perfectly well alongside a prospective construction of Paragraph 9. To take Nugee LJ's example at J§200, if the leaseholder had already paid £20,000 at the

end of the 5 year ‘look back’ period, paragraph 5 *might* (subject to the presumption) have the effect that from the point the BSA comes into force, no further sums could be demanded, even if incurred prior to the BSA coming into force. However, paragraph 5 does not use the ‘no service charge is payable’ form of words, and paragraph 5 does not apply to Paragraph 9 costs in any event (as costs are not a relevant measure in respect of a relevant defect). There is no direct correlation between the measures. Accordingly, Nugee LJ was wrong to find that paragraph 5 lends any support to a retrospective interpretation of Paragraph 9.

F. Conclusion

105. The reasons upon which the Appellant’s argument is founded are as follows:

- (1) The language of Paragraph 9, read with the mechanism in Paragraph 10, does not require a retrospective construction.
- (2) Where Parliament intended provisions of Part 5 to operate retrospectively it said so in express terms.
- (3) The presumptions against retrospectivity and retrospective takings of property are both clearly engaged.
- (4) The level of unfairness consequent upon a retrospective interpretation is very high.
- (5) The statutory purpose of the BSA and the wider scheme of Part 5 does not require Paragraph 9 to have retrospective effect; the leaseholder protections are met by a prospective construction, particularly if s.124 operates retrospectively.
- (6) Taking into account the balance of fairness, the language used, and achieving the purpose of the BSA, on a true interpretation of Paragraph 9, the presumptions against retrospectivity and retrospective takings of property have not been rebutted. The correct conclusion is that Paragraph 9 operates prospectively only.

106. For the reasons well expressed by Newey LJ and as set out above, this appeal should be allowed.

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