

B E T W E E N:

ADRIATIC LAND 5 LIMITED
(a company incorporated under the laws of Guernsey) Appellant

- and -

LONG LEASEHOLDERS AT HIPPERSEY POINT Respondents

- and -

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

RESPONDENTS' WRITTEN CASE

Paragraphs marked "[X]" refer to the Court of Appeal judgment [2025] EWCA Civ 856

Introduction

1. The issue on this appeal is short, but important to leaseholders with flats in unsafe buildings. The leaseholder protections in Sch.8 to the Building Safety Act 2022 (**the BSA**) came into force on 28 June 2022. The issue whether, from that date, the protections in Sch.8 to the BSA applied to all service charges falling due within their scope, irrespective of when the landlord incurred the underlying relevant costs. In other words, did Parliament intended those safeguards to 'bite' on all relevant service charges payable after 28 June 2022, or only on charges for remediation costs incurred by landlords after that date. [MH/48/525-534]
2. The Court of Appeal (by a majority) held that para.9 of Sch.8 to the BSA answers that question in straightforward language: "*No service charge is payable*", irrespective of when landlords incurred the underlying relevant costs. The Appellant's case depends on adding qualifications which Parliament conspicuously omitted, and which were contrary to the purposes of Sch.8. The Respondents and the Secretary of State submit that the majority in the Court of Appeal were correct. [MH/48/529]

3. Para.9 of Sch.8 expressly deals with “*legal or other professional services*”. Strictly speaking the appeal raises the question whether the Respondents must contribute to the relatively modest legal costs incurred by the Appellant in applying to the First-tier Tribunal (Property Chamber) for dispensation under s.20ZA Landlord and Tenant Act 1985 (**the 1985 Act**). But the appeal has wider significance. The Court of Appeal recognised that the interpretation of para.9 “*has implications for other paragraphs in Sch.8, which depend on similar language*” [52]. The Appellant’s evidence below was that it and two associated companies had demanded nearly £87 million before commencement, of which more than £70 million remained unpaid in June 2024. The appeal therefore affects liabilities considerably exceeding the sum directly in issue [84(i)]. This figure is repeated in the Appellant’s Written Case §6. If these costs are not met by landlords such as the Appellant (or by the Government or by developers), then the risk is that a significant part of the burden of remediating unsafe buildings will shift to leaseholders.

The Scope of the Appeal

4. The Statement of Facts and Issues sets out the procedural history, and this need not be repeated. It should be noted that it was not the Respondents who first raised the point now before this Court. The point was first raised by the Deputy President of the Upper Tribunal of his own motion, when granting permission to appeal on 13 July 2023. Until the Court of Appeal, the Respondents did not appear and were not represented, although some unrepresented individuals made limited written representations.
5. This Court granted permission to appeal on Ground 1 alone on 7 November 2025. The sole issue is therefore whether para.9 prevents relevant costs incurred before the BSA came into force from being payable by way of service charge. Three matters are no longer in issue:
- (1) The Scope Issue. The Court of Appeal held unanimously that the costs of a dispensation application under s.20ZA of the 1985 Act fall within para.9 [44-47]. There is no appeal against that conclusion.

- (2) The A1P1 Issue. It also unanimously held that construing para.9 as retrospective would not violate Art.1 Pr.1 of the European Convention on Human Rights: [131], [MH/26/289] [133] and [206]. Permission to appeal this aspect of the decision was refused. [MH/26/290, 309]
- (3) The ‘fully retrospective’ construction. In the Court of Appeal, the Respondents advanced an alternative construction of para.9, namely that it meant “*no service charge is to be regarded as ever having been payable*” [180]. The Secretary of State argued para.9 meant no service charge was payable from 28 June 2022 “*whether such services have been provided and billed for, or any service charge demanded or fallen due, before or after 28 June 2022*”: see [181]. The majority of the Court of Appeal preferred the Secretary of State’s construction: per Nugee LJ at [194-203]. Despite some reservations, the Respondents adopt a pragmatic approach in this appeal, and do not pursue the wider construction they advanced in the Court below. They accept the reasoning of Nugee LJ, and their position is now directly aligned with that of the Secretary of State. [MH/26/300] [MH/26/305-308]
6. The Respondents’ construction, like the Secretary of State’s, is therefore that set out by Nugee LJ at [181]. From 28 June 2022, no service charge within para.9 is payable, “*whether such services have been provided and billed for, or any service charge demanded or fallen due, before or after 28 June 2022*”. Sums paid before that date are unaffected. [MH/26/300]
7. A further preliminary point can be made about the scope of the appeal. The summary of reasons supporting the appeal asserts that “*the appeal also provides an opportunity for the Court to address two diverging strands of caselaw concerning the proper application of the common law presumption against retrospective takings of property*”. But it is not altogether easy to discern the “*two diverging strands of caselaw*” from the Appellant’s Written Case where it deals with deprivation of property rights §58-64. Indeed, the Appellant’s Written Case does not even mention a number of the authorities referred to in the Grounds of Appeal §3.1-3.2 (*Colonial Sugar Refining; Robinson & Co; Newcastle Breweries*; and, *De Keyser’s Royal Hotel*), which purport to identify the two diverging strands. [MH/3/59-60] [MH/101/1845-1846]

8. The Appellant no longer presents its case as one of divergent authority. To the extent the point survives (Appellant's Written Case, §§56(a), 78, 80-81 and 86), it is misconceived: [MH/3/58, 65, 65, 70]

(1) The Appellant did not suggest to the Court of Appeal there was any divergence of authority, either in oral argument, or in its written submissions following the hand down of this Court's decision in *URS*. [MH/86/1534-1630]

(2) The members of the Court of Appeal did not disagree about the principles of interpretation generally. Neither did they disagree about the principles of the presumption against deprivation of property. They only disagreed about the specific application of those principles to para.9 of Sch.8 to the BSA: per Newey [MH/48/529] LJ at [53] and Nugee LJ at [140]. Nugee LJ's reasoning did not rest on any [MH/26/291] different principle. He simply found that the presumption against retrospectivity and the presumption against property rights acted "*in tandem*".

(3) In any event, there is no divergence. The Court has rightly declined to prescribe any rigid approach. As Lord Mustill pointed out in *L'Office Cherifien* at 524-5, [MH/63/934-935] the subject matter of statutes is so varied that these generalised maxims are not a reliable guide, because they too readily confine the court to a perspective which treats all statutes as if they were the same. The Appellant is wrong to treat the presumption against uncompensated takings as a rigid rule, different in kind from the presumption against retrospectivity. Lord Neuberger's observation in *Odelola* [MH/67/1049] at [55] applies equally to both. Each is a factor, whose weight depends on context, [MH/67/1049] in identifying what Parliament intended, and each yields to a sufficiently clear contrary intention.

(4) In truth, the Appellant seeks a special and more stringent test of construction for statutes affecting property rights, over and above the ordinary approach. Nugee LJ was right to reject it at [140], and this Court should reject it too. [MH/26/291]

The Building Safety Act 2022

9. Newey LJ summarised the relevant provisions of the BSA at [13-22]. The BSA has its [MH/26/248-252] origins in the Grenfell Tower tragedy, which took place nearly a decade ago on 14 June 2017, and the subsequent recommendations made in the 2018 Hackitt report. Sch.8 was [MH/48/525-534] first introduced as an amendment to the Bill in the House of Lords tabled on 14 February

2022. The BSA received Royal Assent on 28 April 2022, and by virtue of s.170(3), most of the provisions in Pt.5 came into force on 28 June 2022.

[MH/43/500]

10. The Appellant emphasises that the remediation provisions were introduced late, without consultation or impact assessment, and with limited debate: Appellant’s Written Case §§13, 97. That does not assist it. “[T]he courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility”: *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [184], cited at [125]. The same must hold for construction.

[MH/3/43, 74]

[MH/75/1312]

[MH/26/286]

11. In addition, the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (SI 2022/859) (**the 2022 Regs**) were made in July 2022. In particular, regs 3-5 permit landlords who are unable to recover the cost of relevant measures through service charges as a result of Sch.8 to pass those costs on to other landlords.

[MH/49/535-553]

12. At around this time, the Government also published explanatory notes in respect of the BSA (the **Explanatory Notes**). Newey LJ considered that these notes were “persuasive” but did “not enjoy any particular legal status and can be compared with academic writings”: [70]. There is no appeal against that finding, and the Appellant agrees Newey LJ’s conclusions on the point are uncontroversial: Appellant’s Written Case §92.

[MH/98/1808-1837]

[MH/26/267]

[MH/3/73]

13. The Respondents draw attention to the following features of the architecture of the legislation, which are central to the issue of construction.

14. **First**, this Court has recently considered the effect of various material parts of the BSA in *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21; [2025] 2 WLR 1095:

[MH/86/1534-1630]

- (1) The Act itself is “both forward and backward-looking”, and the “backward-looking provisions are set out in Part 5”: *URS* at [84]-[86], [102].

[MH/86/1579, 1583]

- (2) The second of the four main changes to the law introduced by Pt.5 was s.124, which this Court described as sitting “within a broader suite of ‘leaseholder protections’ at sections 116 to 124 of, and Schedule 8 to, the BSA”: *URS* at [86(2)].

[MH/86/1579]

(3) This Court described the leaseholder protections as ensuring that owners of qualifying leases “*are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating*” (URS at [86(2)]). They held that “[a]ll four sets of provisions have retrospective effect” (URS at [87]). They added that “*the importance of retrospectivity to Part 5*” was “*reflected not only in section 135 but in all the main changes to the law made by Part 5*” (URS at [102]): see [88].

[MH/86/1579]

[MH/86/1580]

[MH/26/273]

(4) The Appellant suggests these findings “*must ... be reconsidered*” in the light of the issue about the relevance of the Explanatory Notes: see Appellant’s Written Case §93. But that criticism is directed at URS [105]–[106], where the Court relied on passages in the notes published after enactment. It does not touch the Court’s analysis at [84]–[87] and [102], which rests on the structure and text of Pt.5 itself.

[MH/98/1808-1837]

[MH/86/1583 - 1584]

[MH/86/1579-1580, 1583]

15. **Second**, the Sch.8 leaseholder protections are engaged by reference to historic facts, and in particular the state of play on 14 February 2022 (the “*qualifying time*”). Whether a lease is a “*qualifying lease*” depends on a snapshot of who owned the lease at the “*qualifying time*”: s.119(2). Whether para.2 of Sch.8 applies depends on who was responsible for a defect and who the landlord was at the “*qualifying time*”. Whether para.3 applies depends on the landlord’s group’s net worth at the “*qualifying time*”. Para.4 depends on the value of the lease at the “*qualifying time*”. Each gateway into Sch.8 is therefore ‘backward-looking’.

[MH/48/525]

[MH/44/503]

[MH/48/526]

[MH/48/527]

16. **Third**, paras.2-4 and 8-9 of Sch.8 each provide, in identical terms, that “*no service charge is payable*” if the relevant condition is met. Para. 5 of Sch.8 provides that a service charge “*is payable only if*” the aggregate does not exceed the permitted maximum. Whatever this Court decides about para.9 is likely to govern all of them: [52], [177]. The consequences of the Appellant’s construction must therefore be tested against the other Sch.8 protections, including para.2 (responsibility of developer-landlords), and para.8 (cladding). They are not tested merely against the more modest sums at stake in this appeal.

[MH/48/525-527]

[MH/48/527]

[MH/26/261, 300]

[MH/48/525, 529]

17. **Fourth**, the machinery for implementing the leaseholder protections is at para.10 of Sch.8. Where a relevant paragraph provides that no service charge is payable in respect of a thing, “*no costs incurred or to be incurred in respect of that thing*” are to be regarded as relevant costs, or met from a reserve fund, and “*any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise*”.

18. Particular emphasis is placed on three features of para.10:

- (1) It speaks of costs “*incurred*” as well as “*to be incurred*”.
- (2) It prevents protected costs from being “*met from a relevant reserve fund*”.
- (3) And it requires “*any necessary adjustment*” to be made “*by repayment, reduction of subsequent charges or otherwise*”.

Each shows that Sch.8 was designed to operate immediately on existing service charge arrangements.

19. **Fifth**, Parliament went on to provide a comprehensive menu of routes by which the displaced costs could be recovered from other parties so that the burden does not fall on a single landlord. These ‘landlord protections’ dovetail with the ‘leaseholder protections’ in Sch.8:

- (1) Regs 3-5 of the 2022 Regs permit a landlord which has paid, or is liable to pay, the cost of a relevant measure to recover it from responsible landlords (reg.3), contributing landlords (reg.4), and other landlords in the building (reg.5): [24-26].
- (2) Section 124 of the BSA permits remediation contribution orders (RCOs) to be made against landlords, former landlords, developers and their associates, where just and equitable, to meet costs incurred or to be incurred in remedying relevant defects: [21(ii)].
- (3) Section 130 permits building liability orders to be made extending liability from one corporate body to its associated companies.
- (4) Section 135 extends the limitation period for claims under the Defective Premises Act 1972 and the Building Act 1984.
- (5) Section 149 creates new causes of action against those who manufactured or mis-sold cladding products.

20. **Finally**, as a matter of practicality, the total taxpayer contribution is expected to be some £5.1 billion, including through the Building Safety Fund. Developers have also signed a Developer Remediation Contract, under which they take responsibility for work necessary to address life-critical fire-safety defects [35]-[36]. The Respondents do not suggest these arrangements cover every case. Not every relevant defect attracts public funding, and the Developer Remediation Contract binds only developers who have signed it. But the scheme as a whole ensures that landlords “are not left to bear the burden of remediation alone”. It “seeks to allocate responsibility by reference to likely degree of culpability and likely ability to contribute”: [130(iv)].

Statutory Interpretation

21. The relevant principles of statutory interpretation were recently restated by this Court in *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16; [2026] AC 315. The Court of Appeal, which did not have the benefit of that decision, approached the exercise through the summary of Lord Sales JSC in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 at [40]-[41]: see Nugee LJ at [142]-[144]. Nothing turns on the difference. The Court’s task is to identify the objective meaning of the words which Parliament has used, read in the context of the statute as a whole, and in the historical context of the situation which led to its enactment.

Retrospectivity: Applicable Legal Principles

22. The general principles of statutory interpretation are supplemented by the presumption against retrospectivity. This applies where a provision is said to affect past events or accrued rights (see Newey LJ at [53]-[59]). The basic principle is that, unless a contrary intention appears, a statutory provision is presumed to operate prospectively only: Lord Rodger in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 at [187], cited at [53].

23. The Appellant refers repeatedly to the significance of the principle and talks of legal certainty as the “*fundamental pillar*” of English law. But the presumption against retrospective operation of a statute is, nonetheless, only a presumption: *URS* at [274]; see also *Bennion* at §7.14. It is not a substantive or procedural right. It is a rule of construction or, more accurately, a factor to be taken into account in interpreting the

provision: per Lord Neuberger in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230 at [55].

[MH/67/1049]

24. The presumption is not a rigid rule, but an aspect of the ordinary search for the meaning Parliament intended. The basis of the rule is no more than a simple question of fairness. The question in each case is whether, having regard to the language used and to the practical consequences of the competing constructions, Parliament must be taken to have intended the provision to apply to past events: per Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, at 524-525.

[MH/63/934-935]

25. Hence, there is said to be a “spectrum” of retrospective effect: the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended: *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724 per Staughton LJ, approved in *Wilson* at [19], and in *L'Office Cherifien* at 525; see *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032 at [57]. This was referred to below [137].

[MH/82/1458]

[MH/63/934-935]

[MH/60/851]

[MH/26/290-291]

26. The decision in *Tunncliffe* was subsequently overruled in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249. Staughton LJ’s statement of principle has nonetheless been repeatedly approved: [136]. The Appellant’s reliance on the facts of *Tunncliffe* to explain why the presumption was “weak” in that case (Appellant’s Written Case §47) is therefore beside the point.

[MH/69/1083-1095]

[MH/26/290]

[MH/3/55]

27. Lord Mustill in *L'Office Cherifien* identified a number of factors that may be relevant to the evaluation of “fairness”, including:

[MH/63/896-939]

- (1) The value of the right affected; the extent to which that value is diminished or extinguished;
- (2) The clarity of the language; and
- (3) The wider circumstances in which the legislation was enacted.

[MH/63/896 - 939]

The relevant factors will vary from case to case: *L'Office Cherifien* at 525, cited at [55].

[MH/26/262]

28. A long-standing distinction exists between laws which alter, for the future, the rights and obligations arising from pre-existing legal relationships, and laws which alter such

rights and obligations retrospectively. Legislation of the latter kind may be harder to justify, but justification for it exists in some cases, and in particular where the legislation has a remedial purpose: *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, at [121] per Lord Reed, cited at [139]. The Appellant accepts that the presumption is at its strongest in the criminal sphere: Appellant's Written Case §45. Remedial legislation responding to a public safety crisis lies at the other end of the spectrum. [MH/56/708] [MH/26/291] [MH/3/55]

29. Where a provision is intended to have some retrospective effect, the interpretive question is not whether it operates retrospectively but how far it does so. There is a subsidiary presumption that retrospective operation extends no further than is necessary to achieve the statutory purpose: see *URS* at [273] per Lord Leggatt, citing *Arnold v Central Electricity Generating Board* [1988] AC 228, 275B, cited at [56]. [MH/86/1623] [MH/26/262 - 263]
30. That subsidiary presumption cannot be used to cut down wording which is general on its face where the statutory purpose points the other way. In *URS*, this Court held at [124] (per Lords Hamblen and Burrows) and [274] (per Lord Leggatt) that, assuming the *Arnold* presumption to apply, it was necessary to construe the general wording of s.135(3) of the BSA as extending to the claims already in issue in order to achieve the provision's purpose of holding those responsible for building safety defects to account without the leaseholders having to bear the (potentially very large) costs. [MH/86/1588, 1623-1624] [MH/46/518]

The Presumption Against Interference with Property Rights

31. A further, similar, presumption is relied on by the Appellant. An Act of Parliament should not be construed as interfering with or injuring a person's rights without compensation, unless the Court is obliged to so construe it: *Attorney General v Horner* (1884) 14 QBD 245 at p.257, per Brett MR. Newey LJ set out the principles underpinning this presumption at [60-64] and the majority agreed with them, at [140]. The Respondents adopt this exposition of the principles involved. [MH/55/666] [MH/26/265-266, 291]

The Respondents' Submissions

32. In summary, the Respondent invited the Court to dismiss this appeal for eight reasons:

- (1) **The language used.** Para.9 of Sch.8 says that no relevant service charge “is payable”. It contains no qualification based on when the underlying costs were incurred (§§33-42 below). [MH/48/529]
- (2) **The statutory purpose.** The interpretation adopted by the majority in the Court of Appeal answered the mischief which Parliament intended. Sch.8 was enacted to provide immediate protection against historic remediation liabilities. The Appellant's construction delays that protection and defeats the purpose of the legislation (§§43-50 below). [MH/48/525-534]
- (3) **The Appellant's construction is arbitrary.** Liability would depend on the timing of invoices, payments or demands rather than any principle identified in the statute (§§51-57 below).
- (4) **The remaining leaseholder protections point the same way.** The Appellant's construction undermines the operation of the wider protections in Schedule 8, many of which use materially identical language (§§58-60 below). [MH/48/525-534]
- (5) **The role of remediation contribution orders.** Parliament provided alternative routes for recovery from those responsible for defects. The statutory scheme does not leave landlords without protection (§§61-64 below).
- (6) **The balance of fairness favours the Respondents.** Parliament deliberately chose to protect leaseholders facing unaffordable liabilities arising from defects they did not create (§§65-74 below).
- [MH/98/1808-1837] (7) **The Explanatory Notes support, but do not drive, this conclusion.** They are consistent with the interpretation indicated by the statutory language, structure and purpose (§§75-76 below).
- (8) **The applicable presumptions do not assist the Appellant.** The Court of Appeal adopted the least retrospective interpretation capable of achieving Parliament's purpose, and the presumptions against retrospectivity and interference with property rights yield to the contrary intention demonstrated by the legislation (§§77-96 below).
- (9) **The Appellant's alternative case runs expressly contrary to the wording of Schedule 8.** The alternative case establishes an entirely arbitrary line which has no textual or factual foundation (§§97-99 below). [MH/48/525-534]

The Language Used

33. The starting point is the meaning of the words used. Para.9 states, simply, that no service charge of the relevant description “*is payable*”. The ordinary and natural meaning is that, from when the provision came into force on 28 June 2022, leaseholders did not have to pay any service charge in respect of certain matters: per Nugee LJ at [199]. On the Court of Appeal’s construction that is exactly what the legislation provides. On either of the Appellant’s constructions it is not. Many leaseholders would continue to have to pay, after that date, service charges of precisely the description which para.9 says are not payable. As Nugee LJ explained, if Parliament had intended the protections to be deferred until the leaseholders had paid every cost already incurred, or every charge already fallen due, the natural and obvious course was to enact a saving or transitional provision: per Nugee LJ at [199]. And there is no such transitional machinery. [MH/48/529] [MH/26/307] [MH/48/529] [MH/26/307]

34. The Appellant relies on the proposition that the language of para.9 is “*ambiguous*”: Appellant’s Written Case §71. It is not. The words “*no service charge is payable*” are perfectly clear. What the Appellant means is that the words do not expressly address the temporal question. That is a different thing altogether. A provision expressed in general terms is not ambiguous merely because a party wishes it had contained an exception. [MH/3/63]

[MH/44/509] 35. Section 122, which introduces Sch.8, points the same way. It describes Sch.8 as a Schedule which “(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*”: [14]. [MH/48/525-534] [MH/26/248-249] The focus is on service charge amounts. Nothing in s.122 or Sch.8 ties the protection to the date on which the underlying costs were incurred. [MH/48/525-534]

36. Some support for this is provided by para.5 of Sch.8, which refers to service charges which “*fell due in the pre-commencement period*”. This requires pre-commencement service charges to be brought into account in determining post-commencement payability. Take Nugee LJ’s example: a leaseholder with a permitted maximum of £15,000 who had paid £20,000 in the five years before commencement. The natural [MH/48/527]

reading of para.5 is that no more can be demanded. On the Appellant's construction, that leaseholder could be required to go on paying, well beyond the permitted maximum, so long as the underlying costs had been incurred before 28 June 2022. That is contrary to the plain language of para.5 [200].

37. The Appellant's answer is that it is possible for para.5 of Sch.8 to operate perfectly well alongside a prospective construction of para.9 and that para.5 does not use the "*no service charge is payable*" form of words: Appellant's Written Case §104. Neither point meets the argument. Paras.2 to 5 and 7 to 9 form a single scheme, each regulating what "*is payable*" from the commencement date, and the same word is presumed to bear the same meaning throughout: *For Women Scotland* at [13]. It is therefore no answer to suggest that para.5 deals with something different beyond the limitation on the "*service charges*" which are "*payable*". If "*is payable*" in para.5 engages costs incurred before commencement, there is no principled reason why "*is payable*" in para.9 should not.

38. Para.5(2)(a) expressly requires account to be taken of service charges which "*fell due in the pre-commencement period*", a period of up to five years before 28 June 2022 (para.5(3)). Parliament therefore specifically considered the position of leaseholders who had already paid remediation service charges before commencement. It provided that those payments count towards the cap on what "*is payable*" after commencement. It made no provision for their recovery, and it made no exception for charges based on costs incurred before commencement.

39. The Respondents further rely on para.10(2) of Sch.8. Below, it was doubted whether para.10 was relevant to the issues in the appeal [78] (and at [153] of the Upper Tribunal's decision). The Appellant says para.10 cannot be ignored – and the Respondents agree (but for different reasons). The Respondents' argument is threefold.

(1) First, para.10(2) expressly refers to "*relevant costs*", as opposed to "*service charges*". That terminology is derived from s.18(1)-(2) of the 1985 Act, which draws a bright line distinction between sums payable by the lessee to its landlord (the "*service charge*"), and the sums incurred by landlords for repairs and other services (the "*relevant costs*"). In this case, the costs relating to the liability of the Appellant incurred as a result of the relevant defects at Hippersley Point are "*relevant costs*". Had Parliament intended for para.9 to commence by reference

to the date the Appellant incurred such relevant costs, it would have said so. Instead, it (quite deliberately) used the words “*service charge*”.

- (2) Second, the President observed that para.10(2) “*contains the mechanism by which the result is achieved that no service charge is payable*”, a statement with which Newey LJ agreed at [78]. That is self-evidently correct. But it also reinforces the point that Parliament was well aware of the terminology used. It gave effect to the time bar on “*service charges*” by providing a mechanism explaining how this affected recoverability of the relevant costs incurred. [MH/26/269]
- (3) Third, as to the Appellant’s argument in its written case §19-22, it essentially repeats the point expressly rejected below at [78]. Paras. 9 and 10 operate as follows. Para.9 states that certain “*service charges*” which would otherwise be payable by the Respondents to the Appellant after 28 June 2022 are not payable. [MH/48/529]
The mechanism for implementing this is supplied by para.10, which provides that no costs incurred or to be incurred in respect of the para.9 “*thing*” are to be regarded as “*relevant costs*” to be taken into account in determining the amount of a “*service charge*”. The inelegant word “*thing*” accommodates the different subject matter addressed by paras 2, 4, 8 and 9, while the operative distinction remains that between the landlord’s relevant costs and the service charge payable by the leaseholder. [MH/48/530] [MH/48/525 - 529]

40. The Appellant suggests that the Respondent’s construction cannot be rationalised on an application under s.27A of the 1985 Act, given s.27A(2) and (5): Appellant’s Written Case §67(c). There is no such difficulty. Section 27A(5) provides that a tenant “*is not to be taken to have agreed or admitted any matter by reason only of having made any payment*” ([39]). It is concerned with admissions, not with the temporal operation of later legislation. On a s.27A application, the tribunal asks whether a service charge is, or was, payable at the relevant time. A service charge paid before 28 June 2022 was payable when it fell due and when it was paid; para.9 did not then exist. From 28 June 2022, para.9 provides that no such service charge “*is payable*”. It does not provide that such a charge was never payable. The different outcome for paid and unpaid charges flows from the date on which para.9 took effect, not from any inconsistency in the s.27A jurisdiction. [MH/3/61-62] [MH/53/598] [MH/53/598] [MH/48/529] [MH/53/598]

- [MH/3/63-64]
41. The Appellant also argues in its written case §73-76 that ss.130, 135 and 149 are expressly retrospective in effect. It is said that if Parliament intended Sch.8 to have retrospective effect, it could be expected to have said so. That argument proves far less than the Appellant needs: [MH/45/515] [MH/46/518] [MH/47/521-522]
- (1) Section 135(3) does something quite different in kind. It provides that the amendment to the limitation period “*is to be treated as always having been in force*”. That is deeming language, necessary because s.135 revives claims which had already become time barred. Sch.8 does not purport to unwind the past. It speaks about service charges from commencement forward. [MH/46/518] [MH/48/525-534]
- (2) Sections 130, 135 and 149 share a feature which Sch.8 lacks. Each attaches new or revived liabilities to third parties by reference to past events. Those third parties are associated companies, defendants to Defective Premises Act claims, and manufacturers and sellers of construction products. In some cases the claims had become time-barred before the Act. It is unsurprising that Parliament defined the temporal reach of those provisions expressly. Section 130 applies to a liability “*whether arising before or after commencement*”. Section 149(8) fixes accrual at the completion of the works. And s.135(3) provides that the amendment “*is to be treated as always having been in force*”. Sections 135(5) and 149(9) add a saving for defendants’ Convention rights. Sch.8 does something different. It does not alter the legal position at any past date. It provides what “*is payable*” from commencement under leases which, by definition, already existed. [MH/45/515] [MH/47/522] [MH/46/518] [MH/47/522]
- (3) Section 124 is fatal to the Appellant’s “*express words*” argument. It contains no words of express retrospectivity. Yet the Court of Appeal, in the same constitution, held in *Triathlon* that it permits RCOs in respect of costs and defects pre-dating the BSA. [MH/44/510] [MH/85/1490-1533]
- (4) Parliament plainly addressed questions of time in Pt.5 and Sch.8: see ss.119 and 120(2)-(3) and paras.5(3) and 7 of Sch.8 to the BSA. The suggestion it simply overlooked the temporal reach of the operative words is untenable. [MH/44/503, 506] [MH/48/527-529]
42. So far, as Nugee LJ concluded, “*the text of the Act militates against*” the Appellant’s construction. But language alone is not of course the end of matters. The Court of Appeal (quite properly) did what the authorities require and read the text in the light of the purpose and scheme which “provide the basic frame of orientation” for its language

[144, 201-203]. On Lord Mustill’s formulation in *L’Office Cherifien*, the question is whether giving the words the effect they “*might appear to say*” would be so unfair that Parliament cannot have intended it [55]. Here, the words appear to say that, from commencement, no such service charge is payable.

The Mischief

43. The next stage is to consider the meaning of those words in context, namely in light of Sch.8, and more generally in the context of Pt.5 of the BSA. The Secretary of State is best placed to deal with the legislative context, but some initial points can be made:

- (1) The purposes of the remediation provisions were common ground below. Counsel for the Appellant identified them as: to ensure that historic safety defects were remediated; to protect leaseholders; to ensure that those responsible for the defects were held liable; and to restore stability to the lending market [148]. It is not understood that this is controversial.
- (2) In September 2024, the Secretary of State estimated that it was monitoring some 260,000 affected dwellings in residential buildings over 11 metres with unsafe cladding, of which around 116,000 were in buildings where remediation had not started [154].
- (3) Mean cladding remediation costs were estimated in January 2022 at £59,000 per flat in buildings over 18 metres. Around 40% of leaseholders had no savings and about two-thirds had less than £16,000. Additional costs of £60,000 would put 21% into negative equity and 34% into financial stress [157].
- (4) The lending market froze, so that leaseholders could not sell and were, in the Court of Appeal’s words, “*in effect trapped in unsafe homes, facing potential financial ruin and with no way out*” [160].
- (5) The Government’s response was announced on 10 January 2022 as a “*reset*”, with a guarantee that “*no leaseholder living in their own flat will pay a penny to fix dangerous cladding*” [161].
- (6) An initial set of amendments followed on 13 January 2022, and a substantial set on 14 February 2022; those amendments became ss.116-125, and Sch.8 followed within weeks [162].

44. This was the mischief. An immediate crisis about bills which leaseholders were being asked to pay and could not afford. It was not confined to bills which leaseholders might be asked to pay in the years to come. There was “*an undoubted problem in the inability of leaseholders to pay now*” [185]. [MH/26/302]
45. On the Appellant’s case, a leaseholder holding a qualifying lease of a flat worth under £325,000 in London, who is relieved by para.4 of any service charge in respect of relevant measures relating to relevant defects ([17], [173]), would nevertheless remain liable for every penny of costs incurred before commencement. Similarly, a leaseholder protected by para.8 from paying “*a penny*” towards cladding remediation would, in Nugee LJ’s words, “*still have to pay many thousands of pounds*” [202]. [MH/26/250, 299] [MH/26/308]
46. This is why the appeal matters far beyond the modest sum directly in issue [199]. As explained, for the Appellant and two associated companies alone, the outcome of this case has a bearing on live demands for the greater part of some £87 million, of which some £70 million remains outstanding. [MH/26/307]
47. The Appellant’s construction does nothing to break the logjam with the immediacy intended by Parliament. It would not free the lending market. It would simply postpone the operation of the leaseholder protections until each landlord had worked through the costs it had already incurred, for a period which no leaseholder could predict and no leaseholder could control.
48. The Appellant answers, at §25 of its written case, that s.20B(1) of the 1985 Act already limits recovery to costs incurred in the preceding 18 months, so that any hiatus would be short. That answer fails on its own terms because s.20B(1) is easily avoided. Section 20B(2) of the 1985 Act permits a landlord to preserve recoverability indefinitely by serving notice, and such notices are very common indeed in residential property management. Indeed, the Appellant’s own skeleton argument below relied on precisely that scenario as an illustration of the hardship it complains of [85(xi)]. The Appellant’s own evidence refutes the suggestion that any hiatus would be short-lived. Of nearly £87 million demanded by it and two associated companies before the BSA was enacted, more than £70 million remained unpaid in June 2024, two years after commencement [84(i)]. [MH/53/583] [MH/53/583] [MH/26/272] [MH/26/272]

49. Nugee LJ's conclusion at [202]-[203] is unanswerable. The Appellant's construction [MH/26/308] would "*cut across the evident legislative purpose of relieving leaseholders from their immediate predicament of facing large and often unaffordable bills*". The way to give effect to the parliamentary intention of "*breaking the logjam and protecting leaseholders*" is to read "*no service charge is payable*" as meaning what the words say.
50. Moreover, a direct comparison can be made with this Court's decision in *URS* at [124] [MH/86/1588, 1623-1624] and [274], where it was considered necessary to construe the general wording of s.135(3) of the BSA as extending to the claims already in issue in order to achieve the [MH/46/518] provision's purpose of holding those responsible for building safety defects to account without the leaseholders having to bear the (potentially very large) costs. The same logic applies to costs that have already been incurred. The wording of Sch.8 applies to [MH/48/525-534] them with equal force in order to achieve the same statutory purpose.

The Appellant's Construction is Arbitrary

51. The Appellant's primary construction turns on when costs were "*incurred*". Relevant costs are incurred, for the purposes of the 1985 Act, when the landlord is invoiced or pays: *Burr v OM Property Management Ltd* [2013] EWCA Civ 479 at [11, 15] [38, [MH/57/720-721] 197]. Newey LJ accepted that "*incurred*" must bear the same meaning here [95]. [MH/26/257, 306] [MH/26/276]
52. On the Appellant's construction, the line is arbitrary, unworkable, and manipulable. The result would depend upon the timing of invoices and payments, matters which may vary independently of either the nature of the defect or the leaseholder's circumstances. Moreover, the Appellant's proposed lines would also open an obvious route to avoidance. The amendments which became Sch.8 were introduced into the Bill in February 2022 and came into force on 28 June 2022 ([29]-[30], [162]). On the Appellant's primary construction, a landlord could escape the protections by procuring invoices for work already contracted before 28 June 2022. On its alternative construction, it need only serve demands in that window. [MH/26/254, 297]
53. Parliament was alive to this risk. It fixed the "*qualifying time*" for the gateways into Sch.8 at the beginning of 14 February 2022. Nugee LJ rightly described that as "*no doubt an anti-avoidance measure, designed to stop developer-landlords from altering*" [MH/48/525-534]

their position after the proposals were first introduced into the Bill” ([165]). Having [MH/26/297] guarded the gateways against manipulation during that period, Parliament is most unlikely to have left the operative protection open to defeat by accelerating invoices or demands during the same period.

54. On the Appellant’s case, a landlord that signed a remediation contract in 2021, but was not invoiced by its contractors until July 2022, cannot recover those costs from qualifying leaseholders, while a neighbouring landlord that was invoiced by its contractors in May 2022 would recover in full. There is no principled distinction between these two landlords. Moreover, a landlord which accelerated its payments in that window would defeat the protection; a landlord which did not, would not. The Appellant’s answer below was that an anti-forestalling provision could have addressed that risk [129(vi)]. But Parliament enacted no such provision, and no transitional [MH/26/288] provision of any kind [199]. The absence of any machinery to police a pre-commencement line is a strong indication that Parliament did not draw one. [MH/26/307]

55. The Appellant’s line has the further vice that, from the leaseholder’s perspective, protection turns on matters which the leaseholder can neither know nor control. Whether a leaseholder is protected under Sch.8 depends on when the managing agent or solicitor happened to render its bill to the contractors. Two leaseholders in otherwise identical buildings, with identical defects, identical works and identical contracts, would be treated differently according to a matter entirely outside their knowledge and wholly within the landlord’s control. [MH/48/525-534]

56. Against those difficulties, the Court of Appeal identified a single fixed line. This line – which is also the Respondents’ line and the Secretary of State’s line – has the merit of being the only line which the statute itself draws, namely the date on which the provisions came into force. Like any line, it produces hard cases, but it requires no implication, no reading in, and no inquiry into billing practices or the timing of demands.

57. The Appellant’s alternative construction (see further below), that para.9 does not apply to service charges which had “*fallen due*” before 28 June 2022 (Appellant’s Written Case §§100–103), fares no better. The Appellant itself accepts that it is “*not obviously* [MH/3/74-75]

consistent with the mechanism in Paragraph 10”: Appellant’s Written Case §102. [MH/3/75]
Moreover, it produces arbitrary results within a single service charge year. Payments on account demanded before 28 June 2022 would be recoverable, but balancing payments for the same costs demanded afterwards would not: [197]. [MH/26/306]

The Remaining Leaseholder Protections

58. As already set out, whatever this Court decides about para.9 will likely govern the remaining protections under Sch.8 (paras.2-5, 8-9) [52, 177]. As a result, the effect of the rival constructions also needs to be tested against the other protections. [MH/26/261, 300]
59. Paras.2 (responsibility) and 3 (contribution condition) are designed to reallocate the burden of paying for repairs to (a) those responsible and (b) those with the deepest pockets. This accords with the stated purpose of the scheme above. On the Court of Appeal’s construction, this is achieved the day the BSA came into force. This is sensible. On the Appellant’s constructions, this protection is kicked into the long grass, and becomes dependent on when bills were rendered or a particular service charge fell due. This frustrates the statutory purpose. [MH/48/525-526]
60. The same may be said of paras.4 (low value lease) and 8 (cladding). Parliament wanted to protect those who could not afford the potentially eye-watering costs of repairs. Again, on the Court of Appeal’s construction, this takes effect from the day the BSA came into force. On the Appellant’s case, that protection is not instant, and there is a real risk of tenants being forced to pay for remediation works that may bankrupt them for an indeterminate period after the Act came into force. [MH/48/527, 529]

The Role of s.124 (RCOs)

61. One of the Appellant’s responses to the above construction of the statutory scheme is that a prospective construction of para.9, taken together with s.124 of the BSA (the [MH/44/510] [MH/85/1490-1533] latter as construed in *Triathlon Homes LLP v SVDP* [2025] EWCA Civ 846), achieves Parliament’s purpose. It is said that RCOs mean retrospectivity is unnecessary: Appellant’s Written Case §§30-31. [MH/3/50-51]

62. It is wrong to say that if s.124 operates retrospectively, the leaseholder protections are met by a prospective construction. If the appeal in *Triathlon* is dismissed, the argument is twofold:

- [MH/48/525-534] (1) First, Sch.8 confers an entitlement. By contrast, s.124 confers a discretion, [MH/44/510] exercisable only if a tribunal “*considers it just and equitable to do so*”. The Appellant’s construction would convert leaseholders’ absolute statutory protection into a right to apply for relief, at their own risk and expense, after they had been billed. That is a materially inferior protection; it is not the protection Parliament enacted.
- (2) In any event, the possible availability of RCOs under s.124 often provides no [MH/44/510] protection at all. An RCO application may only be made against a person within s.124(3) [21(ii)], and it is of value only if that person is solvent. As Newey LJ [MH/26/251] recognised, by the time of an RCO claim, the developer and any associates may no longer exist or be financially able to meet any claim [85(viii)]. [MH/26/272]

63. Most fundamentally, the existence of an alternative route by which a leaseholder might eventually recover money already paid is not a reason to construe the primary protection narrowly. Parliament legislated to relieve leaseholders of the obligation to pay, not to give them a claim that might enable them to recover their money after they had paid. Hence, whatever the final outcome of the appeal in *Triathlon*, an RCO remains a discretionary remedy, whereas the protections in Sch.8 are expressed as rules governing whether a service charge is payable. [MH/48/525-534]

64. Finally, therefore is an important point about RCOs under s.124 of the BSA. They are [MH/44/510] also available to the landlord. This is relevant when assessing whether the statutory scheme leaves landlords without any route to seek recovery from other responsible parties. The availability of an RCO mitigates any unfairness to landlords, as much as it mitigates unfairness to the tenants. Indeed, in practice RCOs usually involve claims by landlords and management companies such as the Appellant for payment by developers. They can be applied for by tenants, but that is rare in practice. The *Triathlon* appeal is typical. [MH/85/1490-1533]

The Balance of Fairness

65. If, as set out in *L'Office Cherifien*, the question is one of “*simple fairness*”, it is worth stating plainly where fairness lies. The starting point is to note that this legislation is a departure from the usual scheme of landlord and tenant legislation. In general, leases apportion liability for various matters, and statutory intervention simply qualifies those rights and obligations, for example by linking liability to the concept of “*reasonableness*” (s.19(1) of the 1985 Act), the BSA makes a marked departure from that restraint: it expressly sought to shift the burden from many of those who might be contractually liable onto those with the deepest pockets. In the present case, that means protecting (some) leaseholders from unexpected bills which could reach tens of thousands of pounds, and instead placing liability in the hands of a company with assets worth hundreds of millions of pounds. [MH/63/935] [MH/53/578]

66. Indeed, as Nugee LJ highlighted, the question is not whether it was unfair to deprive landlords of a contractual right. The Court accepted that this was unfair [203]. The real question, accepting that landlords have been deprived of that right, is where the balance of fairness lies between the rival constructions. [MH/26/308]

67. The Respondents are leaseholders. Leaseholders who bought homes. They did not create the defects, any more than the Appellant did [85(iv)]. But it is leaseholders whom Parliament chose to protect, because leaseholders in affected buildings faced unaffordable bills and were “*in effect trapped in unsafe homes*” [157], [160]. [MH/26/272] [MH/26/296]

68. Moreover, it is important to note that the protections are not universal. Many leaseholders will not qualify for the protections and the Appellant will be able to recover remediation costs from them in the usual way.

69. The Appellant, by contrast, is a successful company, far better placed to shoulder the burden of these costs than leaseholders. That said, there is a further distinction to be drawn between legal liability and practical liability. Even if a landlord is determined to be liable in law, in practice it will rarely have to reach into their own pockets. Between such schemes as the Building Safety Fund and the Developer Remediation Contract, a

large majority of the costs are likely to be covered without the landlord having to foot the bill.

70. Even if, which appears unlikely (see §94 below), the Appellant does have to cover some of the costs, it benefits from its own scheme of protections. It has the 2022 Regs and ss.124, 130, 135 and 149 of the BSA. It has a developer who has signed the Developer Remediation Contract, and who has agreed to manage and fund work on Hippersley Point. Indeed, on its own case, the Appellant looks to Land Securities to indemnify it for the Costs in dispute in this case.

71. The Appellant argues that a landlord which held off demanding payment while pursuing third parties suffers a particularly acute unfairness: Appellant's Written Case §83(a). Such a landlord has, by definition, chosen not to collect. It has meanwhile enjoyed the benefit of the leaseholders' forbearance and the possibility of third-party recovery. It is not obviously more deserving than a leaseholder in negative equity.

72. That is not to say that all remediation costs are irrecoverable by way of service charges. Sch.8 does not protect all leaseholders. The protections are subject to significant limits, including the qualifying lease requirement and the conditions relating to responsibility, lease value and the landlord group's net worth [84(v)].

73. It is important to note that the Court of Appeal's construction does not reach back into the Appellant's pockets to extract sums already paid and collected. In that sense its retrospective effect is limited.

74. The Court of Appeal did not ignore the countervailing considerations. Newey LJ set them out at length [85]. The majority weighed them [195]-[203] and concluded they did not justify a construction which cut across the legislative purpose. That was an evaluative judgment properly and correctly made.

The Explanatory Notes

75. The role of, and weight to be given to, the Explanatory Notes was a matter of dispute in the Court below. The Explanatory Notes were published in July or August 2022, after commencement of the BSA (at [31]). The Court of Appeal held these notes "*may be of persuasive authority*", but "*do not enjoy any particular legal status and can be*

compared with academic writings”: [70], [76] and [141]. The Respondents do not seek to go behind these conclusions.

[MH/26/267, 269, 291]

[MH/98/1808-1837]

76. That does not make the Explanatory Notes irrelevant. As persuasive material, their weight depends on the cogency of what they say [70-71]. They record the Secretary of State’s understanding when the protections came into force, that the protections “*apply equally irrespective of when any service charge demands were issued*” (para. 986), and that costs within para.9 “*are not payable from the date of commencement onward, even if those costs were incurred by the landlord prior to commencement*” (para. 1759): [31-32]. As set out above, that understanding accords with the language, scheme and purpose of Sch.8. The significance should not be overstated. The Court of Appeal considered they “*chime[d]*” with the Secretary of State’s case. The notes add something, and are a supplementary factor as an aid to interpretation.

[MH/26/267-268]

[MH/26/254-255]

[MH/48/525-534]

The Presumption Against Retrospectivity

77. The Respondents make two overarching points in relation to the presumption against retrospectivity. First, the Court of Appeal construed para.9 with no greater retrospectivity than necessary, and second, the presumption itself is a tool of construction and not a trump card.

78. **First**, the Appellant relies upon the subordinate rule that a statute is not to be construed as having a greater retrospective operation than is clearly necessary: *URS* at [272]-[273], [301]. The Respondents acknowledge that rule. It supports the Court of Appeal’s construction and defeats the Appellant’s.

[MH/86/1623, 1629]

79. As Lord Leggatt explained in *URS*, the rule is that retrospective operation “*extends no further than is necessary to give effect either to its clear language or to its manifest purpose*”: *URS* at [273], quoting *Arnold* at 275B. The question is therefore what is necessary to give effect to the manifest purpose of Sch.8, not what would be necessary if the Court looked at the language alone.

[MH/86/1623]

80. In this case, there were four candidate constructions below [178]-[183]. The Court of Appeal rejected the most far-reaching construction advanced by the Respondents, precisely because it went further than the mischief required [185], [193]. It adopted a

[MH/26/300-301]

[MH/26/302, 305]

construction which left every payment received by the Appellant before 28 June 2022 undisturbed. This re-opens nothing. It leaves every completed payment undisturbed and affects only sums unpaid at commencement.

81. The Appellant's construction goes the other way. It gives the protection less effect than the manifest purpose requires, leaving leaseholders exposed to the very bills the Act was passed to remove. That is not the 'fairness' Parliament had in mind.

82. **Second**, the Appellant's argument treats the presumption against retrospectivity as though it were a strict rule requiring express words: Appellant's Written Case §80-81. [MH/3/65] It is not. It is a tool; a factor to be taken into account: *Odelola* at [55], cited by Nugee LJ at [135]. [MH/67/1049] The question is not binary, and there are degrees of retrospectivity. In turn, this means "*the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended*": *Tunncliffe* at p.724, cited by Newey LJ at [54]. [MH/26/290] [MH/26/261-262]

83. The starting point is to note that it is common ground that Sch.8 has retrospective effect in the sense that, from commencement, it affects the liability of leaseholders to contribute to the costs of remedying historic defects [90(iii)]. [MH/48/525-534] The question in this appeal is therefore one of degree, and of where Parliament drew the line: per Nugee LJ at [197]-[199]. [MH/26/275] [MH/26/306-307]

84. The Respondents accept that the unfairness relied upon by the Appellant is real [195]. [MH/26/305-306] But it is not the principal unfairness. Parliament decided to strip landlords of a contractual right to pass costs on to leaseholders. That was the real intervention, and it was a deliberate one [163], [196]. [MH/26/297, 306] Against that, as Nugee LJ held, "*the unfairness of depriving landlords of accrued rights*" does not "*add very much*" [203]. [MH/26/308]

85. The Appellant says this comparison is not valid: Appellant's Written Case §87-89. [MH/3/71] However, Nugee LJ was not suggesting the degree or type of unfairness is the same. Rather, he concluded the additional unfairness, in the context of forever depriving landlords of a contractual right, is modest. Nugee LJ outlined a typical process for a landlord to recover remediation costs from leaseholders, and observed that (in practice) the process from decision to expenditure to recovery may take "*a number of years*" [196]. [MH/26/306]

Presumption Against Interference with Property Rights

86. The right in issue in this appeal is the Appellant's contractual right to be reimbursed, through the service charge, for expenditure on its own building. Five points follow.

87. **First**, the presumption against interference with property rights does not operate as a free-standing rule distinct from, or additional to, the presumption against retrospectivity. Treating the presumption against interference with property rights as a separate and additional hurdle is 'double counting'. As Nugee LJ held at [140], both presumptions are directed to the same question, namely whether Parliament intended to take away the landlord's existing rights. Both operate in a similar way, in tandem, and both yield to a sufficiently clear contrary intention. Newey LJ also expressly dealt with the combined effect of the two presumptions together [83].

[MH/26/291]

[MH/26/270-271]

88. The Appellant suggests in its written case §78 that the two principles have "*reinforcing effect*", and that "*a truly retrospective deprivation of vested property rights represents a higher degree of unfairness*". No authorities are cited to support this proposition. Given that both presumptions are aids to interpretation of statute, it seems unlikely there is a particular (and different) threshold of clarity to displace the presumptions against retrospectivity and deprivation of property rights.

[MH/3/65]

89. **Second**, as Lord Mustill pointed out in *L'Office Cherifien* at 524H-525A, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide, because they too readily confine the court to a perspective which treats all statutes as if they were the same. Indeed, the Appellant is wrong to treat either the presumption against uncompensated takings or the presumption against retrospectivity as rigid rules. Lord Neuberger's observation in *Odelola* at [55] applies equally to both. They are both "*factors*", whose weight depends on context, in identifying what Parliament intended, and each yields to other indications of contrary intention.

[MH/63/934-935]

[MH/67/1049]

90. **Third**, the contractual right of a landlord to receive service charges under a lease can of course be characterised as a 'property right'. But the Appellant is not being deprived of the land itself. As the majority noted, in practical terms the rights concerned in the present case are the rights of landlords to pursue their lessees for service charges [140].

[MH/26/291]

91. The point is reinforced by the Court of Appeal’s unanimous finding on the A1P1 Issue, against which permission to appeal has been refused. On the hypothesis that para.9 operates retrospectively, the Court held that the Sch.8 restrictions on service charges effect a ‘control of use’, not a deprivation of possessions. Even with the limitation on service charges suggested by the Respondents and the Secretary of State, the Appellant would still be able to insist on payment of other service charges: per Newey LJ [123-4], with whom Nugee LJ and Holgate LJ agreed [133], [206].

[MH/26/286,
290, 309]

92. **Fourth**, the right to a service charge is not absolute. It was always contingent. The right is limited by contract and statute:

- (1) The terms of the leases. Typically, a lease requires a landlord or management company to assess its costs in any given year, and demand payment of interim service charges, with accounting at year end, and provision for balancing service charges. The courts and tribunals are replete with examples where landlords do not recover their costs because of seemingly minor failures to follow the contractual regime.
- (2) Statutory intervention in service charge recovery. For example, service charge costs must be reasonably incurred (s.19(1) of the 1985 Act), demands must be made within 18 months of the costs being incurred (s.20B of the 1985 Act), landlords must consult about major works (s.20 of the 1985 Act) and valid demands must be given (s.21B of the 1985 Act). There are numerous other examples of statute intervening.

[MH/53/578]

[MH/53/583]

[MH/53/592]

93. **Fifth**, the Appellant stresses the weight to be attached to ‘lack of compensation’ in Pt.5. This again mirrors the findings on ‘control of use’ under A1P1. The Court of Appeal observed that “*Landlords are not left to bear the burden of remediation alone*” [130(iv)]. Aside from the multi-billion-pound Building Safety Fund and voluntary contributions from developers under the Developer Remediation Contract, the BSA provides mechanisms by which landlords can pass on liability to developers, other past and present landlords and their associates. Notable amongst these mechanisms are s.124 (remediation contribution orders), s.130 (building liability orders), s.135 (extension of limitation periods) and s.149 of the BSA (cladding). Regulations 3-5 of the 2022 Regs also include specific provisions to assist landlords who are unable to recover service charges from lessees under Sch.8. The Court of Appeal was also entitled to take into

[MH/26/289]

[MH/44/510]

[MH/46/517
-518]

[MH/47/521-
522]

[MH/49/537-5
43]

account, as Newey LJ himself did [84(iii) and (iv)], that the prejudice to landlords is mitigated by those contributions and by their ability to pass liability on. [MH/26/271]

94. Viewed as a whole, the scheme reallocates the cost of remediation rather than confiscating it. Having relieved leaseholders, Parliament made provision “for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible”: [176]. [MH/26/299]

95. The facts of this very case illustrate the point. The developer of Hippersley Point was a subsidiary of Land Securities plc, which signed the Developer Remediation Contract on 30 January 2023 and which, by June 2023, had agreed to manage and fund the life-critical fire safety works to the building [12]. The Appellant’s own stated position, communicated to the Secretary of State on 13 March 2025, is that the costs of the dispensation application “*are properly payable by Land Securities under the Developer Pledge*”. A party whose own position is that a third party is obliged to bear these costs, is poorly placed to characterise the legislation as an uncompensated expropriation. [MH/26/248]

96. What remains is a question of how much weight the interference with accrued rights should carry. The presumption against retrospectivity already weighs exactly that: its factors include “*the value of the rights which the statute affects*” and the extent to which that value is diminished or extinguished: Lord Mustill in *L’Office Cherifien*, cited at [55]. A separate property presumption has no further work to do. [MH/26/262]

The Appellant’s Alternative Case

97. On the Appellant’s alternative case, the line should be drawn with service charges that had become payable or fallen due before 28 June 2022 (Appellant’s Written Case §100). [MH/3/74-75] This ignores the operation of para.10 entirely. Indeed, the Appellant even concedes this this alternative is “*not obviously consistent*” with that mechanism (§102). That [MH/3/75] concession is necessary, but fatal. Para.10(2)(b) provides that any amount payable is [MH/48/530] “*limited accordingly*”, and that “*any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise*”. Provision for repayment and reduction presupposes that the protection operates on sums which have already been demanded and may already have been paid. Parliament was express that it did not want to treat the

date on which a sum fell due as the limit of the protection. The Appellant's alternative case seeks to go behind this express intention and falls to be dismissed accordingly.

98. The Appellant argues that this is a "*literal reading*" of para.9. That is not the case. Para.9 provides that no service charge "*is payable*". It does not say that no service charge shall "*become payable*" or "*fall due*" after commencement. Take a sum demanded before 28 June 2022 and unpaid on that date. On and after that date it would otherwise be payable, and para.9 says that it is not. The Appellant's alternative can be reached only by reading words into the provision that are not there. The Appellant's own reliance on the present tense (Appellant's Written Case §71) supports the Respondents. The present tense asks whether a service charge is payable at and after commencement, not whether it had fallen due beforehand.

[MH/48/529]

[MH/48/529]

[MH/3/63]

99. Moreover, there is no principled basis for the Appellant's alternative. The Appellant's case on fairness locates the relevant reliance at the point when costs are incurred. On that analysis, the alternative still extinguishes rights which, on the Appellant's own case, had accrued before commencement. Once it is accepted the alternative extinguishes rights accrued before commencement, the alternative offers no reason, textual or purposive, for drawing the line at the date a sum fell due.

Conclusion

100. The language, scheme and purpose of Sch.8 all point to the same conclusion. From 28 June 2022, para.9 rendered service charges within its scope not payable, irrespective of when the underlying costs were incurred. The Appellant's construction cannot be derived from the words Parliament chose to enact. It requires qualifications to be read into the legislation which are conspicuously absent from the statutory text, undermines the operation of the wider leaseholder protections in Sch.8, and substantially frustrates the purpose for which those protections were introduced. It would also produce arbitrary results, making liability depend on the timing of invoices, demands or payments rather than on any of the criteria identified by Parliament. The construction adopted by the majority in the Court of Appeal gives effect to the ordinary meaning of the statutory language, accords with the scheme of Pt. 5 of the BSA, and achieves the

[MH/48/525-534]

[MH/44/501]

legislative objective of providing immediate protection to qualifying leaseholders. The appeal should therefore be dismissed.

101. Finally, the Court should be aware that this appeal will not, of itself, determine whether the Appellant may recover the costs of its dispensation application. The Respondents' cross-appeal against the Upper Tribunal's decision to set aside the costs condition was stayed by consent by order of Newey LJ dated 24 February 2025 and remains stayed pending the outcome of this appeal. If the appeal is allowed, that cross-appeal would fall to be determined.

[MH/19/166]

MARK LOVEDAY

Tanfield Chambers

HUGH ROWAN

Serle Court

7 October 2026