

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION) (ENGLAND)

BETWEEN

**(1) STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP
(2) GET LIVING PLC**

Appellants

and

**(1) TRIATHLON HOMES LLP
(2) EAST VILLAGE MANAGEMENT LIMITED**

Respondents

and

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

Intervener

APPELLANTS' WRITTEN CASE

Introduction

1. This appeal relates to the new power afforded to the First-Tier Tribunal (“**FTT**”) to make a remediation contribution order (“**RCO**”) under section 124 of the Building Safety Act 2022 (“**the BSA**”) in respect of the cost of rectifying “*relevant defects*”, i.e. defects which cause a “*building safety risk*”, which is a risk to the safety of people arising from the spread of fire or building collapse in buildings that are at least 11 metres high or that have at least 5 storeys.

MHB/372-
373

2. Section 124(1) of the BSA provides:

MHB/372

“The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.”

3. As section 124(2) originally¹ provided, an RCO:

MHB/372

“in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to the relevant building.”
(emphasis added)

4. Section 124 came into force on 28 June 2022.

5. On the Agreed Issue, the Respondents and the Intervener contend, and the Court of Appeal and FTT found, that an RCO can be made in respect of costs that were incurred even before section 124 came into force. In other words, the Respondents’ and the Intervener’s position is that section 124(2) is retroactive and is to be read as if it states that an RCO may be made *“for the purpose of meeting costs incurred (whether before or after commencement) or to be incurred ...”*.

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6. The Appellants submit that the Court of Appeal and FTT fell into error when seeking to identify the intention of Parliament as to the proper interpretation of section 124. They proceeded on a misplaced reliance on vague general purposes of the BSA and failed to give proper effect to either (a) the language of the statute or (b) the strong presumption against retrospectivity. This Court is therefore invited to decide that an RCO can not be made in respect of costs that were incurred before section 124 came into force and section 124(2) should be construed as if it states *“... costs incurred (after commencement) or to be incurred...”*.

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¹ The phrase “, or otherwise in connection with,” was inserted after “remedying” by the Leasehold and Freehold Reform Act 2024, section 116(2). This amendment is not material to the present case, which concerns section 124 as originally enacted.

MHB/249 **The Decision of the FTT**

7. The decision of the FTT (“JFTT”) considered the Agreed Issue at JFTT, paragraphs 69 to 79. At JFTT, paragraph 73, the FTT concluded that an RCO can be made in respect of costs incurred before 28 June 2022. MHB/264-267

MHB/266 7.1 Their starting point, in JFTT, paragraph 73 was the language of section 124(2):

“A remediation contribution order is an order requiring payments to be made for the purpose of meeting costs incurred or to be incurred in remedying relevant defects ...” The drafter of the section was here specifically addressing the issue of which costs of remedying relevant defects may be the subject of an order. In relation to time, the choice of language is unlimited, extending to costs which have already been incurred and those which are yet to be incurred. The language appears to us to be clear and explicit and the absence of any temporal limitation or transitional provision is telling.”

- 7.2 The FTT read paragraph 1012 of the Explanatory Notes to the BSA² as confirming their conclusion; the Notes suggest that a leaseholder who has paid towards costs of remediation before Part 5 of the BSA came into force “*may*” wish to seek to recover those costs using an RCO (JFTT, paragraph 74). At JFTT, paragraph 75 the FTT concluded that the construction of section 124 as retrospective was not unfair as they felt it was: MHB/465 MHB/266

“... consistent with the purpose and structure of Part 5 that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time.”

MHB/196 **The Decision of the Court of Appeal**

8. In the Court of Appeal, separate judgments were given on the Agreed Issue by Nugee LJ and Newey LJ. Holgate LJ agreed with Nugee LJ. In this Written Case, the Court of Appeal’s judgment is referred to as the “JCA”.

² These Notes were not before Parliament during the passage of the Bill. See below.

9. Nugee LJ's treatment of the issue is at JCA, paragraphs 137 to 155. Of the FTT's reasons for determining that an RCO could be made with retrospective effect: MHB/231-237

9.1 He disagreed with the FTT's conclusion (recorded at JCA, paragraph 139) that the wording of section 124(2) as enacted was "*clear and explicit, and the absence of any temporal or transitional provision is telling*". Nugee LJ held at JCA, paragraph 150 that: MHB/232 MHB/235

"the language of section 124 by itself does not take one very far (as the import of the words "incurred or to be incurred" is that one can apply for an RCO both to cover costs already paid and to cover costs not yet paid and that makes sense whether or not the section has any retrospective effect)".

MHB/232 9.2 Of the FTT's reliance on paragraph 1012 of the Explanatory Notes (see JCA, paragraph 140), Nugee LJ said at paragraph 150 that the Explanatory Notes to the BSA were "*of limited assistance*" because, as explained by Newey LJ in *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856; [2026] 1 WLR 1857 ("*Adriatic Land*"),³ the Notes as they relate to Part 5 of the BSA and hence to section 124 did not accompany the Bill in its passage through Parliament. As a result, the Notes did not enjoy any particular legal status but, depending on the cogency of any reasoning contained in them, may be of some persuasive authority in the same way that academic writings may be: see *Adriatic Land*, paragraphs 69 to 72. MHB/235 MHB/501-565 MHB/526

9.3 However, Nugee LJ found persuasive the FTT's decision that a construction of section 124 as having retrospective effect was neither improbable nor unfair (JCA, paragraph 141), and that an interpretation without retrospective effect would "create serious inconsistencies in the operation of the legislation between the functioning of section 124 ... on the one hand and schedule 8 on the other ..." (JCA, paragraph 142). In so doing, Nugee LJ in JCA, paragraphs 144 to 150, placed MHB/232 MHB/233-235

³ The Court of Appeal's decision in *Adriatic Land* is also the subject of appeal to the Supreme Court (UKSC/2025/0157). The appeals in the present case and *Adriatic Land* are being heard by the same panel consecutively, with *Adriatic Land* to be heard first. The Appellants' position in relation to *Adriatic Land* is set out at paragraphs 115 to 117 below.

considerable reliance on the decision of the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21; [2026] AC 409 (“*BDW v URS*”), and its account of the purpose of Part 5 of the BSA. He also placed reliance on the fact that an RCO can only be made where it is just and equitable to do so (JCA, paragraph 153). MHB/598-694 MHB/236

10. Newey LJ’s decision on the Agreed Issue is at JCA, paragraphs 160 to 167. MHB/237-238

MHB/237 10.1 At JCA, paragraph 161, he agreed that the language of section 124 does not take one very far so that “*In circumstances where there is a presumption against retrospectivity, the fact that section 124 is silent on the subject might be said to favour SVDP and Get Living rather than the FTT’s construction*”.

MHB/237 10.2 He focussed on the perceived purpose of Part 5 of the BSA including, quoting from *BDW v URS*, ““*protect[ing] leaseholders from ... financial risk*” and “*ensur[ing] that those responsible [for historic building safety defects] are held to account*”” (JCA, paragraph 162), a purpose he concluded was served by section 124 having retrospective effect (JCA, paragraph 163). MHB/238

MHB/969-981 10.3 As to the presumption against retrospective effect, Newey LJ concluded that section 124 was a provision that “*imposes a new liability based on past conduct*” and was thus less likely to be unfair than “*legislation which removes or alters already-accrued rights*”, quoting at JCA paragraph 164 from *Granada UK Rental & Retail Ltd v Pensions Regulator* [2020] ICR 747 (“*Granada*”). Newey LJ also considered that the just and equitable requirement in section 124 was “*very significant to the assessment of the fairness of treating section 124 as having retrospective effect*” (JCA, paragraph 165). MHB/238 MHB/238

Relevant Principles of Statutory Interpretation

Generally

11. In *R(O) v Secretary of State for the Home Department* [2023] AC 255 (“*R(O)*”), paragraph 29, Lord Hodge DPSC summarised the principles thus:

MHB/109
1

“The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.”

12. In relation to context and purpose, in *R(PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594, paragraph 41, Lord Sales JSC referred to the “*numerous authoritative statements*” which emphasise the central importance in interpreting any legislation of identifying its purpose, such that the statute as a whole should be read in the historical context of the situation which led to its enactment. As he there stated:

MHB/1107
-1108

“The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”

13. But, the relevance of context and purpose must not be over-stated: their role is to enable the understanding of *the meaning of the words used* in the particular statute. The primary source from which meaning is ascertained is the words which Parliament has chosen to enact: see *R(O)*, paragraphs 29 (cited above) and 30 and *R(Bano) v London Borough of Waltham Forest* [2026] UKSC 22; [2026] 1 WLR 3543, paragraph 64. Context and purpose cannot be used to give words a meaning which they cannot bear: see, for example, *R v*

MHB/10
91

Bentham [2005] UKHL 18; [2005] 1 WLR 1057, paragraph 10 and *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16; [2026] AC 315, paragraphs 11 and 12.

MHB/899

14. Similarly, in the process of interpretation, it is a mistake to state the purpose(s) of an Act too broadly, or with a gloss, untethered from the language Parliament used. Thus, as Lord Sales JSC stated in *Akbars Restaurant (Middlesbrough) Limited v Secretary of State for the Home Department* [2026] UKSC 26 (“*Akbars*”), paragraphs 47 and 48:

MHB/578

“Determination of the purpose of a statutory provision has to be linked to the language Parliament has chosen to use.” (paragraph 47)

“The drafter will often seek to take account of a number of objects when drafting legislation, so that the text of a provision strikes a balance between them. In their joint speech in *Maunsell v Olins* [1975] AC 373, at p 393, Lord Simon of Glaisdale and Lord Diplock warned against a simplistic approach to construction based on an assumption that the drafter has sought to remedy only one mischief, and discounted the crude idea that a statutory provision has only one statutory objective” (paragraph 48)

15. Statutes, particularly statutes as lengthy as the BSA, rarely have single purposes. Indeed, in the present context (and borrowing from *Bennion, Bailey and Norbury on Statutory Interpretation* (9th ed 2026) (“*Bennion*”) section 12.3, at pages 396-397), it is possible to construct a descending order of purposes as follows:

MHB/1363
-1368

The purpose(s) of law as an instrument of public welfare

∨

The purpose(s) of building safety law

∨

The purpose(s) of the BSA

∨

The purpose(s) of Part 5 of the BSA

∨

The purpose(s) of the “remediation provisions” (as defined at paragraph 36 below)

∨

The purpose(s) of section 124 of the BSA

16. The purpose of the BSA, or sections of it, cannot go beyond what may be derived from the wording and it is wrong to proceed on the basis that section 124 seeks to achieve every purpose of, say, Part 5.
17. Further, statutes are not always able to achieve objectives completely. Thus, Lord Neuberger PSC and Lord Mance JSC, in *R(Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, stated at paragraphs 170 to 171: MHB/1078

“170. It is a common place in legislation that objectives may not be fully achievable or achieved. Compromises or concessions have to be made if legislators are to achieve the enactment of particular provisions. [...]

171. When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree. Limitations on the scope or application of a legislative measure may have been necessary to achieve agreement. There may also have been good reasons for limitations, of which courts are unaware or are not the best judge. Where the legislature has agreed a clearly expressed measure, reflecting the legislators’ choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or ‘improve’ it in respects which the legislator clearly did not intend.”

These statements were made in the context of EU legislation but they were adopted by Lord Sales DPSC in *Akbars*, at paragraph 50, as “*making a general point*”. They are MHB/579 equally applicable here.

The Presumption against Retrospectivity

18. The principal case law on the presumption against retrospectivity is set out in *Adriatic Land* from paragraphs 53 to 59. The Appellants do not dispute the principles there set out which MHB/520-524 are, in summary, as follows:

- 18.1 There is a presumption that a statute does not have retrospective effect, unless a contrary intention appears: see paragraphs 53, 54 and 56, which cited *Wilson v First Country Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816 (“*Wilson*”), *Secretary* MHB/520-526

MHB/1223
-1235

MHB/1038-1042	<i>of State for Social Security v Tunncliffe</i> [1991] 2 All ER 712 (“<i>Tunncliffe</i>”) and <i>Lauri v Renad</i> [1893] 3 Ch 402 (“<i>Lauri v Renad</i>”).	MHB/1191-1193
	18.2 In ascertaining whether a contrary intention appears, the overall fairness of the alleged retrospective effect needs to be considered: see paragraphs 54 and 55, which cited <i>Tunncliffe</i> and <i>L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd</i> [1994] 1 AC 486 (“<i>L’Office Cherifien</i>”).	MHB/521
		MHB/994-1037
	18.3 The question of fairness depends on the interaction of several factors, namely: the degree to which the statute has retrospective effect; the value of the rights which the statute affects; and the extent to which that value is diminished or extinguished by the retrospective effect of the statute: see paragraph 55, which cited <i>L’Office Cherifien</i>.	MHB/521
	18.4 In the context of fairness, a distinction is drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations retrospectively. The concept of fairness carries much greater weight where it is said that already accrued rights and obligations should be altered retrospectively: see paragraphs 57 to 59, which cited <i>Wilson and Granada</i>.	MHB/522-524
MHB/591-597	18.5 The greater the unfairness, the greater the degree of unlikelihood that retrospectivity was intended and the more it is to be expected that Parliament will make it clear that retrospectivity is intended: see paragraphs 54 and 55, which cited <i>AXA General Insurance Ltd v HM Advocate</i> [2011] UKSC 46; [2012] 1 AC 868, <i>West v Gwynne</i> [1911] 2 Ch 1, <i>Tunncliffe</i> and <i>L’Office Cherifien</i>.	MHB/521
MHB/1213-1222		
	18.6 Even where a statute is clearly intended to have retrospective effect, it should not be construed as having any greater retrospective operation than is clearly necessary: see paragraph 56, which cited <i>BDW v URS</i> and <i>Lauri v Renad</i>.	
MHB/521-522		

MHB/546 19. At paragraph 135 of *Adriatic Land*, Nugee LJ referred to the presumption as “a tool which assists the Court to arrive at the right construction”. This was unlikely to be a precise formulation but the Court must be careful not to downgrade the presumption to a mere tool. A “tool” simply does what the tool-user requires, whereas a presumption such as that against retrospectivity strongly influences how the worker approaches their task. The presumption against retrospectivity is particularly strong. As Lindley LJ stated in *Lauri v Renad* at 421:

MHB/10
42

“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 ...”.

20. The reason the presumption against retrospectivity is fundamental is because, more than most canons of construction, it is about essential fairness in the application of legislation. Whilst it may not override all others, it is submitted that the presumption should not be diluted in either its exposition or application.

21. On the question of fairness and the associated balancing exercise, it is instructive to give the following more complete quote from paragraphs 56 and 57 of the judgment of Patten LJ in *Granada* than that set out at paragraph 59 of *Adriatic Land*:

MHB/973-
974

MHB/523-
524

“One obvious difficulty about these principles is to identify what type of retrospective operation is sufficient to engage the presumption and how the question of fairness is to be judged. No one can expect the law to stand still: it must react to changing circumstances and problems as they unfold. Clearly, legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability based on past conduct. But the balance of fairness may also be affected by the consequences of relying on past events: could, for example, the targets have acted any differently had they had advance notice of the changes? Are they to be assumed to have altered their position or arranged their affairs based on the law at the time, in a way which makes it unfair now to impose a liability based on those past events? Was it reasonable for persons in the position of the targets to assume that the law would not change in the future?”

57. In approaching this issue, the courts have avoided adopting a rigid or mechanistic rule for determining whether the legislation in question is to be treated as retrospective. Instead, they have recognised the various forms and

degrees of retrospective effect which can be incorporated into legislation as a spectrum, and have approached the issues of construction by reference to the degree of unfairness which the particular measure may produce. This is necessarily an objective question which falls to be determined by looking at the legislation and its potential effects in general terms.” (emphasis added)

22. As set out further below, both Newey and Nugee LJ in *JCA* concluded that section 124 had retrospective effect without (as they both agreed) clear language, but also without identifying the specific purpose of section 124 or the mischief to which it was addressed. They also failed properly to consider the overall fairness of giving section 124 retrospective effect. In the result, the Court of Appeal reached the wrong conclusion on the Agreed Issue.

The Inter-Play between Presumptions, Language, Context and Purpose

23. At paragraph 135 of *Adriatic Land*, Nugee LJ emphasised that a court in determining whether a provision in a statute has retrospective effect is carrying out an exercise of statutory construction. Accordingly, the exercise will involve a consideration of the language used and all admissible aids to construction, as well as all other canons of construction and whether they compete with the presumption against retrospectivity or support it: see *York City Council v Trinity One (Leeds) Ltd* [2018] EWCA Civ 1883, paragraph 50 and *Bennion*, section 7.14, page 255.

MHB/1339
-1343

24. In *R(Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215, this Court had to consider whether the smoking ban provided for by the Health Act 2006 bound the Crown so as to apply to public prisons. The Court therefore had to consider the application of the interpretative presumption that, absent express words, a statutory provision does not bind the Crown, unless that is a “*necessary implication*”. At paragraph 36, Baroness Hale PSC (giving the judgment of the Court) stated:

MHB/1052
-1072

MHB/106
8

“(3) The goal of all statutory interpretation is to discover the intention of the legislation.

(4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. In this context, it is

clear that Lord Hobhouse of Woodborough's dictum in *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 616, para 45, that "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context" must be modified to include the purpose, as well as the context, of the legislation.

(5) In considering the intention of the legislation, it is not enough that it is intended for the public good or that it would be even more beneficial for the public if the Crown were bound.

(6) However, it is not necessary that the purpose of the legislation would be "wholly frustrated" if the Crown were not bound. [...]

(7) In considering whether the purpose of the Act can be achieved without the Crown being bound, it is permissible to consider the extent to which the Crown is likely voluntarily to take action to achieve it. Inaction cannot be assumed. It may be that the Act's purpose can as well be achieved by the Crown exercising its powers properly and in the public interest. But if it cannot, that is a factor to be taken into account in determining the intention of the legislation."

25. Thus, Baroness Hale stated at paragraph 37 that the question which the Court had to determine in *Black* was whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound. It is submitted that the same question applies in this case albeit that the question should conclude by asking whether Parliament must have intended section 124 of the BSA to apply retrospectively. MHB/1069

26. The Supreme Court in *Black* found that the Crown was not bound by the smoking ban. Noteworthy are the reasons why:

26.1 There were powerful indicators in the language of the Act itself that the Crown was not to be bound by the smoking ban. First and foremost, it does not say so and it would have been easy enough so to do: see paragraphs 43 and 48. MHB/1070

26.2 In comparable Acts, there were provisions dealing expressly with exactly how and to what extent the Act is to apply to the Crown: see paragraphs 44 and 45. MHB/1070-1071

26.3 The Health Act 2006 itself contained provisions in another Part of the Act dealing with Crown application: see paragraph 46. MHB/107
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26.4 As Baroness Hale stated at paragraph 49: MHB/107
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“It might well be thought desirable, especially by and for civil servants and others working in or visiting government departments, if the smoking ban did bind the Crown. But the legislation is quite workable without doing so. It cannot be suggested, in the way that it could be suggested in the *Liverpool Coroner case* [2015] QB 481, that a major plank of the Act’s purpose would remain unfulfilled if the Act did not bind the Crown.”

26.5 As Baroness Hale concluded at paragraph 50, the fact that where Parliament did mean to bind the Crown in the Health Act 2006, it said so, was conclusive of the question. MHB/107
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27. Accordingly, it is submitted that the Court should avoid the temptation to use assessments of the context and purpose of the BSA, Part 5 or the remediation provisions (defined at paragraph 36 below) to interpret section 124 so that it applies retrospectively when the express language of the BSA points against the displacement of the presumption against retrospectivity.

The Context and Purpose of the BSA

28. As is well known, the historical context which led to the enactment of the BSA was the tragic Grenfell Tower fire which occurred on 14 June 2017: see further *BDW v URS*, paragraphs 1 to 3. MHB/625-
626

29. The Grenfell fire led to Dame Judith Hackitt’s Independent Review of Building Regulations and Fire Safety, published in May 2018 (“**the Hackitt Review**”). The Hackitt Review was focussed on building regulation and fire safety, not on leaseholder liabilities or the question of who should pay for remediation.

30. The Government set out its policies in its consultation response “*Building a Safer Future*”, published in April 2020. The Building Safety Bill, as originally introduced to Parliament

in July 2021 set out those policies in statutory form. It included introduction of the Building Safety Regulator, amendments to the Building Act 1984, and introduction of what is now the Part 4 higher-risk building regime, for example, addressing Dame Judith’s recommendations.

31. Of what is now Part 5, the Bill as originally introduced was limited. It included provision for extension of the limitation period for claims under the Defective Premises Act 1972 (“the DPA”) to 15 years and it introduced provisions relating to construction products, now in section 146 and schedule 11. It also introduced amendments to the Landlord and Tenant Act 1985, now section 133⁴, for example requiring landlords to take reasonable steps to ascertain if alternative funding is available for remediation works. None of the service charge payability limits provided for by Schedule 8 were included. Nor were sections 123 or 124.

MHB/477-479
 MHB/389-391
 MHB/416-422
32. The introduction of the majority of Part 5 came late in the passage of the Building Safety Bill through Parliament. The balance of what is now Part 5 of the BSA, including section 124, was first introduced before Parliament on 2 March 2022 after amendment in Grand Committee in the House of Lords.
33. The “*radical protection*” for leaseholders (per Nugee LJ in JCA, paragraph 141) which was introduced by these late additions to the Bill was not directly informed by the Hackitt Review, or the Government’s consultation response (the two documents referred to in paragraph 1 of the Explanatory Notes) and, as explained by Newey LJ at paragraphs 33 and 34 of *Adriatic Land*, was not the subject of the Explanatory Notes to the Bill at any time during its passage through Parliament. Therefore, none of these documents gives insight into the purposes of Part 5 as a whole or section 124 in particular.

MHB/232
 MHB/432
34. That is presumably why, the Secretary of State’s written submissions were cited so fully in *BDW v URS*: see Lords Hamblen and Burrows JJSC at paragraphs 83, 84 and 104.

MHB/642-643

MHB/647

⁴ Not yet brought into force or the subject of the required regulations.

However, the principal source of the purposes of the provisions of Part 5 of the BSA must be the language of the Act itself.

MHB/354 35. As the BSA was eventually enacted, section 124 sits within Part 5 of the BSA, but, as can be seen from section 1(6) of the BSA, Part 5 is an extensive and disparate Part comprising 44 individual sections: sections 116 to 160 of the Act. Furthermore, as section 116(1) MHB/355 provided (pre-amendment⁵):

“Sections 117 to 125 and Schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings.”

MHB/356- 36. Thus, sections 117 to 124⁶ and Schedule 8 form their own sub-group of provisions within 373 Part 5, referred to by the Court of Appeal as “*the remediation provisions*”: see *Adriatic Land*, paragraph 147 and JCA, paragraph 9. As can be seen from section 170(3)(a) of the MHB/549 BSA, they were brought into force together. By way of overview of the remediation MHB/414 provisions:

36.1 Sections 117 to 121 define the relevant terms used in the remediation provisions.

MHB/369 36.2 Section 122 introduces Schedule 8 (which is the subject of the appeal in *Adriatic Land*). Schedule 8 contains a series of provisions aimed at providing a substantial measure of protection against service charges which might otherwise be levied by landlords in respect of “*a relevant measure relating to any relevant defect*”. For a fuller explanation, see paragraphs 14 to 20 of the judgment of Nugee LJ in *Adriatic Land*. MHB/509-511

MHB/370 36.3 Section 123 enables the FTT to make a “remediation order” (“**RO**”) pursuant to which a landlord may be ordered to remedy specified relevant defects in a specified relevant building.

⁵ Until 23 July 2024 section 116 referred to sections 117 to 125 (as well as Schedule 8) but section 116 was amended when section 125 of the BSA was repealed on 24 July 2024.

⁶ And the now repealed section 125.

36.4 Section 124 has already been introduced at paragraphs 1 to 4 above.

- MHB/549 37. At paragraph 148 of *Adriatic Land*, Nugee LJ accepted a submission which described the purposes of the remediation provisions as fourfold: (1) to ensure that historic safety defects were remediated; (2) to protect leaseholders; (3) to ensure that those responsible for the defects were held liable; and (4) to restore stability to the lending market.
38. The first of those purposes is uncontroversial. Section 116(1) of the BSA expressly states MHB/355 that the remediation provisions are in connection with the remediation of relevant defects. Further, section 123 expressly provides for the remediation of relevant defects. MHB/370-371
- MHB/355 39. The second is also uncontroversial, at least insofar as it relates to *current* leaseholders. Section 116(2)(b) of the BSA expressly describes section 122 and Schedule 8 as containing “*protections for tenants*” and Schedule 8 contains those protections. However, section 124 does not protect *past* leaseholders: see paragraphs 62 to 63 below.
40. The third of those purposes needs to be treated with caution because:
- 40.1 It is not what section 116 says. Section 116(1) only states that the remediation MHB/355 provisions make provision “*in connection with remediation of relevant defects*”.
- 40.2 It is not apparent from the admissible context. And that context cannot be said to be specific to the remediation provisions, let alone section 124.
- MHB/416-417 40.3 As will be developed below, it is not apparent from the language of the remediation provisions either. True it is that RCOs can be made against developers (as section 124(3)(c) provides) and that developers are described as “*responsible for*” relevant MHB/372 defects in Schedule 8, paragraph 2. However, that point only goes so far. For example, the remediation provisions are also targeted at landlords (who generally will not be responsible for relevant defects) and make no reference to the

contractors, professionals or product manufacturers who were also responsible for building safety defects. Moreover, as the FTT stated at JFTT, paragraph 31:

MHB/256

“Responsibility, in this sense, is not synonymous with fault; a developer may have done all that could reasonably be expected of it to build a safe building, but will still be “responsible for” relevant defects caused by others.”

MHB/647

40.4 As can be seen from *BDW v URS* paragraphs 104 and 274, outside of the MHB/687 remediation provisions, Part 5 of the BSA provides various routes for the cost of historic remedial works to be recovered, including by extension of the limitation period for claims under section 1 of the DPA, the introduction of building liability orders and the introduction of rights of action against product manufacturers. These provisions are discussed further at paragraphs 89ff below.

MHB/477-479

41. Accordingly, in relation to the third purpose, it is necessary to distinguish between the purposes of Part 5 of the BSA expressed in broad, portmanteau terms and the particular purposes of the remediation provisions.

41.1 It is accepted that a purpose of Part 5 of the BSA is to ensure that those responsible for relevant defects are held liable. In this connection, it is noted that section 1(6)(a) MHB/354 of the BSA expressly provides that Part 5 contains provisions about “*remediation and redress*”.⁷

41.2 However, for the reasons set out at paragraph 40 above, it is not accepted that ensuring those responsible are held liable is a purpose of the remediation provisions.

41.3 If that foregoing submission is not accepted, nevertheless the remediation provisions are not the primary vehicle by which Part 5 seeks to achieve that

⁷ Emphasis added

purpose. Other provisions within Part 5, but outside of the remediation provisions, are that primary vehicle.

42. Finally, it is accepted that a purpose of the BSA was to restore stability to the lending market. That is most apparent from the historical context which gave rise to the introduction of the BSA, and was borne out by the evidence of leaseholders in this case (summarised at JFTT, paragraphs 231 to 234). It might also be said to be borne out by the leaseholder protections contained in Schedule 8. However, it is difficult to see how this purpose is relevant to the issue of retrospectivity and, in any event, it is difficult to see how it can be said that the purpose of section 124 was to restore stability to the lending market.

MHB/293-
294

The Language of Section 124 itself

Incurred or to be incurred

43. Section 124 does not say that it has retrospective effect.

44. In this connection, the Appellants respectfully adopt the observations of both Nugee and Newey LJ that the wording of section 124, in particular the phrase “*incurred or to be incurred*”, does not take one very far on the issue of its retrospective application. As Nugee LJ stated at JCA, paragraph 150, the import of the words “*incurred or to be incurred*” is that “*one can apply for an RCO both to cover costs already paid and to cover costs not yet paid*⁸ and that makes sense whether or not the section has any retrospective effect”. Once any Act has been in force for a few years, there will be costs which will have been incurred since commencement. The wording “*incurred or to be incurred*” is simply no indication of retrospectivity, to cover costs incurred before section 124 came into force.

MHB/372

MHB/235

- MHB/237 45. Indeed, at JCA, paragraph 161, Newey LJ rightly described section 124 as “*silent on the subject*” of retrospectivity. That being so, the Court of Appeal ought to have held that the

⁸ “*Paid*” and “*incurred*” are not quite synonymous but for the purposes of the point which the Appellants are here adopting from paragraph 150 of Nugee LJ’s judgment the distinction is not relevant.

presumption against retrospectivity was to be applied, as the presumption is fundamental and there was nothing in the language of section 124 to displace it.

The scope and potential application of section 124

Introduction

- MHB/372 46. Section 124 gives “*interested persons*” entirely new rights to seek payment of the costs of rectifying relevant defects in relevant buildings from landlords, developers and their associates. Section 124 does not require the interested person to prove duty, breach, causation or loss. Once the threshold requirements of section 124 have been met, the only limitation to an RCO being made is that it must be just and equitable to make the order. The provisions and scope of application of section 124 therefore merit anxious consideration.

An RCO can remove or alter already accrued rights

47. The first point to note is that an RCO can not only be made against a developer or its associates. It can also be made against the landlord of the building or a person who was a landlord at the qualifying time of 14 February 2022 or an associate of either such landlord:
see sections 124(3)(a), (b) and (d) and 119(2)(d) of the BSA.

MHB/372

MHB/359

48. Linked to that, “*a person with a legal or equitable interest in the relevant building or any part of it*” may apply for an RCO: see limb (e) of the definition of “*interested person*” at section 124(5).

MHB/372-
373

49. As a result:

- 49.1 If section 124 can be applied retrospectively, a tenant can use section 124 to recover costs from their landlord which they were legally obliged to pay (pursuant to a lawfully issued service charge demand) at the time they paid those costs, even though: those costs have been paid; and/or those costs may have been ordered to be paid by a court; and/or those costs were the subject of a determination by a Tribunal

that they were payable; and/or the court order/determination has been enforced by forfeiture or a charging order and sale.

49.2 If applied retrospectively, the RCO therefore gives the FTT jurisdiction to unravel a completed transaction.

MHB/238

49.3 Newey LJ fell into error at JCA, paragraph 164, when he found that section 124 imposes a new liability on past conduct, rather than removed or altered already-accrued rights. A tenant's new right to recover lawfully imposed and paid service charges is an alteration of an already-accrued landlord right. Accordingly, section 124 is at the "*likely to be more objectionable*" end of the scale (to use the approach from *Granada* referred to by Newey LJ in JCA, paragraph 164).

50. Outside the sphere of repayment of service charges, this case itself is an example of section 124 impacting upon the value of a compromise concluded pre-commencement. As set out in JCA, paragraph 120, QDDAV (which purchased SVDP from the Olympic Delivery Authority ("**ODA**")) had the benefit of warranties from the ODA in relation to the East Village, including N26. The ODA's liability under those warranties was released by a settlement deed dated 8 January 2020, a date when the BSA, and potential liabilities against SVDP and Get Living under section 124 and the extension of the limitation period for claims under section 1 of the DPA were not in contemplation. MHB/228

MHB/973 51. To use the wording of *Granada* at paragraph 56, QDDAV "*could ... have acted differently had they had advance notice of the changes*".

52. That also would be true of any settlement between, for example, developer and landlord, or developer and leaseholder, under a contract for purchase off-plan or under section 1 of the DPA prior to the BSA coming into force, and taking into account rights of action in relation to defects. If section 124 has retrospective effect the developer is now exposed under section 124 (and despite the proviso against the extended limitation period under the DPA where there has been a settlement).

53. Both the service charge example and the example of the settlement are examples showing that a retrospective construction of section 124 does not simply impose new rights.
54. In any event, on any analysis, it is unfair. Newey LJ was wrong in JCA, paragraph 164 MHB/238 only to consider whether section 124 imposed a new liability (a binary approach). In doing so, contrary to paragraph 57 of *Granada*, he failed to avoid adopting a rigid or mechanistic MHB/973-974 rule. As the whole of paragraphs 56 and 57 of *Granada* makes clear, the Court recognises the various forms and degrees of retrospective effect which can be incorporated into legislation as a spectrum and one must consider “*the degree of unfairness which the particular measure may produce*”.
55. Accordingly, the fact that section 124 can be deployed to unravel a completed transaction and circumvent or undermine a settlement concluded pre-commencement is a powerful reason why the presumption against retrospective application should be applied in this case.

An RCO can be made against blameless persons

56. It cannot be emphasised too highly that an RCO can be made without there having to be made any finding of fault on the part of the landlord, developer or associate. In other words, an RCO may be made against a body corporate or partnership without it having to be proven that they have done anything wrong at all.
57. That is compounded by the fact that an RCO may be made in respect of the costs incurred in remedying “*relevant defects*”, which are defined by section 120(2) and (3) of the BSA MHB/365 as defects in work carried out in the 30-year period which ended on the date when section 124 came into force, 28 June 2022.
58. As a result, if applied retrospectively, an RCO may be made against an entirely blameless landlord (or an associate of an entirely blameless landlord) for remediation costs incurred over at least a 30-year period, and indeed remedied many years ago. The lack of blame can arise in three respects:
 - 58.1 First, it can arise because the landlord may not have breached any duty.

58.2 Secondly, it can arise because the landlord against whom the RCO is made may not have had any ownership or connection to the building at the time the work that gave rise to the relevant defect was carried out, or even at the time the remediation work was carried out. That is because an RCO can only be made against a *current* landlord or a body corporate or partnership that was the landlord of the building on 14 February 2022: see section 124(3)(a) and (b).

MHB/372

58.3 Finally, it can arise because the term “*landlord*” is wide. In a block of flats with a headlease or headleases, and with flats let on short term tenancies, the potential respondents are many and varied and most could not be described as “*responsible*” for any defect (such as someone who owns two or three flats in a large development and lets them out, via a limited company, for pension income).

59. It is submitted that these factors are compelling reasons against disapplying the presumption against retrospectivity. A real unfairness arises because an entirely blameless respondent could not have accounted for the risk associated with a retrospective RCO before 28 June 2022.

An RCO cannot be made against past landlords

60. Indeed, the foregoing point goes further because an RCO cannot be made against past landlords, i.e. those who sold the freehold to either (a) the landlord of the building on 14 February 2022 or (b) the current landlord. What this means is that, where the ownership of the freehold has changed prior to 14 February 2022 or 28 June 2022:

60.1 An RCO cannot be made against a whole range of landlords who may have received the service charge contribution before 14 February 2022 or 28 June 2022. That could include the service charge contribution which related to the remedial work that is the subject of the RCO application.

60.2 It will not be possible to make an RCO against a landlord who commissioned the relevant work which gave rise to the relevant defect, even though such a landlord is expressly referred to at section 120(3)(b) of the BSA.

MHB/365

61. If an RCO were intended to apply retrospectively, it would be expected that a leaseholder would be able to obtain an RCO against (a) the landlord to whom they paid the relevant service charge and/or (b) the landlord who commissioned the relevant work that contained the relevant defect, even if that landlord had sold the freehold interest to the current landlord before 14 February 2022 or 28 June 2022. But that is not what section 124 provides. That is a strong steer that the JCA is wrong and RCOs cannot be made with retrospective effect for costs incurred pre-commencement.

An RCO cannot be applied for by past tenants or landlords

62. There is also no provision in section 124 which enables past landlords or tenants to apply for an RCO. The list of interested persons in section 124(5) only contains persons or entities who hold the relevant status at the date of the application, as it is addressing standing to apply for an RCO. Hence, only the *current* freeholder, the *current* leaseholders, and those with *current* legal or equitable interests can apply.

MHB/372-373

63. Past leaseholders, who for example have already paid for costs incurred in remedying relevant defects prior to 28 June 2022, and prior to sale of their leasehold interests, have no standing to apply for an RCO. That is inconsistent with a suggested purpose of section 124 as relied on by the Court of Appeal, being to enable leaseholders to recover costs incurred before the BSA came into force.

64. And, past landlords cannot apply for an RCO in respect of the costs they incurred prior to 28 June 2022 in remediation.

An RCO cannot be made against many of those who were “responsible” for the relevant defects

65. Further, it should be noted that section 124 is not the obvious vehicle by which those responsible for relevant defects are held to account. Of the list of bodies corporate against

whom an RCO may be made in section 124(3), it is only developers (and their associates), and landlords who have done maintenance works creating relevant defects under section 120(3)(b) (and their associates), who might be considered to be “*responsible*” for relevant defects.

66. Moreover, an RCO cannot be made against entities who may have much greater factual and moral responsibility for relevant defects than developers, namely those who designed and constructed the relevant building work that gave rise to the relevant defects and those who manufactured, marketed and supplied the unsuitable products that were installed on relevant buildings. As will be seen at paragraphs 72 and following below, those persons are dealt with elsewhere within Part 5 of the BSA.
67. Further still, RCOs may only be made against those who were associated with the original body in the period of 5 years ending at the qualifying time of 14 February 2022 and, in the context of questions of control, the only relevant date for assessing control is 14 February 2022 (not any time before or after that date): see sections 121(3) to (5) of the BSA. This 5- MHB/367 year period ought to be contrasted with the 30-year period ending with 28 June 2022 in which relevant defects could have arisen: see sections 120(1) to (3) of the BSA. In other MHB/365 words, there is potentially a large body of associates against whom an RCO may not be made even though they were associated with the developer at the time the relevant defects were created.

Conclusion on the scope of section 124

68. Once its language is properly considered, it can be seen that: an RCO can be made against entirely blameless respondents; an RCO cannot be sought by all freeholders and leaseholders who have incurred the cost of rectifying relevant defects; and an RCO cannot

be made against many persons who would be considered to be to blame, or responsible for relevant defects. Accordingly, it is submitted that:

68.1 It would be wrong to view section 124 as a vehicle by which Parliament (a) sought to achieve a policy aim of holding those responsible for relevant defects to account or (b) sought to provide a route of redress for all leaseholders.

68.2 If the language of section 124 does not permit Parliament to achieve such policy objectives, reliance on policy objectives cannot suffice to rebut the presumption of retrospectivity.

The just and equitable “safety valve”

69. Both Nugee and Newey LJ considered that the “*just and equitable*” requirement in section 124(1) of the BSA means that section 124 contains its own “*safety-valve*” against unfairness: see JCA, paragraphs 153 and 165.

MHB/372

MHB/236

70. However, there are a number of flaws in this analysis, namely:

70.1 The need for a safety-valve shows the unfairness of retrospectivity. If it is right that it will not be just and equitable to make an RCO in respect of costs incurred before section 124 came into force, the presumption against retrospectivity should be applied so as to make an RCO inapplicable to such costs in the first place.

70.2 If section 124 is retrospective, there is very little room for the supposed safety-valve to apply. If it is found that Parliament intended section 124 to have retrospective effect, it is difficult to see how the FTT could properly conclude that it is unfair / not just and equitable to make an RCO in respect of costs incurred before section 124 came into force. This very point was made by the FTT in this case, at JFTT, paragraphs 280 to 282, where they stated:

MHB/304

“... if it is otherwise just and equitable to make a remediation contribution order, the order does not cease to be just and equitable simply because it is

made in respect of costs incurred prior to 28 June 2022. The legislation permits this result. Something more is required.

282. Although it is difficult to think of an example of such circumstances, we do not rule out the possibility that, on the facts of a particular case, there might be a factor or factors which rendered it unjust and inequitable to make a remediation contribution order in respect of costs incurred prior to 28 June 2022.”

In other words, the just and equitable requirement is not much of a safety-valve at all. Given that permission to appeal on the just and equitable issue before the FTT and Court of Appeal was refused by this Court, that finding stands and the Supreme Court should proceed on that footing.

70.3 The “safety-valve” analysis does not answer the point that section 124 could be used to unravel a completed transaction, such as the payment of service charges by a tenant to their landlord before section 124 came into force.

70.4 If, contrary to the above, the just and equitable requirement can be invoked to resist RCOs being made in relation to completed transactions and/or entirely blameless landlords in respect of costs incurred before 28 June 2022, that would seem to permit the FTT to use its discretion to disapply a significant element of the scope which Parliament otherwise intended section 124 to have (if the starting point is that section 124 has retrospective effect). That seems most unlikely to be what Parliament intended. Why give a tribunal such a broad power with the intention that it be rarely exercised?

70.5 Section 124 should be compared with building liability orders (“**BLOs**”) under section 130. BLOs may also only be made where it is just and equitable to do so: see section 130(1) of the BSA. However, section 130(3) also makes clear that BLOs may be made in respect of a liability which arises “*before or after commencement*”. Thus, Parliament has expressly given section 130 retrospective effect. The inclusion of the just and equitable requirement in section 130 is not an indication of retrospectivity; it is the express wording in s.130(3) which has that effect.

MHB/384

MHB/384

- 70.6 In other words, it is clear from section 130 that the mere presence of the just and equitable requirement in section 124 is not sufficient to displace the presumption against retrospectivity. For retrospectivity, something more, i.e. express language, is required.
- 70.7 Where the BSA expressly provides for retrospectivity, it also expressly contains “*safety valves*” that are more targeted, focused and precise than the much broader concept of “*just and equitable*”: see paragraphs 80 to 84 below. In those circumstances, it is unlikely that Parliament intended the just and equitable requirement in section 124 to act as a safety valve against the effects of retrospectivity.
71. Accordingly, it is submitted that the need for it to be just and equitable to make an RCO is no answer to the retrospectivity issue before the Court.

The Broader Statutory Scheme

Introduction

72. Once resort is had to the broader statutory scheme, the following points become apparent:
- 72.1 Where the BSA wants provisions to have retrospective effect, it says so.
- 72.2 The BSA contains other provisions which (a) enable leaseholders to seek redress in respect of costs incurred before 28 June 2022 and (b) ensure that those responsible for the defects are held to account.
- 72.3 Section 124 is complementary to section 123.
73. Each is addressed in turn.

Where the BSA wants provisions to have retrospective effect, it says so

74. There are a number of provisions in Part 5 of the BSA which expressly provide for retrospective effect, which are set out in the order in which they appear in Part 5.
75. Section 122 introduces Schedule 8. Schedule 8, paragraph 5 places limits on “*relevant service charges*” in respect of a relevant measure relating to any relevant defect, with “*relevant service charge*” being defined by paragraph 5(2) as expressly including service charges that “*fell due in the pre-commencement period*”, which is in turn defined by paragraph 5(3) as, subject to qualifications, the 5-year period between 28 June 2017 and 28 June 2022. MHB/418
76. Section 125 (repealed on 24 July 2024 but nonetheless relevant to the construction of the statute) provided for contributions to be made by associates of an insolvent landlord towards the cost of remediating relevant defects. Section 125(3) expressly provided that: MHB/374

“An order may be made where proceedings for the winding up of the company were commenced before (as well as after) the coming into force of this section.”
(emphasis added)

77. As stated at paragraph 70.5 above, section 130(3) of the BSA provides that BLOs may be made in respect of a relevant liability “*whether arising before or after commencement*”. In this way, section 130 has retrospective effect. Furthermore, section 130(3) uses this phrase in the same sentence as the word “*incurred*”. It provides: MHB/384

“In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred...”

78. Thus, section 130(3) emphasises that:

78.1 Newey LJ was right when he described section 124 as “*silent on the subject*” of retrospectivity: see the discussion of “*incurred or to be incurred*” at paragraphs 43 to 45 above.

78.2 If Parliament wanted section 124 to apply to costs incurred pre-commencement, it would have said so.

79. The retrospectivity of section 130 is reinforced by section 130(5) of the BSA, which MHB/384 provides that a BLO may be made in respect of the liability of a body corporate that has been dissolved “*including where dissolution occurred before commencement*”.

MHB/392- 80. Section 135 retrospectively changed the limitation period to 30 years for claims under the
393 DPA which had become time-barred before 28 June 2022. It did so by providing for a new section 4B of the Limitation Act 1980, which “*is to be treated as always having been in force*” (section 135(3)), and which provides at subsection 4B(4):

MHB/393

“Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.”

81. Also in relation to DPA claims, there are proper, targeted and express “*safety valves*” to ameliorate the express retrospectivity of section 135:

MHB/393 81.1 Section 135(5) of the BSA provides for the mandatory dismissal of an action which involves reliance on the retrospective application of the 30-year limitation period for DPA claims if it is necessary to avoid a breach of the defendant’s Convention rights.

MHB/393 81.2 Section 135(6) of the BSA expressly provides that nothing in section 135 applies to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).

MHB/399-400	82.	Section 149 of the BSA creates a new retrospective liability which can only apply to past defaults relating to cladding products. ⁹ That is express: it is what the title of section 149 says and also, and more fundamentally, Condition A to the making of an award under section 149 is (only) engaged in relation to matters that occurred “ <i>at any time before the coming into force of this section</i> ”: see section 149(2).	MHB/399	
MHB/401-402	83.	Section 150 ¹⁰ of the BSA expressly provides that the new cause of action in section 149 relating to “ <i>cladding products</i> ” which have caused the building or dwelling to be unfit for habitation is to have a retrospective 30-year limitation period. It does so by providing for a new section 10B of the Limitation Act 1980, which provides at subsection (2):	MHB/401	
		“An action under section 149 of the Building Safety Act 2022 shall not be brought after – (a) if the right of action accrued before the commencement date, the expiration of the period of 30 years from the date on which it accrued”		
MHB/400	84.	Further, section 149(9) ¹¹ provides for the mandatory dismissal of an action which involves the retrospective application of section 149 if it is necessary to avoid a breach of the Defendant’s Convention rights.		
	85.	Accordingly, the combined effect of sections 125, 130, 135, 149, 150 and 151 of the BSA and Schedule 8, paragraph 5(2) is that it is clear that, when Parliament intended for provisions in Part 5 of the BSA to have retrospective effect, Parliament said so expressly.		
MHB/495-500	86.	That approach continued when section 124 of the BSA was amended by the Leasehold and Freehold Reform Act 2024 (“ LAFRA ”). Sections 116(1) to (6) of LAFRA amended various parts of section 124 with effect from 31 October 2024. ¹² Those amendments in particular amended section 124: to add the wording “ <i>or otherwise in connection with</i> ” to	MHB/496-498	
MHB/397	⁹ Looking forward, such products will fall within the wider meaning of “construction products” to which section 148 applies.			
	¹⁰ Section 150 applies to England and Wales. An equivalent provision is made for Scotland at section 151.			MHB/403-404
	¹¹ Section 149(9) applies to England and Wales. An equivalent provision is made for Scotland at section 149(10).			
MHB/202-203	¹² It is understood that the parties agree that none of the substance of these amendments is material to the outcome of this appeal. The Court of Appeal considered section 124 in its original form: see JCA, paragraph 16.			

MHB/372 section 124(2); to add sections 124(2A) and (2B) in their entirety; to add the wording “*as*
MHB/373 *a person required to make payments*” into section 124(3); and to revise the wording of
section 124(4). Section 116(7) of LAFRA then provided:

MHB/498

“The amendments made by this section apply –

(a) in relation to proceedings for a remediation contribution order under section 124 of the BSA 2022 which are pending on the day on which those amendments come into force (as well as proceedings for such an order which are commenced on or after that day);

(b) in relation to costs incurred before as well as after those amendments come into force.” (emphasis added)

87. Thus, even when Parliament amended section 124, it made express provision in respect of retrospectivity.

88. It is therefore submitted that the facts that (a) section 124 does not make express provision for RCOs to be made in respect of costs incurred before it came into force and (b) when Parliament intended provisions of the BSA to have retrospective effect, it said so expressly are conclusive (in the Appellants’ favour) of the Agreed Issue (as was the case in *Black*, see paragraph 26 above).

The BSA contains other provisions which provide for redress and accountability

89. The purposes of the remediation provisions and Part 5 generally have already been discussed at paragraphs 35 to 42 above. At this point, it is important to record that, beyond the remediation provisions, Part 5 of the BSA contains a number of provisions which can be clearly seen from their express language (a) to enable leaseholders to seek redress in respect of costs incurred before 28 June 2022 and (b) to ensure that those responsible for relevant defects are held to account. In particular:

89.1 Sections 126 to 129 permit the Secretary of State to establish a scheme for the purpose, inter alia, of “*securing that persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings*”, MHB/376
with associated powers to prohibit those who are not members of such schemes

from carrying out development of land in England or from obtaining Building Control approval. In this connection, see *BDW v URS*, paragraph 84 which confirms the purpose of the “*Responsible Actors Scheme*” established in accordance with these statutory provisions. MHB/643

89.2 Sections 130 to 132 enable the High Court to make BLOs, which make companies within a corporate group liable for liabilities of a related company incurred under the DPA or “*as a result of a building safety risk*”. Section 130 has already been discussed at paragraphs 70.5, 77 and 78 above. MHB/384

89.3 Section 135 retrospectively changed the limitation period for claims under the DPA which had become time-barred before 28 June 2022 to 30 years. Section 135 has already been discussed at paragraphs 80 and 81 above.

MHB/399-400

89.4 Section 149 introduced a new cause of action for anyone with a legal or equitable interest in a dwelling or a building containing one or more dwellings against those who market, supply or manufacture a “*cladding product*” which has caused the building or dwelling to be unfit for habitation. Section 149 also has a retrospectively applied 30-year limitation period: see sections 150 and 151. Sections 149 to 151 have already been discussed at paragraphs 82 to 84 above. MHB/401-404

89.5 Sections 152 to 155 provide for the making of cost contribution orders by the Court on the application of the Secretary of State, where a person is convicted of an offence consisting of a failure to comply with a construction product requirement. MHB/405-413

90. There are a number of relevant features to the duty imposed by section 1 of the DPA to see that work is carried out in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed (“**the DPA duty**”):

90.1 Leaseholders (including those who have since sold) have a clearly established cause of action under the DPA: section 1(1)(b) of the DPA provides that the DPA duty is

MHB/477

owed to “every person who acquires an interest (whether legal or equitable) in the dwelling”.

- 90.2 The duty owed under the DPA is owed by any “person taking on work for or in connection with the provision of a dwelling”. That includes developers and not just contractors or professionals who designed or constructed the dwelling or relevant building which contains dwellings: see section 1(4) of the DPA. Accordingly, anyone who is responsible for defects in the dwelling or its surrounding common parts will be held to account through a DPA claim (and not just developers who are the only potential “accountable” target under an RCO). MHB/477
- 90.3 The requirement to prove fitness for habitation under the DPA is comparable to the requirement to demonstrate that a “relevant defect” gives rise to a “building safety risk” for the purposes of an RCO: see the discussion of “fitness for habitation” in *Rendlesham Estates Plc v Barr Ltd* [2015] 1 WLR 3663, paragraphs 60 to 73. In essence, unfitness for habitation relates to defects rendering the dwelling dangerous or unfit for it to be occupied and inhabited for a reasonable time without risk to the health or safety of the occupants. It includes the absence of a safe means of escape in case of emergency and the presence of defects that, if left unrepaired, would have the result that the structural integrity of part of the building is subject to a risk of failure at some time during the design life of the building. MHB/1185-118
- 90.4 The 30-year limitation period applicable to claims under the DPA is expressly provided by the BSA to be retrospective: see section 135 of the BSA, discussed at paragraph 80 above. MHB/392-393
- 90.5 Section 130(3)(a) of the BSA expressly provides that BLOs can be made in respect of liabilities under the DPA. MHB/384
- 90.6 There can be no doubt that BLOs have retrospective application: see section 130(3) of the BSA, discussed at paragraphs 70.5 and 77 above. Accordingly, DPA claims can be made against the associates of the original “wrongdoer”. MHB/384

91. Indeed, in *BDW v URS*, paragraphs 104 to 106, Lords Hamblen and Burrows JJSC stated that a central purpose of section 135 of the BSA was “*to hold those responsible for building safety defects accountable*”. Moreover, as Lord Leggatt JSC stated at paragraph 274 of *BDW v URS*: MHB/647-648 MHB/687-688

“A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs. To achieve that goal, Parliament has decided to enable claims to be brought against property developers, contractors and others responsible for the construction of unsafe residential buildings even when the construction work was completed many years ago. That is only made possible by greatly extending the limitation period for bringing such claims, including where the limitation period had already expired before the BSA came into force.” (Emphasis added).

- MHB/735 92. Likewise, Constable J in *Crest Nicholson v Ardmore Construction Limited* [2026] EWHC 789 (TCC), paragraph 61(4) (applying *BDW v URS*) found that the purpose of section 130 of the BSA is “*to provide the Court with powers to allow those directly responsible for defective work ... to be pursued through their associates*”.

93. The cause of action under section 149 of the BSA against those who market, supply or manufacture a “*cladding product*” has similar features to the DPA duty. In particular: MHB/399

- 93.1 It is a person with a “*relevant interest*” who may pursue a claim under section 149: see section 149(6) of the BSA. In relation to a building in England and Wales, where a building contains one or more dwellings, that is a person with a legal or equitable interest in the building or any dwelling contained in the building: see section 147 of the BSA. So individual leaseholders within a block of flats have a clear cause of action under section 149. MHB/399-400

MHB/395-396

- 93.2 The cause of action is against either (a) persons who failed to comply with a cladding product requirement (b) persons who marketed or supplied a cladding product and made a misleading statement in relation to it or (c) manufacturers of

inherently defective cladding products: see section 149(2) of the BSA. As is well known, it is these people who are responsible for the fact that so many buildings have unsuitable cladding products installed on them. MHB/399

93.3 Section 149 claims benefit from a 30-year limitation period which is expressly retrospective: see sections 150 and 151 of the BSA, discussed at paragraph 83 above. MHB/401-404

93.4 A BLO ought to be capable of being made in respect of section 149 claims. Although there is no decided authority on this point, a liability under section 149 must be a liability incurred “*as a result of a building safety risk*” (within the meaning of section 130(3) of the BSA) given that a liability only arises under section 149 if the cladding product is attached to, or included in, the external wall of a relevant building during the course of works to that building such that a dwelling contained in that building is rendered unfit for habitation: see sections 149(3) to (5) of the BSA. MHB/399

MHB/399

93.5 Given that BLOs have retrospective application, claims under section 149 of the BSA can be made against the associates of the original “*wrongdoer*”.

94. It is also worth noting that BLOs can be made against associates with a much more “historic” connection to the original body (i.e. developer, contractor etc) than RCOs. In particular:

94.1 RCOs may only be made against those who were associated with the original body in the period of 5 years ending at the qualifying time of 14 February 2022: see sections 121(3) to (5) of the BSA discussed at paragraph 67 above. MHB/367

MHB/367

94.2 Whereas BLOs may be made against those who were associated with the original body at any time between the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and ending with the making of the

order: see section 130(4) of the BSA and the definition of “relevant period” in section 130(6).

95. Accordingly, not only is it wrong to view section 124 as a vehicle by which Parliament achieved its aim of holding those responsible for relevant defects to account (for the reasons discussed at paragraphs 56 to 68 above), it can also be seen that the express terms of Part 5 of the BSA which do not form part of the remediation provisions enable Part 5 to achieve its broad purposes without the need to apply RCOs to costs incurred before section 124 of the BSA came into force. In particular, sections 130 to 132, 135, 149, 150 and 151 of the BSA when read with the duty under section 1 of the DPA (to which sections 130 and 135 of the BSA expressly refer) (a) enable leaseholders to seek redress in respect of costs incurred before 28 June 2022 and (b) ensure that those responsible for the defects are held liable.
96. In those circumstances, there is no warrant to disapply the presumption against retrospectivity and read section 124 as having retrospective effect, particularly in circumstances where an RCO can only be made against developers and not anybody else who may be considered to be “*responsible*” for relevant defects.

- MHB/236 97. At JCA, paragraph 151, Nugee LJ stated:

“there is no good policy reason why Parliament would have decided to “penalise” leaseholders whose landlords (perhaps at the leaseholders' own instigation) had acted responsibly and got on with repairs; *a fortiori* there is no good reason why Parliament should have prejudiced leaseholders who had themselves (possibly at great sacrifice) discharged their service charge debts as opposed to those who had not”

- MHB/237- 98. At JCA, paragraphs 162 and 163, Newey LJ adopted similar reasoning in concluding that a retrospective interpretation of section 124 “*is consistent with the evident purposes of Part 5 of the BSA*”.
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99. It is submitted that the Court of Appeal fell into error here for two reasons.

99.1 First, it assumed that the purposes of Part 5 of the BSA were sought to be achieved in the remediation provisions generally and section 124 in particular. However, as already explained, there is no warrant for such an assumption.

99.2 Secondly, Parliament patently did not decide to penalise such leaseholders. As explained above, Parliament has given such leaseholders express retrospective rights against practically everyone who could be held accountable for defects in their buildings (including their associates).

MHB/236 100. The Court of Appeal's real point at JCA, paragraphs 151 and 163, is that they considered MHB/238 that Parliament did not intend such leaseholders to be left with "*the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court*".¹³ However, that is a different point, which is whether Parliament intended such leaseholders to have rights through RCOs, and against the largely blameless possible respondents to an RCO application, to avoid having to exercise their rights against the blameworthy under the DPA and section 149 of the BSA.

101. Further, it is respectfully a bad point for the following reasons:

101.1 That is not what Parliament said in the language of the BSA and/or the language of the BSA points towards a different conclusion.

101.2 There is no clearly stated policy intention that the FTT should be a "*one stop shop*" for leaseholders, whereas the language of the BSA is clear that the High Court does have jurisdiction to allow leaseholders to recover costs incurred before the BSA came into force.

¹³ The text quoted is from the Judgment of Nugee LJ at paragraph 151.

101.3 This part of the JCA is in reality a policy decision, dressed up as an exercise of statutory interpretation, which cannot properly be made by the Court. There is no basis for such a policy decision in either the language of the BSA or its context or purpose.

102. Accordingly, there is no valid policy reason to give section 124 retrospective effect.

103. Finally, and for the avoidance of doubt, it is not accepted that, as the JCA implies, High Court proceedings are unattractive or should be seen as significantly less attractive than proceedings before the FTT. There are advantages and disadvantages of proceeding in either forum. For example, in the specific context of claims for remediation costs which may have been incurred c. 30 years ago, an attraction of proceeding in the High Court is that the High Court has power to award interest on damages under section 35A(1) of the Senior Courts Act 1981 whereas the FTT would have no equivalent power (if section 124 were to apply retrospectively).

Section 124 is complementary to section 123

104. At the risk of stating the obvious, section 124 of the BSA immediately follows sections 122 and 123.

MHB/369 105. Section 122 introduces the service charge protections provided to leaseholders by Schedule 8 to the BSA.

MHB/370 106. Section 123 enables interested persons to apply to the FTT for a “*remediation order*” which is an order that requires a “*relevant landlord*” to remedy relevant defects in a specified relevant building (even if the landlord would not be contractually obliged by any lease to carry out the work¹⁴). By definition, section 123 is forward looking.

¹⁴ Section 123(3) of the BSA defines a “*relevant landlord*” as a landlord who is required “*under the lease or by virtue of any enactment*” to repair or maintain anything relating to the relevant defect.

107. The list of interested persons who may apply for a remediation order is the same as the list of interested persons who may apply for an RCO: see sections 123(5) and 124(5) of the BSA.¹⁵ It therefore includes “*a person with a legal or equitable interest in the relevant building or any part of it*”: see section 123(5)(d) of the BSA.

108. So, having greatly curtailed the ability of landlords to levy service charge in respect of the cost of remediating relevant defects (in section 122 and Schedule 8), section 123 of the BSA then contains provision by which a landlord can nevertheless be ordered by the FTT to remediate those defects.

109. Then comes section 124 which enables an RCO to be made against a landlord and also applied for by a landlord: see sections 124(3) and (5) of the BSA discussed at paragraphs 47 and 48 above. MHB/372-373

110. Viewed in this way, the function of section 124 (and the RCOs for which it provides) can be seen as providing a means of funding the cost of remediating relevant defects that are either the subject of a remediation order or are being carried out voluntarily, in circumstances where the relevant costs cannot be recovered through service charge. In other words, by section 124, Parliament has provided a means by which remedial works which remained to be carried out when the BSA came into force could be carried out and funded in circumstances where Parliament had also provided that the historic means of funding such work (i.e. service charge) had been greatly curtailed.

111. As a result, it can be understood why Parliament did not provide for section 124 to have retrospective application. There was no need. That was not the purpose of section 124. The purpose of section 124 was to facilitate the remediation of work that remained to be carried out from 28 June 2022 onwards. This is one of the recognised purposes of the remediation provisions: see paragraphs 37 and 38 above.

¹⁵ The Secretary of State was added on 21 July 2022, shortly after the BSA came into force: see regulation 2(1) of the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022. MHB/471

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112. In this connection, it is submitted that the Court of Appeal fell into error. Nugee LJ (at JCA, paragraph 154) and Newey LJ (at JCA, paragraph 163) found that a retrospective interpretation of section 124 was necessary to make the BSA work. That is simply not so. Rather the BSA works as follows (with what follows not involving a construction of section 124 as having retrospective application):

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112.1 Section 122 and Schedule 8 curtail the ability of landlords to levy service charges in respect of relevant defects.

112.2 Section 123 is the lever or power by which landlords can nevertheless be required to remedy relevant defects.

112.3 Section 124 enables leaseholders, landlords and, with effect from 5 August 2023, management companies¹⁶ to apply for the costs of remedying those defects from landlords and developers if and insofar as they were incurred (or will be incurred) after the BSA came into force.

112.4 Sections 126 to 129 contain levers by which “*persons in the building industry*”¹⁷ are essentially required to remedy defects and/or contribute to the costs of remedying defects if they wish to continue operating (otherwise, they will be unable to obtain planning permission or Building Control approval for future developments).

112.5 Sections 130 to 132, 135, 149, 150 and 151 enable leaseholders and landlords to recover costs incurred both before and after the BSA came into force from those who were ultimately responsible for the relevant defects.

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¹⁶ As a point of detail, which is worth noting in relation to JCA, paragraphs 154 and 163, management companies were not expressly empowered to apply for an RCO until regulation 2A of the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022 was introduced on 5 August 2023. Prior to that time, a management company could only apply for an RCO if it had a legal or equitable interest in the relevant building or any part of it: see the definition of “interested person” at section 124(5) of the BSA. The Second Respondent to this appeal (“EVMIL”) had such an interest: see JCA, paragraph 38(2).

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¹⁷ The words of section 126(3)(a) of the BSA

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113. There is nothing objectionable in the BSA working in this way. Nor can it be said that Part 5 does not achieve its purposes if it works in this way.

Conclusion on the broader statutory scheme

114. When viewed in the context of the broader statutory scheme provided for by the BSA, there is no reason to disapply the presumption against retrospectivity in respect of section 124.

The Relationship between the Present Appeal and *Adriatic Land*

- MHB/236-237
115. The judgment in *Adriatic Land* and the JCA cross-refer. In the present case, Nugee LJ (at JCA, paragraph 154) and Newey LJ (at JCA, paragraph 163) found that the Court of Appeal’s interpretation of Schedule 8 in *Adriatic Land* supports their retrospective interpretation of section 124. Likewise, the decision in the present case was relied on at various points in the *Adriatic Land* judgment as supporting the conclusions drawn in that appeal: see paragraphs 74, 85(vii) and 90(iv). This approach is circular. MHB/238 MHB/527
116. For the assistance of the Court, it is noted that Schedule 8 to the BSA is intended to dovetail with the existing restrictions on recovery of service charges in sections 18-30 of the Landlord and Tenant Act 1985 (see paragraphs 10(2)(i) and 10(3) of Schedule 8 to the BSA in particular). However, the *Adriatic Land* judgment does not address the established meaning of the words “payable” or “is payable” in that context. They have a settled meaning: see: *R v London LVT ex p Daejan Properties Ltd* [2001] EWCA Civ 1095; [2002] HLR 25 (CA) at paragraphs 9 and 15 and *Termhouse (Clarendon Court) Management v Al-Balhaa* [2021] EWCA Civ 1881; [2022] 1 WLR 1529. MHB/420 MHB/1179-1181
- MHB/1201-1212
117. It should be emphasised that the Appellants’ case in the present appeal, as developed in this Written Case, stands on its own and the arguments raised do not depend on the decision in *Adriatic Land* being reversed. However, if *Adriatic Land* was wrongly decided, then *at the very least* that indicates that the Court of Appeal’s decision in the instant appeal must be approached with caution and reconsidered.

Reliance on the Supreme Court's Decision in *BDW v URS*

- MHB/233-238 118. At paragraphs 145, 146, 149 and 166 of the JCA, Nugee and Newey LJ relied upon paragraphs 86, 87 and 102 of the judgment of Lords Hamblen and Burrows JJSC in *BDW v URS* as being “*strongly in favour*” of the proposition that section 124 of the BSA has retrospective effect.¹⁸ However, MHB/643-647
- 118.1 Paragraph 87 of the judgment in *BDW v URS* features as a summary of the provisions contained in Part 5 of the BSA, no more and no less. It is not directed at the remediation provisions or section 124 specifically: there is just a general statement which refers to sections 124, 130, 135 and 147 to 151 of the BSA as “*all*” having retrospective effect. Even that general statement patently cannot have been intended to be precise or prescriptive because section 148 of the BSA does not have any retrospective effect whatsoever. That is clear from section 148(2) which provides that Condition A only applies to actions “*at any time after the coming into force of this section*” (emphasis added). MHB/644 MHB/397
- MHB/652 118.2 Further, as paragraph 124 of the judgment in *BDW v URS* records, there was no issue in *BDW v URS* as to *whether* section 135 of the BSA applied retrospectively: the issue was as to *how* it so applied - a point made by Newey LJ at *Adriatic Land*, paragraph 90(ii). MHB/533
- 118.3 It is therefore submitted that those passages in *BDW v URS* do not form part of the *ratio decidendi* (as Nugee LJ correctly found at JCA, paragraph 149) and do not address the specific issue that arises in this present appeal. There is no discussion at all in the judgment in *BDW v URS* of either the language of section 124 or the respects in which section 124 might, or might not, be retrospective. MHB/235
- 118.4 The dangers in lower courts alighting upon general summary passages in judgments of the Supreme Court as if they were authoritative expositions of meaning or effect of particular provisions not directly in issue were the subject of recent consideration

MHB/235 ¹⁸ The quoted phrase is taken from JCA, paragraph 149.

by this Court in *Avon Freeholds Ltd v Cresta Court E RTM Co Ltd* [2026] UKSC 31, at paragraphs 65 to 74.

MHB/586-589

119. Moreover:

119.1 As the Court of Appeal acknowledged at paragraphs 34, 77, 90(iv) and 141 of *Adriatic Land*, the decision of the Supreme Court in *BDW v URS* (at paragraphs 104 to 106 of the judgment of Lords Hamblen and Burrows JJSC) involved an error as to the status of the Explanatory Notes to the BSA; the Supreme Court was not told in *URS* that the Notes on Part 5 were not before Parliament during the passage of the Bill.

MHB/515-516

MHB/527-528

MHB/533

MHB/548

119.2 In *Adriatic* at paragraphs 88 to 90, Newey LJ did not place much reliance on *BDW v URS*, quite properly recognising that the Supreme Court in *BDW v URS* was not considering the points in issue on the appeal before the Court of Appeal.

119.3 Nevertheless, the Court of Appeal in the instant case relied on *BDW v URS*: that was inconsistent with their approach in *Adriatic Land* but no explanation for that inconsistency was given, and they were wrong to do so.

120. Accordingly, it is submitted that here the Court of Appeal fell into error and paragraphs 86, 87 and 102 of the judgment of Lords Hamblen and Burrows JJSC in *BDW v URS* cannot be determinative of the outcome of this appeal. It is simply insufficient to rely upon broad policy-based statements about the BSA being retrospective and the importance of retrospectivity, where the language of the Act states expressly when it is intended to be retrospective.

MHB/643-644

MHB/647

Anomalies and Fairness

121. Much has been made in the Judgments below of the suggested anomalies that may exist if section 124 of the BSA did not have retrospective effect. See, for example, Nugee LJ at JCA, paragraphs 151 and 152 and Newey LJ at JCA, paragraph 163.

MHB/238

122. However, the identification of anomalies does not take the analysis far at all – certainly not sufficiently far to displace the presumption against retrospectivity. That is because it is possible to identify anomalies however section 124 is interpreted. Indeed, if section 124 were to apply to costs incurred before 28 June 2022:

122.1 There could be cases in which, long before the BSA came into force, a landlord and a developer settled a claim under section 1 of the DPA or under contract for damages or the Court gave judgment on such a claim. The landlord could apply under section 124 in effect to reconsider the settlement figure or judgment sum (for example, because the cost of remedial works proved to be higher than the settlement sum) and the FTT could award the landlord additional sums provided the FTT considers it just and equitable to do so. That the FTT may make such an award is far from fanciful given the nature of the Court of Appeal’s decision on the just and equitable requirement, particularly at JCA, paragraphs 56 to 74, in respect of which this Court refused permission to appeal. By contrast, section 135(6) of the BSA would expressly preclude such a claim. Parliament cannot have intended this outcome.

MHB/393

MHB/212-217

122.2 Developers could be liable for past remediation costs under section 124 without there needing to be any finding of fault, whereas any other person who may be “responsible for” relevant defects would need to be proven to have been at fault under either section 1 of the DPA or section 149 of the BSA. It is difficult to see how Parliament will have considered it fair to impose a harsher outcome on developers than those who bear a greater degree of responsibility for relevant defects (such as contractors, designers and product manufacturers).

MHB/477-479

MHB/399-400

122.3 There could be two groups of leaseholders who paid service charge to remediate a building before the BSA came into force on 28 June 2022. The first group could have sold their flats before 28 June whereas the second group could still own their flats. However, because only *current* leaseholders may apply for an RCO (for the reasons explained at paragraph 62 above), only the second group will be able to

recover their service charge contributions through an RCO. That does not seem fair if section 124 was intended to apply retrospectively.

122.4 As explained at paragraph 60 above, if section 124 has retrospective application, a leaseholder may not be able to recover their service charge from the landlord to whom they paid the costs of remediating relevant defects (because they sold the freehold before 14 February 2022) but they can recover it from their current landlord. That does not seem fair either.

122.5 A leaseholder could seek to recover service charges paid over 30 years ago whereas, as discussed at paragraph 75 above, Schedule 8, paragraph 5 only places limits on MHB/418 service charges payable by reference to those due (potentially by the same leaseholder) in the five years prior to commencement. Parliament cannot have intended the unexpressed retrospectivity to be six times wider than the expressed one.

123. It can therefore be seen that a retrospective construction of section 124 will not achieve a consistent approach. What it would do, however, is give rise to real unfairness by putting current landlords (and those who were landlords on 14 February 2022) and their associates at risk of applications for contributions to up to at least 30 years' worth of remediation costs: a clear unfairness which the Court of Appeal did not consider at all.

Overall Conclusion and Summary of Reasons

124. In all the circumstances, the Supreme Court is respectfully invited to allow the appeal and decide that section 124 of the BSA does not apply to costs incurred before the BSA came into force on 28 June 2022, for the following reasons:

124.1 Section 124 does not say that it has retrospective effect and it would have been easy enough for it to say so expressly. Indeed,

124.2 Elsewhere within the remediation provisions and Part 5 generally, the BSA does contain express provisions where it makes clear that retrospectivity is intended.

124.3 Section 124 is not a vehicle by which Parliament sought to achieve its aim of either (a) holding those responsible for relevant defects to account or (b) providing a route of redress for all leaseholders.

124.4 The BSA is workable without section 124 having retrospective effect.

124.5 The DPA (due to the retrospective 30-year limitation period introduced by section 135 of the BSA) and section 149 of the BSA (which also has a retrospectively applied 30-year limitation period) achieve the BSA's purposes of (a) holding those responsible for relevant defects to account and (b) enabling all leaseholders to seek redress in respect of costs incurred before 28 June 2022.

15 September 2026

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