

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

FIRST RESPONDENT’S WRITTEN CASE (TRIATHLON)

Introduction

1. In this Written Case, the First Respondent (“**Triathlon**”) will adopt the nomenclature used by the Appellants (“**SVDP/GL**”) in their Written Case. Their Written Case will, itself, be described as “**AWC**”. For ease of navigation, Triathlon has generally (but not invariably) retained the headings and sequence used in AWC, without adoption or acceptance that they properly reflect the position.
2. There is a single issue which arises in this appeal, namely “whether a remediation contribution order under section 124 Building Safety Act can be made in respect of costs

MHB/372-
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incurred before that provision came into force on 28 June 2022”.¹

3. The FTT concluded that it could be. The Court of Appeal unanimously agreed and dismissed the appeal on that point (and others). The result was that Triathlon remained entitled to reimbursement for (amongst other things) the cost of building inspections, professional fees, fire alarm and detection costs, waking watch and fire evacuation officer costs which it had incurred prior to 28 June 2022 (“**pre-BSA**”²). It is common ground that Triathlon incurred those costs by reason of building safety defects for which SVDP, as developer, was responsible. The Court of Appeal unanimously concluded that the FTT was both entitled and correct to decide that it was just and equitable that SVDP should pay Triathlon for such costs. The FTT and the Court of Appeal reached the same conclusion in respect of Get Living plc, an associate of the freeholder, who, as the FTT found, was worth £2.6 billion in 2022: see JFTT [229]. Permission to appeal against the MHB/293 conclusion that it was just and equitable to make these orders was refused by this Court.
4. Accordingly, the only issue which remains live in this Court is whether Triathlon incurred those costs too early for them to be recoverable, even though: (a) they were costs in relation to relevant defects (for which SVDP, as developer, was in fact responsible); and (b) it was just and equitable for it and the associate to pay such costs.
5. Triathlon’s case before this Court is that the Court of Appeal reached the right conclusion on the issue of retrospectivity and did so for the right reasons. The appeal should be dismissed.

The Decision of the FTT

- MHB/23 6. As AWC paragraph 7 notes, the FTT concluded that an RCO could be made in respect of costs incurred before 28 June 2022. Although SVDP/GL refer only to JFTT [69] to MHB/264-267 [79], a fuller introduction to retrospectivity begins from JFTT [57]. The experienced MHB/262 members of the FTT were “*in no doubt*” that RCOs could be made in respect of costs MHB/266 incurred before 28 June 2022: JFTT [73].

MHB/8-13 ¹ See the Statement of Agreed Issues.

² It is acknowledged that the BSA 2022 was enacted on 28 April 2022 and that pursuant to section 170(3) section MHB/414-124 (amongst others) commenced two months later but this shorthand is used nonetheless for ease of expression. 415

MHB/266 7. The FTT first considered the language of section 124, noting that it was unlimited by time, and was clear and explicit: JFTT [73].

MHB/266 8. By way of confirmation of that interpretation, it relied on paragraph 1012 of the Explanatory Notes, which were “*consistent only*” with an intention that costs paid before section 124 came into force should be capable of being subject to an order under section 124: JFTT [74]. SVDP/GL do not challenge that interpretation of the Explanatory Notes but, instead, suggest that it was wrong for the FTT to have relied on those Notes at all: a point addressed by Triathlon below at paragraphs [159]-[167].

MHB/266 9. At JFTT [75], the FTT reviewed section 124 in the context of Part 5 as a whole and concluded that a retrospective construction of section 124 was not “*improbable or unfair*”, rather it was consistent with the “*purpose and structure*” of Part 5 and the “*radical protection it extends to leaseholders*”. The FTT noted: “*Parliament has decided that, irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens*” JFTT [75].

MHB/266- 10. Further, in JFTT [75] to [78], the FTT drew attention to “*serious inconsistencies*” that 267 would apply in the operation of the legislation if some leaseholders, but not others, were left to fund the cost of remediation. The importance of avoiding a construction which gives rise to “*serious inconsistencies*” is a matter addressed by Triathlon below at paragraphs [173]-[186].

11. Notably, SVDP/GL’s summary of the FTT’s decision, at AWC paragraph 7, completely MHB/23 ignores the FTT’s detailed consideration of those serious inconsistencies. Indeed, they downplay that whole topic, leaving them to a couple of pages at the very end of their Written Case.

The Decision of the Court of Appeal

MHB/23 12. Although, as AWC paragraph 8 notes, separate judgments were given by Newey LJ on the one hand, and Nugee LJ (with whom Holgate LJ agreed) on the other, the Court of Appeal was unanimous in its conclusion in respect of this issue. Newey LJ’s separate judgment flowed from the need for him to explain why he agreed with Nugee LJ in

respect of the retrospective operation of section 124 in circumstances where he had reached a different view from him in respect of the retrospectivity of Schedule 8 in *Adriatic*.

MHB/233 13. At JCA [144], Nugee LJ started with his consideration of *BDW v URS* (addressed in more detail below) concluding that passages from it were self-evidently strongly in favour of section 124 having a retrospective interpretation [149]. Nugee LJ's reasoning does not, however, depend solely on the decision of the Supreme Court, since he agreed that the relevant statements made in that case did not form part of the ratio decidendi [149]. See his further analysis at JCA [150] to [154]. In summary:

MHB/598-694

MHB235

MHB/235-237

MHB/236 (1) Per JCA [151], he said that Parliament's intention to give section 124 retrospective effect can be gleaned from the fact that, by doing so, it would give effect to the purposes of Part 5: providing a statutory mechanism for leaseholders who have paid to seek to pass on the costs they have already incurred – whether before or after the Act came into force. Leaseholders who spent money remediating building safety defects before 28 June 2022 would not otherwise have been protected from financial risk (e.g. loans they may have taken out) and would not be left with any remedy at all “*except the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court*”. A point adopted by Newey LJ at JCA [163].

MHB/238

MHB/236 (2) Per JCA [151] and [152], the intention to give section 124 retrospective effect can be gleaned from the fact that Parliament would not have intended arbitrary and inconsistent outcomes to flow from not giving it retrospective effect. Giving section 124 only prospective effect would arbitrarily “*penalise*” the responsible and proactive leaseholders whose blocks were remediated early. Remedial works which straddle the date would be treated inconsistently, as would a leaseholder who started paying a large service charge by instalments which straddled the commencement date (these points about anomalies are considered further below at paragraphs [173]-[186]).

MHB/111-115

MHB/236 (3) Per JCA [153], there is a built-in safety-valve against unfairness (This point is considered further below at paragraphs [101]-[110]). MHB/91-94

MHB/236-237 (4) Per JCA [154], a retrospective construction enables the BSA to work as a composite whole. If retrospective effect is not given to section 124, a management (including a RTM) company, for example, that incurred costs pre-BSA, but had not yet claimed or received reimbursement through service charges, would be left without funding for the costs it had incurred and with no means to pursue those ultimately liable, and therefore would be unable to pass on such costs: it could be left with a significant shortfall. Newey LJ agreed with this point; see JCA [163]. MHB/238

14. Triathlon respectfully commends to this Court the careful and considered judgments of the Court of Appeal.

Relevant Principles of Statutory Interpretation

MHB/26-27 15. As set out in AWC paragraphs 12 and 13, the well-known principles of statutory interpretation are set out in *R(O) v Secretary of State for the Home Department and R(PACCAR Inc) v Competition Appeal Tribunal*. MHB/1088-1092 MHB/1093-1167

MHB/1107-1108 16. In *PACCAR*, Lord Sales JSC emphasised the central importance in interpreting any legislation of identifying its purpose: [41]. See his citations from Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8] and Lord Mance in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546 at [10]. MHB/1171

MHB/26-27 17. At AWC paragraph 13, SVDP/GL observe that context and purpose cannot be used to give words a meaning which they cannot bear. That point simply does not arise for consideration in the present case. At its very lowest, the words “incurred or to be incurred” are perfectly capable of bearing the retrospective interpretation upheld in the JCA. After all, at the time that the provision came into force, no other costs had been “incurred” than those which pre-dated it. Whilst SVDP/GL are correct that “[o]nce any Act has been in force for a few years, there will be costs which will have been incurred since commencement” (AWC paragraph 44), the word must have a meaning from day 1. MHB/38

A retrospective interpretation is therefore a natural and obvious meaning of the words used at the time of commencement.

MHB/22 18. That the word “incurred” is at least capable of either interpretation is nowhere more evident than in the contrasting alternatives identified by SVDP/GL in paragraphs 5 and 6 of the AWC, which highlight the rival contentions. It is telling that those paragraphs add words of qualification, or description, but do not replace the statutory words that are there. On SVDP/GL’s case the issue dividing the parties is the appropriate qualification to the words actually used in section 124. Expressed more bluntly, this Court is not being asked to rewrite, or interpret, a legislative provision which says “black” as “white” having regard to the context and purpose of the provision. Contrast *R v Bentham*, cited by SVDP/GL at AWC paragraph 13, in which the House of Lords said that an offence of having “in possession” an imitation firearm could not be committed where the defendant pretended his natural hand, concealed in clothing, was the weapon. It was plain that he did not have his natural hand “in possession”, those being the words of the statute, and the context and purpose could not create an offence which Parliament had not created with the words used: [10].

MHB/566-581 19. The *Akbars* case, referred to in AWC paragraph 14, concerned the interplay between the MHB/27 general purpose of section 15 of the Immigration, Asylum and Nationality Act 2006 on the one hand, and the specific language of section 15(6)(a) on the other. That feature does not arise in the context of construing section 124 BSA. Section 124 is not a sub-provision reflecting a choice or compromise to secure agreement to a broader or over-arching provision. Indeed, it is difficult to see how the creation of an entirely new statutory remedy, contained in a single section, would not be in furtherance of the over-arching purpose of the statute.

MHB/28 20. The point made in *R (Buckinghamshire County Council) v Secretary of State for Transport*, referred to in AWC paragraph 17, does not arise. Triathlon does not invite a rewriting of legislation in respect of a clearly expressed measure. It invites an interpretation of a provision which may be said to be capable of bearing either of the meanings contended for. MHB/1073-1079

The Presumption against Retrospectivity

- MHB/233 21. In the Court of Appeal, there was no dispute as to the applicable principles for determining whether a legislative provision has retrospective effect: see Nugee LJ at JCA [143]. In the broadest sense, that remains the position: see below. Primarily, the issue turns on the application of those well-established principles to the particular statutory provision to be interpreted in the present case.
22. The principles themselves are helpfully set out in:
- MHB/520-524 (1) *Adriatic* per Newey LJ at [53] to [59];
- MHB/546-547 (2) *Adriatic* per Nugee LJ at [134] to [139];
- MHB/233 (3) *Triathlon* per Nugee LJ at [143].
23. In summary, Parliament has the power to enact legislation which has retrospective effect and will be justified in doing so particularly when the legislation has a remedial purpose³ but is presumed not to intend to do so unless that intention is clear. How clearly that intention must appear depends on the degree of unfairness which would result from the relevant statutory provision having retrospective effect. See *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at p.724, cited by Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at p.525C-H. All the relevant factors:
- MHB/1193
- MHB/1033
- “must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.”*
24. The distinction between laws which remove or alter already accrued rights and laws which impose a new liability on past conduct was rightly identified in *Granada* at [56], MHB/973 referred to by Newey LJ in *Adriatic* at [57] to [59]. He also cited *AXA General Insurance Ltd, West v Gwynne and Wilson*. In *Wilson* at [98] the same distinction was drawn MHB/591-597 between, on the one hand, accrued rights and the legal effect of past acts, and, on the other, new statutory provisions which depend for their application on past events. MHB/1228-1229

³ See *AXA General Insurance Ltd v HM Advocate* at [121] in which Lord Reed quotes Fuller.

MHB/596

- MHB/40
MHB/39-41
25. This distinction does not, itself, answer the question but serves to identify where on the spectrum of unfairness any given case lies. In this case, SVDP/GL contend at AWC paragraph 49.3 that Newey LJ wholly misapplied the distinction for the reasons it gives in AWC at paragraphs 47 to 55. These points are addressed at paragraphs [65]-[77] below.
26. Although the existence of the presumption against retrospectivity has been described as “*a fundamental rule of English law*” (per Lindley LJ in *Lauri v Renad* at p.421) that says MHB/1042 nothing about the strength of the presumption, once called into service. Further, in suggesting that only plain words which require a retrospective construction would displace the presumption, *Lauri* reflects an older and stricter formulation of the test, than that developed in more recent cases such as *L’Office Cherifien*.
- MHB/30
27. Yet further, paragraphs 20 and 45 of AWC are also wrong to describe the strength of the presumption itself as fundamental. There is no principle that the weight of the presumption is “*particularly strong*”, as suggested in paragraph 19 of AWC. On the MHB/30 contrary, again see *L’Office Cherifien* at p.524H to p.525A for a more rounded approach. MHB/1032-1033
- MHB/687
- See also *BDW* at [274]:
- “*The presumption against retrospective operation of a statute is, nonetheless, only a presumption.*”
28. For the reasons set out at paragraph [77] below, the longer quote from *Granada* at [56], MHB/973 emphasised in AWC at paragraph 21, does not assist SVDP/GL. At a general level, developers and landlords have always faced contractual, statutory and/or tortious liability for defects in their buildings. The facts of this case though are instructive. As explained in paragraphs [72]-[75] below, SVDP/GL cannot show that they have altered their position or arranged their affairs in such a way as to make it unfair now to impose a liability for pre-BSA costs. Even if such matters could be shown in a given case, it would be precisely those factors which would be taken into account in determining if it was unjust and inequitable to make the order. As to that, see Nugee LJ in *JCA* at [153]. MHB/236

The Presumption against Absurdity, Illogicality, Impracticability etc.

29. There is another important point of statutory interpretation in play in this appeal, namely

that the courts will not interpret a statute so as to produce an absurd result unless clearly constrained to do so by the words Parliament has used: see *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at [43]. The importance of avoiding unworkability, impracticability, anomaly and illogicality was noted by the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 at [160].

MHB/1108-1109

MHB/933

30. A meaning that avoids absurd or irrational or unworkable consequences is to be preferred to one where this is the result. As stated in Bennion:⁴

MHB/1369-1374

“The court seeks to avoid a construction that produces an absurd result ... Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.”

31. The strength of the presumption depends on the degree to which a particular construction produces an unreasonable result: see *PACCAR* at [43]. As noted above, the inconsistencies that would arise in this case were described below as:

MHB/1108-1109

“too extreme for such a haphazard pattern...to have been Parliament’s intention”: JCA [142] citing JFTT [78]

MHB/267

MHB/232-233

32. Triathlon invites the application of the presumption at paragraphs [173]-[186] below.

33. Where interpretive factors point in different directions, it is necessary to determine the weight to be given to any particular rule.⁵ For example, Lord Reid in *Maunsell v Olins* [1975] AC 373 at 382E said the following of “rules of construction”:

MHB/1044

“... They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one “rule” points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular “rule”. ”

34. In this case, the application of the presumption against absurdity should stand alone rather than become subsumed as part of the balancing of fairness in respect of

⁴ Bennion 9th edition 2026 at Section 13.1

MHB/1355-1358 ⁵ Bennion, Section 10.8, Weighing of interpretive factors.

retrospectivity. That is because, whilst it contains a balancing exercise, it is a different one with a more stringent test than that applicable in respect of retrospectivity, namely: ‘having regard to the degree of absurdity (defined in the wider sense set out above), did Parliament clearly intend it to have that effect?’ In *BDW*, this Court considered the two issues separately: see [122]/[123] and, separately [124].

MHB/651-652

Other Rules of Interpretation

35. There is another rule of interpretation which falls for consideration. It is to be presumed that the drafter aimed to use language accurately (pointing to a natural, day 1, meaning of “incurred”).⁶ In *Spillers Ltd v Cardiff Assessment Committee and Pritchard (Cardiff Revenue Officer)* [1931] 2 KB 21 at 43 Lord Hewart CJ said:⁷

MHB/1199

“... words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily...”

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

MHB/1052-1072 36. The case of *R(Black) v Secretary of State for Justice*, relied upon in AWC paragraphs 24 to 27, has no application here. It related to a different principle entirely, namely the application of the rule that the Crown was not bound by a statutory provision except by express words or necessary implication: [36(1) and (2)]. Accordingly, the question of whether the smoking ban in the Health Act was binding on the Crown had to be determined either by its express words or their necessary implication. The remaining sub-paragraphs of [36] are concerned with the application of that question. Establishing necessary implication is not the exercise in play in this appeal. The question before this Court is not about whether retrospectivity is necessary to make the provision work.

MHB/31-33

MHB/1068

MHB/32 37. For that reason, AWC at paragraph 25 is wrong. The same question as in that case does not arise here.

MHB/1348-1351

⁶ *Bennion*, Section 10.3, Assumption of ideal, rational legislature; Section 11.3, Relevance of quality of drafting to interpretation; Section 22.1, Words presumed to be used correctly.

MHB/1360-1363

MHB/1377 ⁷ Applied in *New Plymouth Borough Council v Taranaki Electric Power Board* [1933] AC 680 per Lord Macmillan at 682.

MHB/33 38. In any event, contrary to paragraph 27 AWC, the express language of the BSA does not point against the displacement of the presumption (nor do SVDP/GL identify the “express” word or phrase that is said to bear such effect). The express language is, at its lowest, neutral, as reflected by the alternative drafting in paragraphs 5 and 6 of the AWC. MHB/22

The Context and Purpose of the BSA

MHB/641-644 39. This Court has already fully considered the context and purpose of the BSA generally, and Part 5. See *BDW* at [78] to [87].

MHB/650 40. In particular, following the Grenfell fire in 2017, landlords were positively encouraged by the Government to remediate building safety defects within their buildings: see *BDW* at [115] and [116]. Significant sums were expended in doing so and the costs were passed to leaseholders, who unsurprisingly faced financial hardship as a consequence. Costs incurred in this five-year period would, in many cases, have included interim life-safety measures such as waking watch and installation of fire alarms. There is no reason to suppose that Parliament intended that leaseholders in those buildings should lack the summary remedy made available in section 124 to recoup those mitigatory and remedial costs simply because they were incurred in that pre-BSA period.

41. It is clear that much of Part 5 is concerned with the need to rectify historic building safety defects and is backward facing.

MHB/199-200 42. There can be no doubt that this is a piece of legislation with a remedial purpose: see Nugee LJ at JCA [9]. Such purpose comprises both ensuring “*that works that are required are actually done*” but also “*to deal with the “who pays” question*”, including by operation of section 124 to protect leaseholders from costs which they would otherwise have borne: see Nugee LJ at JCA [87]. That is a powerful consideration when it comes to evaluating the degree of unfairness said to arise from the degree of retrospectivity contended for.

43. Parliament’s intention to make section 124 retrospective in its effect can be ascertained from the broader purpose of the package of remedies in Part 5 BSA, of which section 124 forms a part.

MHB/233- 44. As to that, Nugee LJ in JCA at [144] to [149] cited extensively from *BDW*. As he noted, 235 the Supreme Court considered the background to the BSA (at [78] – [83]) and at [84] MHB/641-643 had said that the BSA:

“is part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account.”

MHB/234 45. Nugee LJ also cites [86], where the Supreme Court noted, amongst other things, that 644 section 124 sat within the broader suite of leaseholder protections (sections 116 to 124 MHB/355-373 and Schedule 8), which were “*new safeguards*” protecting leaseholders: “... *as far as possible from the costs of remediating historical building safety defects that they played no part in creating.*” A retrospective interpretation would, of course, protect leaseholders “as far as possible”.

MHB/643- 46. The Supreme Court having listed, at [86], the four main changes in Part 5 (including 644 section 124) then observed at [87] that all four sets of provisions “... *have retrospective effect*” and quoted with approval the explanation given in the written submissions of the Secretary of State in the following terms:

“Retrospectivity is central to achieving the aims and objectives of the BSA. Many of the building safety issues identified in the wake of the Grenfell Tower fire arise in relation to buildings constructed many years ago ... A retrospective approach provides for effective routes to redress against those responsible for historical building safety defects that have only recently come to light ...”

MHB/235 47. These, and the other passages to which Nugee LJ referred, enabled him to conclude that MHB/643 the statements from this Court were strongly in favour of giving section 124 a retrospective interpretation; see JCA [149]. Newey LJ agreed at JCA [162], noting that MHB/237 the aims identified in [84] of *BDW* are furthered by construing section 124 as applicable to costs incurred before the BSA.

MHB/63 48. SVDP/GL have no answer to this beyond their submission, first, that the statements from the Supreme Court were no more than broad policy-based ones capable of being put to one side and, second, its suggestion that the Supreme Court’s reasoning in *BDW* was coloured by its misapprehension about the Explanatory Notes (AWC paragraphs 119-120). These points are separately addressed below at paragraphs [151]-[172].

49. Returning to the provisions themselves, the whole of the BSA is:

“intended to secure the safety of people in or about buildings and to improve the standard of buildings”: see section 1(1).

MHB/354

MHB/354 50. As is clear from section 1(6)(a) BSA, Part 5, of which section 124 forms a part, contains provisions about “*remediation and redress*”, these two concepts taken together.

51. SVDP/GL refer to sections 117 to 124 and Schedule 8 as a sub-group within Part 5, described as the remediation provisions: AWC at paragraph 36. That is correct, although that is no reason to ignore their concurrent capacity for redress. Moreover, section 116(1) BSA more specifically stated (later amended to remove reference to section 125): “*Sections 117 to 125 and Schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings*”, itself a broad expression.

MHB/35-36

MHB/355

MHB/36 52. Nugee LJ’s fourfold purposes of the remediation provisions, referred to in *Adriatic* at [148], are listed in AWC at paragraph 37. At paragraphs 40 and 41, SVDP/GL challenge the correctness of the third of these: namely “*to ensure that those responsible for the defects were held liable*”. It should be noted that the four purposes were common ground in *Adriatic*: see [148].

MHB/549

MHB/36-38

53. It is perfectly obvious that Parliament had in mind this third purpose when it included developers as one of those against whom an RCO could be sought: see section 124(3)(c). If responsibility for defects was not an intended factor, one might ask why else would developers have been included. There is no entity with greater responsibility for a building which contains relevant defects than the developer, whether that responsibility is with, or without, fault. See, also, *BDW* at [84] and [274]. The latter refers to the overarching, central, goal of the legislation being to ensure defects are remedied by those responsible for them in the first place.

MHB/372

MHB/643

MHB/687-688

MHB/36-37 54. At AWC paragraph 40, SVDP/GL are wrong to suggest section 116(1) does not support the third purpose: its broad language (“*in connection with*”) encompasses the same. In any event, section 116(1) does not purport to contain an exhaustive description of the provisions in sections 117 to 124, rather it merely identifies a common thread of the provisions. An obvious illustration that the list in section 116 is incomplete is the

MHB/355

description of section 124 in section 116(2)(d), which offers only limited insight into the ambit of section 124. Potential targets for an RCO are, of course, far greater in number than mere associates of landlords. MHB/355

55. Further, the same group of provisions introduces Schedule 8, through section 122. Schedule 8 imposes the liability for costs on landlords, with developer landlords at the top of the hierarchy. Those same provisions recognise that landlords are often connected with, or are themselves, developers. SVDP/GL appear to accept that a landlord can, at least on occasions, be responsible for relevant defects: see AWC paragraph 40.3. See, also, section 120(3)(b). MHB/369
MHB/365 MHB/36-37

MHB/37-38 56. In short, contrary to AWC paragraph 41, a hardline distinction between the purposes of Part 5 when viewed as a whole, and the purposes of the specific sub-set of remediation provisions of which section 124 forms a part, does not exist. Whether or not the third purpose (to hold those responsible) is a primary or secondary vehicle for that purpose matters not. It is a purpose to which regard should be had when construing section 124.

MHB/38 57. In respect of the fourth purpose of these provisions, the concessions in the first three sentences of AWC paragraph 42 are properly made. However, the fourth sentence is wrong. It ought to be obvious that making provision for retrospective recovery of costs paid within service charges would also have served the aim of restoring stability to the lending market. Without that, leaseholders would have remained in debt from potentially large historic service charge bills, incurred in the period prior to 28 June 2022, with limited prospect of recovery.⁸ See *Adriatic* at [27] where Newey LJ records that by January 2022 (i.e. in the very period of retrospective operation presently under consideration) the mean cost of cladding remediation was such that 21% of leaseholders were in negative equity and 34% in financial stress. This, together with the increased risk associated with these buildings, caused the lending market to freeze. See also *Adriatic* at [127]⁹ and [160]. MHB/513
MHB/543-544 MHB/552-553

⁸ No purchaser would purchase, and no lender would lend, in respect of a flat that was the subject of an unpaid service charge.

⁹ Here, Newey LJ cites paragraphs 154 and 155 from Mr Murphy's witness statement. The last sentence of [155] makes specific reference to the relationship between retrospectivity and the restoration of stability to the lending market. MHB/544

The Language of Section 124 itself

Incurred or to be incurred

- MHB/235 58. The Court of Appeal concluded that the language of section 124 (“*incurred or to be incurred*”) does not positively point for, or against, retrospectivity: see Nugee LJ at JCA [150] and Newey LJ at JCA [160–161]. But, as noted earlier, the language is perfectly consistent with a retrospective interpretation because it draws no distinction between costs incurred prior to 28 June 2022 and costs incurred after that date. See JFTT [73].
- MHB/38 59. Contrary to AWC paragraph 44, there is no reason to treat the language alone as limiting it to costs incurred after a given date. SVDP/GL put it far too high to say there is no indication of retrospectivity. First, there is: the natural meaning of “incurred” (past tense) and the need for “incurred” to bear meaning on day 1; as above the drafter is taken to have been accurate in these respects. Second, “relevant defects” are those created in the 30-years preceding the BSA to which the recoverable costs must be tied. In truth, the language is, at its lowest, neutral and capable of either interpretation, as paragraphs 5 and 6 of AWC acknowledge. Focussing on the language, there is just as much reason to suppose section 124 should apply to costs incurred in, say, the five-year period between the Grenfell fire and the commencement of the BSA as to suppose it would exclusively apply to costs incurred after the BSA.

The scope and potential application of section 124

Introduction

60. Some introductory features of section 124 bear mentioning.

- MHB/372-373 61. It is clear that section 124 is a new remedy with far reaching effect (see e.g. JFTT [261] – [262]; JCA [95], [119] and [145]). As SVDP/GL point out, at AWC paragraph 46, it does not require any applicant to prove duty, breach or causation (see JFTT [261]). Any interested person (as defined) may apply. Not only can parties directly responsible for the existence of relevant defects be made subject to an order but, so too, can their associates, including those potentially not at fault at all. However, those features are balanced by the threshold point that section 124 only ever applies to ‘relevant defects’, limiting its scope to works completed in the ‘relevant period’ (of 30 years to 28 June

2022) which cause a building safety risk. The provision itself was particularly designed to address the temporal question of funding for remedial works. Unlike other remedies, such as the BLO, it is not a provision which determines, or seeks to address, ultimate civil liability for breach.

62. Further, it would be too simplistic to view section 124 as limiting recovery to the cost of carrying out ‘pure’ remedial works. Whilst that is its central focus, the provision is broader than that. Costs consequent upon the existence of defects, such as waking watch, and mitigatory steps to avoid harm such as fire alarm installation, are also recoverable.¹⁰ That is significant because these are the very types of costs most likely to have been incurred post-Grenfell, in the five year pre-BSA period (see *Adriatic* [160]), pending development and implementation of a remedial programme, which might be expected to take far longer to execute.

MHB/39-44 63. In AWC paragraphs 47 to 67, SVDP/GL make a series of statements about the scope and potential application of section 124, designed to show how, in certain cases, it may operate in a blunt, harsh or anomalous way. The detail of these points will be addressed below but, for present purposes, the over-arching submission is that they provide no assistance at all in the resolution of the issue before the Court. That issue is not about how section 124 may operate in these various given instances and the potential for ‘unfairness’ in the way that it does. Those instances are inherently part of the scheme that Parliament considered was necessary in the circumstances. Rather, the issue here is whether giving it retrospective effect really adds anything material in terms of ‘unfairness’, given the breadth and impact of Part 5 and section 124 itself.

MHB/266 64. In this context, Triathlon commends to this Court the observation from the FTT on retrospectivity at JFTT [75]:

“In the context of Part 5 as a whole, we do not regard this [retrospective] construction of section 124 as either improbable or unfair. On the contrary, it is 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.”

¹⁰ The FTT decided that an RCO could be made in respect of costs incurred to prevent a risk from materialising or in reducing the severity of a building safety incident. SVDP/GL did not pursue its appeal against that decision.

“An RCO can remove or alter already accrued rights”

65. The landlord’s accrued right to payment of a service charge made in, say, 2021, is neither removed nor altered by the retrospective application of section 124. It is not the function of section 124 to amend the application of the service charge regime for sums that have been paid. Indeed, section 124 does not refer to service charges at all, let alone remove or retrospectively alter their application. The absence of any reference to service charges is unsurprising since, in many cases including the present one, the first target will not be the landlord but the developer, who is not concerned with service charges at all. Thus, “*Unlike Schedule 8*”, as Newey LJ observed in JCA paragraph 164, the contractual right to payment of service charges is not the subject of any removal or alteration in section 124. Rather, the function of section 124 is to compensate leaseholders (and others) for costs incurred in remedying relevant defects, provided always that it is just and equitable to make such an order. Whilst, of course, the substance of those costs may historically have formed part of a lawful service charge demand, that is not the same thing as removing or altering the right to have claimed those payments at all. Nor does section 124 make any service charges re-payable. MHB/238

66. In any event, there would be nothing objectionable or unusual about challenging the payability of a service charge merely because a payment has already been made in respect of it: section 27A(1) and (2) Landlord & Tenant Act 1985. The FTT may determine if a service charge is payable whether or not any payment has been made: section 27A(2). Further, for the purposes of section 27A a tenant is not to be taken to have agreed or admitted any matter by reason only of having made the payment: section 27A(5). Following a challenge to the reasonableness of a service charge demand which has already been paid, the FTT thereby has jurisdiction to unravel that completed transaction and determine a repayment is due. Therefore, contrary to AWC paragraph 49, there would be nothing particularly special about section 124 in that respect. MHB/491 MHB/39-40

67. The JFTT made this point at [75]: MHB/266

“Service charges are already subject to extensive statutory intervention, which can certainly include unpicking payments already made.”

68. Even if the service charge payment which included costs now the subject of a section 124 application had, itself, been the subject of a judicial determination as to its

reasonableness or the subject of a pre-BSA settlement (section 27A(4) refers), it is not possible to contract out of the BSA. Parliament must, therefore, be taken to have prioritised the application of the BSA over contractual entitlement. See JFTT [286]:

“Beyond this, the world in which the costs of dealing with relevant defects fell to be recovered through service charges has been changed, fundamentally, by the 2022 Act.”

MHB/40 69. Paragraph 49.3 of AWC is wrong. Of the two available alternatives referred to by Newey
MHB/238 LJ in JCA [164], section 124 is plainly a new remedy: one which imposes a new liability on past conduct, the conduct being the bringing about of a building containing relevant defects which require remediation. In developer cases, there are no accrued rights capable of being removed or altered, clearly confirming Newey LJ’s categorisation. In landlord cases, it neither removes nor alters accrued rights: see paragraphs [65]-[66] above. That it might, in certain circumstances, impact upon the substance of part of a lawfully demanded and paid service charge which had also been judicially determined (by reference to a different test), or settled, will be the exception and ought not materially to affect the analysis.

70. In any event, the (exceptional) fact that an RCO can render payable costs that had earlier been included within a service charge that had also been the subject of a judicial determination or settlement is a factor which could be taken into consideration in determining whether it is just and equitable to make an order under section 124 now.

71. Yet further, even if the RCO was made in any such (exceptional) case, the landlord would, itself, have a right to claim against the developer and its associates under section 124 so as to recover those costs. No unfairness arises.

72. Aside from service charges, the compromise point at AWC paragraphs 50 and 51 is a bad one.¹¹ Not only are unknown risks part of the commercial bargain inherent in any similar settlement, in this case, the decisions by QDDAV to acquire SVDP and its risk of liabilities (rather than purchase the land and buildings) and to give up rights it had to

MHB/973-
974 ¹¹ At *Granada* [57], the point is made that any investigation must depend on potential unfairness of the legislation in general terms and cannot depend on how it operates in the particular case. A particular case will often provide useful, perhaps, compelling evidence of how the legislation is capable of operating unfairly. It is assumed to be on that basis that SVDP/GL advances its point about the compromise agreement.

MHB/228 claim against the ODA were commercial ones it freely chose to take: see JCA at [119] – [120]. As to the facts found by FTT, see JFTT [187] and [188]: MHB/285

“The settlement was concluded after the Grenfell fire and after it was known that East Village suffered from serious cladding problems including the presence of ACM cladding in some buildings, but before the extent of those problems had been identified and the full cost of remediation determined.”

MHB/298 See also JFTT [252] and [254] recording that QDDAV released its rights against ODA for valuable consideration.

73. Thus, for its own commercial reasons, QDDAV chose to withdraw the rights it had against the ODA (receiving valuable consideration in return), despite knowing, post-Grenfell, that there were serious building safety defects at East Village and taking its own chances on the scale and cost of remediating them. It is impossible to see why unfairness flows from that. Still less is it possible to see why it is any less fair in respect of pre-BSA costs than those incurred after the BSA. SVDP/GL also benefit from the longer limitation period provided by the BSA for DPA claims.

74. The fact, if it be so (and there are no findings of fact about it), that settlement with the ODA may have been reached at a time when potential liabilities (and concomitant remedies) under the BSA were not in contemplation is immaterial, and the court should not dissect a commercial bargain. Moreover, SVDP was (and remains) contractually liable to Triathlon for defects, including building safety defects, pursuant to the Development Agreements and must be assumed to have taken the risk of contractual liability to it for the very costs which became the subject of these RCOs. That risk extended to costs incurred both before and after 28 June 2022.

MHB/40 75. AWC paragraph 51 is speculative and there is nothing to support it. As above, it is not credible that QDDAV would have acted differently given that it knew the risk of contractual claims it might face from Triathlon pursuant to the Development Agreements and nonetheless compromised its right to claim against the ODA (for other significant commercial reasons).

MHB/40 76. As to the unlikely set of facts posited in AWC paragraph 52, this has nothing to do with retrospectivity. A developer who settles with a landlord after the BSA came into force

could also face a claim under section 124. In both cases, any potential unfairness arising from the fact or impact of the settlement can be addressed as part of the just and equitable requirement.

- MHB/41 77. AWC paragraph 54 is wrong. Newey LJ did not adopt a rigid or mechanistic approach at JCA [164]. Nor could he be assumed to have done so given that he was one of the Judges in *Granada*. He well understood that the issue of ‘removal or alteration of accrued rights vs. new liability based on past conduct’ was one factor in, rather than a determinative resolution of, considerations of unfairness. His full reasoning in respect of unfairness appears at JCA [163] to [167]. It is not limited to [164]. In any event, neither Nugee LJ, nor Holgate LJ, referred to this point in *Granada* at all. MHB/238
- MHB/238

“An RCO can be made against a blameless person”

- MHB/41 78. Paragraphs 56 and 57 AWC describe the potential ambit of section 124. No issue is taken with that, save that the developer, with over-arching responsibility for having brought the defective building into existence, may well in fact have been at fault. The reasons for the extensive statutory intervention, of which section 124 forms a part, are fully explained by Nugee LJ in *Adriatic* at [164] to [175] and JCA [23]-[24]. Given that the immediate cost of remediating building safety defects has to land with someone, Parliament has legislated that it should not be with the leaseholders but should, instead, be with the developer or, failing it, the landlord, even if they are “blameless” in the ordinary sense of the word. MHB/554-556 MHB/204-205
79. In considering the overall fairness of construing a provision with retrospective effect, it would not be right to focus, as SVDP/GL do, on what might be termed the least responsible landlord. A broader view must be taken. Moreover, as set out below, the focus should not be on the balance of “fairness” Parliament has chosen to adopt in enacting Part 5 but on the specific question of whether there is any additional ‘unfairness’ from construing the provision in question retrospectively.
80. It should be noted that all of these are costs incurred, or to be incurred, in remediating building safety defects for which the leaseholder is not only blameless but ill-equipped to fund. Understood in that way, there is no greater degree of “unfairness” in an RCO

attaching to costs incurred pre-BSA. On the contrary, the adoption of an inevitably arbitrary cut-off date for entitlement itself becomes unfair. It would leave some leaseholders to bear those costs while others do not, even in respect of the same remedial programme on the same building.

81. It is notable that SVDP/GL have to pray in aid the position of the “blameless landlord”, despite SVDP being a developer, not a landlord. It is to be supposed that Parliament considered the respective likely blame and ability to fund of a whole range of actors when it created the cascade of funding liability in the BSA. The “blameless landlord” is given the right to claim an RCO against the developer in respect of the costs which it cannot recover from leaseholders by virtue of Schedule 8, paragraphs 3, 4, 5 and 6. That is equally the case whether the RCO relates to costs incurred before or after the BSA so no additional degree of “unfairness” attaches by giving the legislation retrospective effect. Otherwise, the “blameless landlord” has contractual or statutory DPA remedies against the developer which it is likely to be far better placed to pursue than the leaseholder. MHB/417-419

MHB/41-42 82. The three examples in AWC paragraph 58 are merely instances of landlords to whom the points just made apply whether or not the BSA is retrospective. On the issue before this Court, therefore, they are entirely neutral.

“An RCO cannot be made against past landlords”

83. As stated, the proposition under this heading is wrong. An RCO can be made against any past landlord who was the developer or who is an associate of the developer, or who was the landlord on 14 February 2022¹² (but is not the current landlord) or who is an associate of that landlord or an associate of the current landlord (section 121(2), (3), (4) and (5), and section 124(3)(b), (c) and (d)). MHB/367

84. Notably also if a leaseholder chooses to seek the RCO from its current landlord, rather than any of the past landlords referred to above, such a respondent can pursue its own RCO against any of them instead (and specifically any such landlord who received the relevant service charge), including the developer as mentioned and its (other) associates

¹² This was the date upon which an amendment to the draft Bill to introduce ROs and RCOs was first published.

MHB/372 (section 124(3) refers).

85. Further, such a respondent can rely upon Regulations 3, 4 and 5 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations SI 2022/859 as the case may be to share the burden amongst other landlords depending on their level of responsibility, means or interest in the relevant building: see Regulation 3, paragraph (8), Regulation 4, paragraph (2) and Regulation 5, paragraphs (4)-(6). MHB/472-475 MHB/472 MHB/474

MHB/43 86. Paragraph 60.2 AWC is also wrong if the past landlord who undertook or commissioned the works is an associate of the developer, or of the landlord on 14 February 2022 or of the current landlord: (section 121(2), (3) (4) and (5), section 124(3)(d)). MHB/372

87. Otherwise, in any case, the immediate cost burden must lie between: (a) the landlord on 14 February 2022 or the current landlord; (b) a management or RTM company (where applicable) and; (c) the leaseholder. Parliament concluded it should rest with (a). That outcome is unaffected by the question of whether section 124 applies to costs incurred before 28 June 2022.

88. The current landlord has its DPA remedy against the contractor and either landlord may have collateral warranties enforceable against the contractor in respect of works undertaken by its predecessors.

89. For the reasons referred to above, the argument in paragraph 61 AWC is mistaken. In many instances (as above), an RCO will be available against past landlords. Otherwise, absent developer, responsible landlord or relevant associates, the policy choice (see paragraph [87] above), is ultimately between the innocent landlord or innocent leaseholder which Parliament has incontrovertibly resolved in favour of leaseholders. MHB/43

“An RCO cannot be applied for by past tenants or landlords”

MHB/43 90. Paragraph 62 AWC is correct. Only those with current legal or equitable interests in the relevant building can apply for an RCO.¹³ It follows that past leaseholders who have paid

¹³ In addition, the Secretary of State, the regulator, the local authority, the fire and rescue authority, the Homes and Communities Agency, the named manager, the RMC or the RTM can apply.

for costs incurred in remedying relevant defects have no standing to obtain an RCO.

91. The question for this Court, however, is whether, in a claim by a current leaseholder, it is fairer to impose a liability for pre-BSA costs pursuant to an RCO, than it is to provide no remedy at all for such costs, leaving the current leaseholder to bear the cost burden and pursue the wrongdoer in the TCC, even where: (a) those costs may have been “unprecedentedly high and often unaffordable” (see Nugee LJ at JCA [9]); (b) the only route to recovery may be long and complex (see Nugee LJ at JCA [111]); and (c) another leaseholder living in the same block may be entitled to RCO funding in respect of the same defects and course of remedial works.

MHB/199-200

MHB/226

92. In the evaluation of that question, it is immaterial that past leaseholders are given no right at all to claim pursuant to section 124. The interests of that constituency of leaseholders simply forms no part of the exercise.

93. In any event, in the real world, the existence of many past leaseholders is not a likely scenario. A key consequence of the Grenfell tragedy was that leaseholders were simply unable to sell their flats: see *Adriatic* at [27].

MHB/513

94. Further, the fairness question posed in paragraph [91] above does not just arise in the context of current leaseholders: RTM companies with no interest in the building, for example, may have no practical route to recovery in respect of pre-BSA costs if section 124 does not operate retrospectively.

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

MHB/43-44

95. Again, the points made here, in AWC paragraphs 65 to 67, form no legitimate part of the balancing exercise to test the fairness of a retrospective construction. They are comments which equally apply to RCOs operating prospectively and, on the question of retrospectivity, are no more relevant.

96. Parliament did not choose to provide RCOs of such breadth that they could be sought against contractors and manufacturers, or entities with associations that ended more than

5 years before the qualifying time (14 February 2022). The issue is whether, as regards those entities that Parliament did decide could be specified, and in those circumstances, fairness suggests Parliament intended them to be potentially responsible for costs incurred pre-BSA or for them not to be, leaving the burden upon the leaseholder.

97. The five year provision was self-evidently designed as an anti-avoidance provision. Legitimate severance of an association that took place prior to 14 February 2017 (about four months before the Grenfell fire) was respected. Re-structuring after that was to be disregarded, with a bespoke and far-reaching definition of association to see through any such post-Grenfell arrangements.

Conclusion on the scope of section 124

98. For the reasons given above, the conclusions in AWC paragraph 68 do not flow. That MHB/44 section 124 does not provide a direct remedy for every leaseholder against every responsible party is not the point. The remedy made available in section 124 does achieve the policy aim and purposes of the legislation, whatever exceptions there may be. The coherent approach is to construe that remedy as being available to the fullest extent for those to whom it has been made available.

The degree of unfairness arising from construing section 124 retrospectively

Focussing on the right fairness question

99. It is important to focus on the question of fairness within the context in which it arises, namely the issue of retrospectivity. It is no part of the exercise to revisit broader questions of fairness which underpin Part 5 of the BSA generally. Fairness is an inherent part of the balancing act which Parliament itself conducted when enacting Part 5: protecting leaseholders, removing the right to claim certain service charges and requiring those best placed to pay for immediate remedial works to do so, whilst providing those so responsible with additional remedies against those ultimately liable (and their associates) in damages. Here, SVDP/GL fall into error, referring to ‘blameless landlords’ and the like. The only issue is whether it is more unfair to give section 124 retrospective effect than not to do so.

100. In overview, the degree of retrospectivity that would be engaged by allowing recovery of pre-BSA costs is limited. As such, little should be required to displace the presumption. The degree is limited by the following features: there must be proven ‘relevant defects’; the class of private applicants is narrow and specific (e.g., those with current property interests) (see AWC paragraph 62); the categories of respondents are limited to those identified in section 124(3); the existence of the safety valve; and, in the real world, the fact that pre-BSA costs are overwhelmingly likely to be those incurred in the post-Grenfell period, rather than those dating back 10, 20 or more years. Noting, for the avoidance of doubt, the 30-year window attaching to ‘relevant defects’ is not relevant to the degree of retrospectivity, given it applies just as much to costs incurred after 28 June 2022.

The safety valve

101. As already noted, a key question in the determination as to whether a legislative provision was intended to operate retrospectively is the degree of unfairness. The greater the unfairness, the more clearly the retrospective intent must appear and vice versa.

102. In this case, a central feature which impacts upon any degree of unfairness resulting from giving the legislative provision retrospective effect is that an order under section 124 could only ever be made where the First-tier Tribunal concludes it is just and equitable to do so.

103. Nugee LJ described this at JCA [153] as a safety valve against any unfairness. Newey LJ regarded this feature as “*very significant*” at [165].¹⁴ Paragraph 70 AWC is a misconceived attempt to avoid the impact of the safety valve. As to that:

AWC 70.1 The factors which may render it unjust and inequitable to make an RCO go well beyond considerations of retrospectivity. As the purpose of the safety valve was not solely as a check against retrospectivity, its mere existence cannot show the unfairness of retrospectivity. The safety valve does not operate so as to necessarily exclude all costs incurred before section 124 came into force and no-one suggests that

¹⁴ See *Edgewater (Stevenage) Ltd v Grey GR Ltd Partnership* [2026] UKUT 18 (LC); 224 Con LR 77 at [316] for a practical application of the safety valve.

it should. Whether it applies to given costs depends on the facts. The existence of the safety valve is not a reason to apply the presumption against retrospectivity. Quite the reverse.

- MHB/45-46 AWC 70.2 If section 124 were retrospective in its effect, SVDP/GL do not dispute that any consequence arising therefrom would be a matter that could, in principle, be taken into account in determining whether it was just and equitable to make an order. Their case seems merely to be that there is limited (but, note, not no) room for its application. That, of course, depends on the myriad of factual circumstances that may arise in other cases. See further, paragraphs [106]-[110] below. As noted above, the features emphasised by SVDP/GL at AWC paragraph 21 (underlined passage from *Granada*) are potential contenders for the application of the safety valve. MHB/30-31
- MHB/46 AWC 70.3 As noted above, a prior payment of a service charge by a tenant to their landlord is a completed transaction already capable of being unravelled: section MHB/491-494
- 27A of L&T Act 1985. But if, on given facts, it gives rise to particular unfairness then the safety valve may be called into service.
- MHB/46 AWC 70.4 The safety valve is part of the criterion for making any order. A Tribunal would not be permitted to use its discretion to disapply a significant element of scope for the reasons given by the FTT in this very case, as explained in paragraph [106] below.
- MHB/46 AWC 70.5 The comparison with section 130 is inapt. Essentially, section 130 depends on the establishment of a “relevant liability” and is concerned with the final determination of liability. Parliament has altered the existing law by amending the limitation period for claims made under the DPA (the paradigm basis for a “relevant liability”): see section 135(4). It was therefore necessary to make clear, beyond doubt, that section 130 applies to a relevant liability which arises before commencement of the BSA. Further, provisions laying down limitation periods fall into a special category of legislative interpretation,¹⁵ and thus require a different approach to drafting. But MHB/384-385
- MHB/392

¹⁵ *Bennion*, Section 7.15, Limitation Acts.

the fact that the relevant liability arose before the commencement of the BSA does not, of itself, mean that its antiquity must be completely disregarded when undertaking the just and equitable balancing exercise in section 130(1). In any event, it should not be assumed that the factors forming part of the just and equitable analysis for the purposes of section 130(1) are the same as those applicable to section 124. Irrespective of retrospectivity, they are different anyway. In this context, see the scope of the balancing exercise undertaken by Constable J in respect of section 130 in *Crest Nicholson Regeneration Ltd v Ardmore Construction Ltd* [2026] EWHC 789 (TCC) at [75ff].

MHB/47

AWC 70.7

See the response to AWC 81 and 84 below (paragraph [122]).

MHB/49-50

104. Given that fairness is already a constituent element of the test to be applied under section 124, it must follow that there cannot be any unfairness (or any unfairness is significantly mitigated) in giving the provision retrospective effect.

105. SVDP/GL argue that it will always be said (presumably by FTT Judges) that any matters relied upon in this connection will already have been taken into account by Parliament when giving section 124 retrospective effect. This contention is wrong.

106. There is a distinction to be drawn between the mere fact that a cost has been incurred before 28 June 2022 and the various consequences of that fact. Triathlon accepts that a decision to dismiss this appeal (i.e., to find that section 124 is jurisdictionally retrospective in its effect) would preclude a party from properly relying on the bare fact that a given cost was incurred before 28 June 2022, because Parliament must indeed be taken to have had that bare fact in mind. But that does not prevent a party from spelling out that there were some factual consequences of it being pre 28 June 2022, or generally historic, which render it unfair to make an order. This Court may find instructive the approach of the FTT in this respect: see JFTT [287].

MHB/305

“In principle, we can see that there might be a case where a person against whom a remediation contribution order was sought, in respect of costs incurred prior to 28 June 2022, could say that they had acted to their irretrievable prejudice, in the belief that they could safely expend the relevant funds as service charges validly demanded and received. In such a case there might be traction for an argument that it was not just and equitable to require that person to fund the relevant costs itself, pursuant to a remediation contribution order.”

107. Thus, rather than it being said by Tribunal Judges that Parliament has already taken account of any and all of the matters that may be relied upon, the FTT in this very case identified a category of cases in which (obiter) it would not say that.

MHB/306 108. Moreover, at JFTT [289] the FTT appears to have contemplated another scenario, namely where a party had not merely given no intimation of an intention to reclaim relevant payments incurred prior to 28 June 2022 but, mindful of the BSA, had positively represented that it would never make a claim for pre-BSA payments, and had then reneged on that promise.

MHB/651-652 109. Other circumstances might include those arising from insolvency complications, e.g. the type of points raised in *BDW* at [122].

110. It is not necessary to speculate on other possible circumstances in which it might not be just and equitable to make an order in respect of costs incurred prior to 28 June 2022. The point is that the safety valve against unfairness exists and can be called into operation where the payments being sought were of long-standing. The fact that costs were incurred prior to 28 June 2022 could also be relied upon to mitigate the terms of any order made (e.g. by giving time to pay).

Why is it unfair on this category of respondents?

111. As has been said, if a prospective only construction were adopted, the leaseholder would bear the burden of funding pre-BSA costs. If a retrospective construction was adopted, others, including the developer, would bear the burden. However, section 124 only ever applies where there exist building safety defects for which a developer or landlord will have been responsible. Where, as here, the respondent is the developer it is not obviously unfair that such a respondent should bear the funding cost of remedying them in full, irrespective of an arbitrary cut-off date.

The balance of unfairness

112. Returning to the balancing exercise, the scales tip firmly in favour of retrospectivity:

- (1) This is a piece of legislation with a remedial purpose.

- (2) Section 124 creates a new remedy intended to impact upon past conduct, as with much of Part 5.
- (3) The degree of retrospectivity is limited.
- (4) An order to pay remedial costs that may, previously, have formed part of a previous service charge is not an order which removes or alters accrued rights in respect of that service charge.
- (5) In any event, service charges previously paid are already capable of being unravelled by the application of legislative provisions. This could simply be regarded as a new basis upon which to unravel a service charge that has been paid.
- (6) The balancing exercise does not entail a review of the ‘fairness’ of the scheme in Part 5, which was a matter for Parliament. The only question is whether any additional degree of ‘unfairness’ arises from giving section 124 retrospective effect.
- (7) Given that it is fairer that a party responsible for relevant defects should bear the cost resulting from such defects than it is for such loss to be borne by the innocent leaseholder, that proposition is no less true because the costs were incurred before the commencement date.
- (8) Any unfairness which arises in a specific case is catered for by the safety valve, such that no order need be made.

The Broader Statutory Scheme

113. SVDP/GL’s analysis of the broader statutory scheme does not support the conclusions that they reach. On the contrary, Triathlon draws support from the over-arching direction of travel, namely that Part 5 of the BSA is generally “*backward facing*”: see *BDW* at MHB/643-644 [86]. It makes a number of changes to the law in order to address the problem of historic

building safety defects created up to 30 years ago and achieve the BSA's aims, most obviously here protecting leaseholders and securing that the "polluter pays". That is the lens through which to view section 124.

MHB/643-644 114. Rather than viewing Part 5 as a composite whole, as the Supreme Court did in *BDW* ([86]-[87]), and the Court of Appeal did in this case, SVDP/GL point to the creation of the specific new liabilities and remedies within Part 5, to contrast them with the section 124 remedy. This is a false comparison. These provisions should be seen as complementary and each of them part of the new "toolkit" to achieve "*remediation and redress*".

MHB/384-385 115. In overview, section 124 provides leaseholders and others with a summary (no fault) remedy in the FTT in respect of the costs of remedying historic building safety defects against the target respondents, primarily the developer or responsible landlord and their associates, with the subsequent provisions (sections 130, 135, and 149-151) assisting such respondents in turn to bring (High Court) claims against their contractors and consultants (on a fault basis). It would make no sense if the time frames for all of these backward-facing provisions were not broadly to align. MHB/392-393 MHB/399-404

MHB/392-393 116. Given the differing nature of these remedies, consistent with the approach in *L'Office Cherifien*, it is unsurprising that different drafting was employed. For example, in the case of section 135, which significantly altered the law of limitation relating to the DPA so as to resurrect time-barred claims, it was appropriate for its retrospective effect to be spelled out in terms. There was no such drafting imperative in the case of section 124.

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

MHB/48 117. As AWC paragraph 75 notes, section 122 introduces Schedule 8. Schedule 8, paragraph MHB/369
MHB/418 5, to which SVDP/GL refer, only applies to provide a limit on service charges "*in other cases*", i.e., those cases not already caught by paragraphs 2, 3 and 4. The pre-commencement five-year period is specifically relevant to quantification of the "*permitted maximum*" and takes into account sums falling due prior to the BSA. However, paragraph 5 does not permit the recovery of sums already paid above the permitted maximum. A leaseholder who has done so should have recourse to section 124. This allows Schedule 8 to work in combination with section 124.

- MHB/48 118. As to AWC paragraph 76, the emphasised words in section 125(3) are not directed to MHB/374
the substantive retrospectivity of the provision, which operates prospectively, but serve
to confirm it applies, in a backward facing sense, to those companies who were the
subject of winding up proceedings before the passing of the BSA. That supports a
retrospective construction of the key words “incurred or to be incurred”, which appear
MHB/374 in sections 125(1)(b) and 125(2)(b), because it contemplates that an order can be made
against an associated company in respect of a liability for costs incurred in the pre-BSA
period where the company was the subject of winding up proceedings in that same pre-
BSA period.
- MHB/384- 119. As to section 130, discussed in AWC paragraphs 77 and 78, this creates a new basis for MHB/48-49
385 legal liability but it is one that is, itself, parasitic upon pre-existing rights of action and
liabilities, under the DPA 1972 or Building Act 1984, that can have accrued before or
after commencement. As it is referencing a legal liability of another type, section 130
necessarily had to spell out that it applied to rights of action and liabilities which existed
pre-BSA. That type of consideration does not apply to section 124 which does not
depend on a prior legal liability. The justification for the drafting in section 130 is a far
cry from any need to specify in section 124 that “costs incurred” could, on given facts,
include costs incurred pre-BSA. The two provisions are simply not comparable.
Nothing of significance is added by section 130(5).
- MHB/49 120. As AWC paragraph 80 observes, section 135 changed the limitation period for DPA
claims in a significant respect and, as it was a change to existing legislation, it was
necessary to spell out in s.4B of the Limitation Act (see section 135(3) BSA) that the MHB/392
provision is to be treated as having always been in force: see *Granada* at [56]. Just as MHB/973
section 124 has its own safety valve which guards against unfairness (see above), sub-
sections 135(5) and (6) provide their own safety valves against the universal application
of section 135.
- MHB/399- 121. Section 149 creates a new right of action (for failure to comply with a cladding product
400 requirement etc.), but it is a right of action and liability that is only capable of having
existed and accrued before commencement. For obvious reasons, it was necessary to
draw a distinction between that cause of action and that contained in section 148, which MHB/397-
prospectively applies to any failure to comply with a construction product (which would 398

include cladding) after the inception of the BSA. The pairing of these forward and backward facing provisions means that it is not possible to draw any conclusions about the fact that section 149 is expressed to be retrospective. It proves nothing on its own. Again, section 149 is a far cry from any need to specify in section 124 that “costs incurred” could, on given facts, include costs incurred pre-BSA. Since section 149 creates a new cause of action relating to past events, it was necessary for section 150 to set out the limitation period for that cause of action. The regime in section 124 is not analogous.

MHB/401-402

MHB/49-50 122. As to AWC paragraphs 81.1 and 84, the requirements for the provisions in section 135(5) and section 149(9) both to yield to the defendant’s Convention Rights are necessary precisely because the Court otherwise has no discretion but to apply the operative elements within those sections. By contrast, section 124 is a discretionary provision, which must in any event be exercised compatibly with A1P1.

MHB/392-393

123. None of the statutory provisions listed in AWC paragraph 85 are comparable to section 124. Their architecture is different and the justification for setting temporal limits is understandable. Section 124 creates a new remedy, but it is not reliant or predicated on any accrued underlying right of action or liability. It merely relies on facts i.e. the incurring of costs, that can have occurred before as well as after commencement of the BSA.

MHB/50

124. For these reasons, the analysis of other Part 5 provisions, each with their own individual function, does not assist in the resolution of the issue before the Court.

MHB/498 125. As for LAFRA, referred to in AWC paragraphs 86 and 87, SVDP/GL can draw no support from section 116(7)(b). The context for section 116(7)(b) LAFRA is what precedes it. Notably, LAFRA does not amend or elaborate upon the words “incurred or to be incurred” in section 124(2). It broadens the footprint of recovery under section 124 to any costs incurred “in connection with” remedying relevant defects. The new sub-paragraphs (a), (b) and (c) of section 124(2A) BSA continue to use the same language of “incurred or to be incurred” already deployed within the existing section 124(2), and which is the subject of this appeal. Section 124(2A) BSA now applies those words to the sub-headings of costs to which an RCO can attach, namely the cost incurred

MHB/50-51

in taking “relevant steps”, procuring expert reports and of temporary accommodation. Thus, these provisions shed no additional light on the meaning of “incurred” than was already apparent in respect of section 124(2) as originally enacted.

126. Thus, viewed in context, the purpose of section 116(7)(b) LAFRA is to make clear that nothing turns on the difference in date between the enactment of LAFRA and the BSA as regards the now wider scope of recoverable costs. It confirms that all recoverable costs, whether existing or newly provided for, are within section 124 whenever they had been incurred. In the result, no temporal distinction will be drawn between those costs which would always have fallen within the scope of section 124 and those which will now do so under the broader definition. Whether costs incurred prior to 28 June 2022 are recoverable in both cases depends on the proper interpretation of the BSA as originally enacted, which is the subject of this appeal. MHB/498

127. Since section 116 LAFRA was changing the existing law in respect of section 124 it had to spell out that it was doing so with retrospective effect. That is entirely conventional.

MHB/51 128. Contrary to AWC paragraph 88, *Black* is not analogous: see paragraph [36] above. MHB/76
Whilst it may have been a relevant consideration in that case to note that, in another provision to the one being addressed by the Court, Parliament positively addressed the very question of its application to the Crown, that is not comparable to the point that SVDP/GL seek to make here. The provisions, and their function, are different.

“The BSA contains other provisions which provide for redress and accountability”

129. In this section, SVDP/GL point to other provisions within the BSA which would enable leaseholders to seek redress in respect of costs incurred before 28 June 2022, presumably to suggest that, in the balance, there is no unfairness in denying their entitlement to use the new remedy under section 124 in respect of such pre-BSA costs.

130. None of the alternatives is, from a leaseholder’s perspective, a remotely comparable substitute. The advantage to them of section 124 is obvious. It is a speedy, summary remedy implemented through the no-cost forum of the First-tier Tribunal, already

experienced in dealing with (often unrepresented) leaseholders raising disputes in respect of their service charges. It would be unduly burdensome to require a leaseholder to institute civil proceedings, for which access to legal aid is limited; where they would need to prove breach of duty in order to succeed; and which would likely become protracted in multi-party proceedings. For management companies, it would also mean that mitigatory costs (waking watch, fire alarms etc) and remedial costs incurred on one side of the 28 June 2022 cut-off date would end up being pursued in a different place and at a different pace from those costs incurred on the other side of the cut-off date, even if they related to the same measures. It would also lead to a multiplicity of proceedings, with different leaseholders in different blocks, depending on the timeline of their expenditure.

131. Timing is, therefore, an essential feature of the intended operation of section 124. It is important that applications for RCOs (and their counterpart Remediation Orders under section 123) are heard swiftly so that remedial works to remedy the relevant defects can be undertaken and paid for. It should not be appropriate for landlords, still less management companies, to wait until the successful recovery of damages in complex civil proceedings before remedial works are undertaken. Those who incurred their costs pre-BSA should not be forced to wait even longer for reimbursement than those who did not.

132. In this section of the AWC, SVDP/GL also point to the range of other remedies available to ensure that those who are culpable (not merely responsible) are held to account. The existence of these remedies positively supports the adoption of a retrospective interpretation for section 124. The enhanced remedies are made available to respondents to an RCO so that they can pass on such liabilities to those who are culpable and to their associates, without drawing any distinction between pre and post-BSA costs.

133. It should be observed that the relevance of the availability to leaseholders (such as Triathlon) of alternative civil remedies was a point unsuccessfully argued by SVDP/GL both in the FTT (see JFTT [258] and [262]) and in the Court of Appeal. SVDP/GL had contended that a factor militating against the exercise of the just and equitable discretion was that Triathlon had other civil remedies available to it, including specifically a claim under the DPA. Ground 1.5 of the appeal, which addressed this point, was dismissed by

MHB/370-
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MHB/299-
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MHB/223 the Court of Appeal (see JCA [96] and [97]) and SVDP/GL did not pursue any appeal to this Court in respect of it. In any event, their application for permission to appeal to this Court under Ground 1 as a whole was refused. The factual premise (that DPA proceedings are a practical alternative) has, therefore, already been rejected below and is not open to SVDP/GL in this appeal.

134. None of the remedies in AWC paragraph 89 is a substitute for section 124. The subsequent creation of the “Responsible Actors Scheme”, arising from sections 126 to 129, can have no bearing on the question of whether costs already incurred by the date of the BSA are recoverable.

MHB/51-52

MHB/376-383

135. As for the suggestion that leaseholders have a claim under the DPA, Triathlon makes the following points:

(1) Such a claim would involve the institution of complex civil proceedings in the Technology and Construction Court: see JFTT [261], JCA [151] and *Crest Nicholson Regeneration Ltd v Ardmore Construction Ltd* [2026] EWHC 789 (TCC) at [75].

MHB/236

MHB/739

(2) Claims under the DPA, and for the newly created associated BLOs, require proof of breach of statutory duty (i.e., they are entirely fault-based), rather than mere demonstration under section 124 that a relevant defect exists. See JFTT [261].

MHB/299-300

MHB/299-300

(3) TCC proceedings of this type often become protracted and expensive (see the references above) and well beyond the reach of many leaseholders, because of the tendency to involve multi-parties (consultants; designers; contractors; subcontractors; sub-subcontractors etc), all of whom become joined in successive rounds of pleadings. A remedy which exists, but which is of no practical use because it is prohibitively expensive and would take years to resolve, is not a comparable solution. The dispute against the contractor, Galliford Try, in respect of Plot N26, with which these proceedings are directly concerned, is in point: those proceedings had barely progressed despite the pre-action protocol process having started in September 2022. The JFTT said at [274] that:

MHB/303

“there is no knowing how long it will take for a claim to come to trial (liability has already been disputed by Galliford Try) and no guarantee of how much will be recovered.”

MHB/52-55

136. In contrast to the leaseholders, the availability of the remedies such as those heralded by SVDP/GL in AWC paragraphs 90 to 93 are powerful points in favour of giving section 124 a retrospective interpretation. Those entities (developers and landlords) rendered liable for RCOs, or in the case of landlords, Remediation Orders, can use those remedies to pursue those downstream parties with the greatest culpability merging, in one forum, costs incurred both before and after 28 June 2022.

MHB/739

137. In respect of BLOs, see *Crest* at [75] and [76], comparing the purpose of BLOs with the remedies in sections 123 and 124. See also [87]:

MHB/743

“Because of the twin regimes – the RO/RCO, and the BLO – it is regularly going to be a (commercial) landlord or developer who has, either itself or through an associate, funded the remedial work and who will seek redress from the contractors, designers or others who caused building safety defects. As discussed at paragraphs 75-76 above, this reflects the purpose of the BSA, and it is in meeting this purpose where the justice lies.”

MHB/762-764

138. That case is also significant for another reason.¹⁶ The Judge held at [162] and [171] that a claim under the DPA was one falling within the adjudication regime of the Housing Grants, Construction and Regeneration Act 1996. Joanna Smith J had earlier reached exactly the same conclusion in *BDW Trading v Ardmere Construction Ltd* [2024] EWHC 3235 (TCC), the reasoning of which Constable J concluded he could not improve upon. Adjudication is a valuable tool because it provides a temporarily binding but enforceable decision on liability within 28 days of the referral. On the basis of this decision, a developer, such as SVDP, is well placed to pursue its statutory claim under the DPA (with its enhanced 30-year limitation period) in adjudication against contractors or consultants that it engaged. Landlords who entered into contracts with contractors or consultants to carry out works can do the same. Leaseholders are not party to such construction contracts so have no recourse to adjudication.

MHB/767

MHB/695-698

MHB/56

139. As to AWC paragraph 95, section 124 is a provision which holds those responsible (whether or not at fault) either for bringing about or for letting to leaseholders a building

¹⁶ It is understood that an appeal in *Crest* is due to be heard in December 2026.

containing relevant defects. Viewed through the leaseholder's lens, the developer is responsible, even if it is not culpable, for the presence of such defects. The urgent need for remedial works was such that they could not await the outcome of long, expensive and complex civil proceedings before the remedial process could be undertaken. It follows that, in the interim, those better placed and more financially able to pay for and execute the works should do so. Wherever possible within the non-fault jurisdiction, Parliament has sought to ensure that those primarily responsible, namely developers or their associates, should pay. As such, section 124 is just one vehicle by which Parliament secured its aim of holding those responsible to account. The existence of other vehicles, in slower and more costly lanes, is not the point.

- MHB/236 140. The criticisms of JCA [151], [162] and [163] in AWC paragraph 99 are misplaced. In MHB/57
MHB/237- respect of paragraph 99.1, see immediately above. As to paragraph 99.2, the “*penalty*”
238 lies in the fact that, if section 124 is given only prospective effect, those leaseholders whose landlords did the right thing in the five year period after Grenfell would have to wait indefinitely for recovery in civil proceedings they would be ill-equipped to pursue, compared to those leaseholders whose landlords had done nothing at all. Those leaseholders have the protection afforded to them by Schedule 8 and can force their landlords to do the work now, pursuant to section 123.
- MHB/57 141. Contrary to AWC paragraph 100, the point in JCA [151] is the same one as that presently MHB/236
under consideration, which is why Nugee LJ made it. Respondents to RCOs may or may not be blameless. But they are “responsible” for bringing about or letting the building containing the relevant defects, or are associates of such parties, and as such can be made to bear the immediate cost of remediation.
- MHB/57- 142. As to AWC paragraph 101, see above. The policy of the BSA is apparent from its
58 purpose.
- MHB/58 143. AWC paragraph 103 is rejected. From the perspective of the leaseholder, High Court proceedings would be far less attractive than a summary application in the FTT, which requires less to prove and is free of cost shifting risk. Forfeiture of a (discretionary) right to interest counts for little if the civil claim for the principal sum is, itself, beyond reach.

“Section 124 is complementary to section 123”

144. It is agreed that section 124 is complementary to section 123. Both are summary remedies available to, amongst others, leaseholders to get their buildings remediated at no cost to themselves.

MHB/59 145. AWC paragraph 110 describes a function of section 124 but it is not the only function, as this appeal shows. Another function is to ensure that the financial protection afforded to leaseholders in respect of building safety defects is consistently applied to those whose buildings were remediated in, say, the five-year period after Grenfell just as it is to those whose buildings have yet to be remediated.

MHB/59 146. AWC paragraph 111 does not explain why section 124 should not also be applied to meet the cost of remediation work already carried out. In this context, 28 June 2022 is entirely arbitrary. After all, as SVDP/GL themselves contend, “incurred” can mean incurred after 28 June 2022 i.e., an RCO can be used to reimburse costs already spent in the execution of remediation. There is no logic in limiting it to those costs incurred after 28 June 2022.

MHB/60 147. AWC paragraph 112 is entirely self-supporting. The same could equally be re-written so as to include recovery of pre-BSA costs (paragraph 112.3 refers) and provide for the downstream recovery of those costs through the other statutory provisions (paragraph 112.5 refers).

The Relationship between the Present Appeal and *Adriatic Land*

148. The outcome of the appeal in *Adriatic* should have no necessary bearing on the present appeal. That is because:

- (1) The majority view in *Adriatic* (Nugee and Holgate LJ) decided that no service charge is payable after 28 June 2022, regardless of whether the underlying costs have already been incurred or service charges demanded by that date: see *Adriatic* at [199]. Costs that had been incurred or service charges MHB/563 which had been demanded by that date, which had been paid and were accordingly no longer payable, would nonetheless be recoverable under

section 124. Thus, the majority’s reasoning in *Adriatic* accepted (and relied upon) section 124 operating retrospectively and applying to costs incurred prior to 28 June 2022.

- (2) The minority view (Newey LJ) was that the presumption against retrospectivity should prevail in respect of Schedule 8: see *Adriatic* at [91]. MHB/533
- MHB/533 But taking section 124 as construed in the present case and *Adriatic*’s interpretation of Schedule 8 together, Parliament’s purposes are achieved: see *Adriatic* at [90(iv)]. Thus, on the minority view, section 124 still applies to costs incurred prior to 28 June 2022. This is recognised by the appellant in *Adriatic*; see paragraphs 90(c) and 105(c) of its Written Case.

149. Thus, in the result, although the Court of Appeal was split in *Adriatic*, it was unanimous as to the outcome in the present case. Nonetheless, if the *Adriatic* appeal were to succeed, it can be said that there is all the more reason to decide the present appeal as it was decided below. As Newey LJ observed at JCA [163], if the Schedule 8 protections are not available retrospectively to protect leaseholders in respect of costs incurred before commencement, there is a greater need for section 124 to operate retrospectively, so as to be available to them in respect of such sums and enable them to recover the same where it is just and equitable for them to do so. See Newey LJ also at [85(vii)] in *Adriatic*. For that reason, AWC paragraph 117 is wrong. MHB/61

- MHB/61 150. At AWC paragraph 115 SVDP/GL complain that the Court of Appeal’s approach was “circular” because each case drew support from the other. The criticism is misplaced. There is every reason to suppose that Parliament intended a relationship between the operation of section 124 on the one hand and Schedule 8 on the other. Both form part of the group of remediation provisions listed in section 116(1), collectively form part of MHB/355 the waterfall/cascade of funding obligations, and it is perfectly proper to test (and then decide) questions of statutory interpretation with both provisions in mind.

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

151. A feature of this appeal is that, in *BDW*, this Court has already said, in terms, that section

124 has retrospective effect: see *BDW* at [86(2)] and [87]. That is the very point which falls for decision now. Of course, *Triathlon* relies on these passages. As Nugee LJ said at JCA [149], the passages in *BDW* are self-evidently strongly in favour of section 124 being given a retrospective interpretation. But, as noted above, he did not treat himself as bound to follow those passages¹⁷ and provided other reasons for his decision. MHB/643-644

152. SVDP/GL seek to overcome the obvious difficulty posed by these statements in *BDW* in three ways:

(1) They say that the statements were not part of the ratio decidendi but were in the nature of broad brush general comments, not sufficiently directed to the issues now arising in this appeal: see AWC paragraph 118. MHB/62-63

(2) They say that the views expressed in these statements were, in any event, undermined by the error about the status of the Explanatory Notes: see AWC paragraph 119.1. MHB/63

(3) They say that the approach to *BDW* taken by the Court of Appeal in *Adriatic* was inconsistent with the approach it took in JCA, with no good reason given for that inconsistency: see AWC paragraphs 119.2 and 119.3. MHB/63

153. As to each of those points, *Triathlon* submits:

(1) The JCA was right to treat the passages in *BDW* as carefully considered statements in respect of section 124, rather than casual asides, but, equally, was right to treat the passages as guidance rather than as part of the ratio decidendi.

(2) The JCA's approach in (1) was not, itself, undermined by the feature that the Explanatory Notes were not before Parliament during the passage of the Bill. On the contrary, the JCA were well aware of that feature. In any event, the significance of the feature is overplayed by SVDP/GL.

¹⁷ Nugee LJ had drafted the substance of his judgment in both *Adriatic* and, presumably, *Triathlon* (to which *Adriatic* refers) before *BDW* was handed down: see *Adriatic* at [205]. MHB/565

- (3) The approach of the Court of Appeal was not inconsistent as between *Adriatic* and the present case.

Each of these points will now be developed.

(1) Not sufficiently directed to the issues on this appeal?

154. This Court may well be best placed to decide for itself the significance, objectively judged, of the statements at [86(2)], [87] and [102].

MHB/643-
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MHB/647

155. Triathlon can do no more than echo the JCA, which at [149] describes these as carefully considered statements, rather than casual asides. The very context for the specific issue arising under section 135 was the whole of the backward facing provisions in Part 5. In [102], Lords Hamblen and Burrows JJSC refer to the “*importance of retrospectivity to Part 5 BSA*”, cross referring to the earlier paragraphs. The analysis and characterisation in those paragraphs would not have been undertaken lightly. It is inconceivable that they would have been written without regard to what section 124 actually says.

MHB/647

MHB/235

156. The present case lacks some of the features which arose in *Avon Freeholds Ltd v Cresta Court E RTM Co Ltd*, referred to by SVDP/GL. See, for example, [74]. Beyond that, Avon Freeholds itself establishes no relevant principle: it is merely another occasion on which this Court has had to consider the extent to which it should, or should not, follow something said by it in a previous case.

MHB/589

157. True it is that in *BDW* there was no discussion about the specific language of section 124, but as Lord Hamblen JSC observes at [86], section 124 forms part of a larger collection of provisions, all of which have a particular purpose in mind. Observations on the entire collection are, therefore, apposite and fall to be taken into account.

MHB/643-
644

158. To conclude, the statements from this Court on which Triathlon relies were not merely broad policy-based statements about the BSA being retrospective. They are observations which are both considered and correct, and should be followed.

(2) Explanatory Notes

159. SVDP/GL's reliance on the misconception described by the Court of Appeal about the Explanatory Notes is misplaced; it had no bearing on the Court's view on section 124. The submissions they make in respect of this point are wrong.

MHB/515 160. It is correct to say that the Court of Appeal in *Adriatic* stated, at [34] and [76/7] per MHB/527-
MHB/548 Newey LJ and [141] per Nugee LJ, that this Court was under a misconception about the 528
July 2022 Explanatory Notes, in that they wrongly referred to the Explanatory Notes to
the Bill and to the Act as being in materially the same terms. This was also recognised
MHB/235 by Nugee LJ in JCA [150].

161. However, the misconception, as it was described by the Court of Appeal, was not
material to the reasoning of this Court in *BDW* because, Triathlon submits, the same
conclusion would have been reached by it in any event. In this connection, [102] and
[104] of *BDW* are free standing statements, not materially impacted by subsequent MHB/647
reference to the Explanatory Notes in [105]. Lord Leggatt's observations at [274] (cited MHB/687
MHB/647- by Nugee LJ at JCA [148]) do not refer to the Explanatory Notes at all. 235

162. Moreover, the law is that Explanatory Notes are admissible on any question of
interpretation even if published after enactment: see *Adriatic* at [70] to [72], citing MHB/526
MHB/1382 Bennion on Statutory Interpretation at 24.14 (at [71]):
-1384

"The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other post-enactment expressions of opinion by the government as to the meaning of legislation.... In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them."

163. The position here is that the Explanatory Notes which accompanied the Act are, in any
event, cogently reasoned. The notes provide a comprehensive explanation of the Act
MHB/423- over some 408 pages, beginning with an Overview of the Act and a statement of the 431
Policy Background, before providing an explanation of each Part and the provisions
within it. Further, the explanation of every provision is itself normally sub-divided into
Effect and Background, with worked examples of the operation of the provision.

164. The notes in relation to Part 5 and section 124 are no exception.¹⁸ Under Effect, each provision is described, including examples as to its scope and operation (see paragraphs 1005 and 1006). Under Background, further explanation of the aims, policy and reasoning behind the provisions is given (see paragraphs 1010 and 1011), with further examples demonstrating the meaning and intent of section 124 (see paragraphs 1012, 1013 and 1016 to 1019). Notably, in this regard (retrospectivity) paragraph 1019 specifically references that the ‘just and equitable’ test exists “*to ensure fairness in proceedings ... etc.*”.

165. In the premises, there is no reason why weight could not be attached to these Explanatory Notes, notwithstanding that they are in a form which accompanied the Act and not the Bill. The Explanatory Notes definitively answer the question as to whether section 124 is intended to have retrospective effect (at paragraph 1012):

‘... leaseholders would have the ability to apply for an order against the developer; for example, if leaseholder contributions are required under Schedule 8, or if leaseholders have already paid costs towards remediation before the coming into force of the leaseholder protections, they may wish to seek to recover these costs using a remediation contribution order.’

166. In any event, this Court may consider whether the approach in respect of Explanatory Notes is really as cut and dried as set out above. In his speech to the Statute Law Society in 2025, Lord Burrows suggested that the hard distinction as to whether Explanatory Notes accompanied the Bill or were produced after the passing of the Act is, in any event, misconceived. He suggested that, even if it were appropriate to place greater weight on one type of Explanatory Notes rather than another, there are a number of significant reasons why greater weight can be placed on those accompanying the Act, whether they differ from those in play before the passing of the Act or not.

167. Either way, the Court of Appeal in the present case patently took properly into account the Supreme Court’s incorrect statement about the Explanatory Notes in reaching the (right) conclusion that it did. SVDP/GL are therefore wrong to say that the JCA is, itself, impaired by reason of the misconception described by the Court of Appeal about the Explanatory Notes.

¹⁸ Constable J referred to them in respect of section 130: see *Crest* at [57].

(3) Inconsistency with *Adriatic*

- MHB/63 168. SVDP/GL make two points. The first observes that, in *Adriatic* at [88] to [90] Newey LJ did not place much reliance on *BDW*: see AWC paragraph 119.2. However, the explanation is that Newey LJ (who, in this respect, was in the minority) was addressing the extent to which the Supreme Court was considering Schedule 8, not the extent to which they were considering section 124: see *Adriatic* at [90(ii) and (iii)]. MHB/531-533 MHB/533
- MHB/63 169. It is also argued by SVDP/GL, at paragraph 119.3, that there is an inconsistency between the way in which the Court of Appeal treated *BDW* in, respectively, *Adriatic* and the present case. Given that the composition of the Court was the same, and the judgments were handed down contemporaneously and cross-referred, this might be thought a surprising submission. The supposed inconsistency is said to exist between [88] to [90] of *Adriatic* (per Newey LJ) on the one hand and JCA [149] (per Nugee LJ) and JCA MHB/531-533 MHB/235
- MHB/238 [166] (per Newey LJ) on the other. SVDP/GL say the incorrect approach was adopted i.e., Newey LJ's approach to *BDW* in *Adriatic* should be preferred.
170. As noted above, however, Newey LJ's (dissenting) observations at [90] in *Adriatic* were concerned with Schedule 8, not with section 124. Moreover, in [90(iv)] of *Adriatic*, Newey LJ positively supports taking a retrospective approach to section 124 based on the reasoning in the present case. Self-evidently, Newey LJ did not consider that the Supreme Court's misconception about the content of the Explanatory Notes in *BDW* impacted upon his conclusion in the present case, since he reached the same conclusion as that of Nugee and Holgate LJJ irrespective, namely that section 124 was intended to be retrospective. MHB/533
- MHB/238 171. The passages from Newey LJ that are said to be inconsistent ([88] to [90] in *Adriatic* vs. JCA [166]) are perfectly reconcilable. It was legitimate to draw plain support from *BDW* for a retrospective interpretation of section 124 (as opposed to Schedule 8) notwithstanding the misconception described by the Court of Appeal in respect of the Explanatory Notes. MHB/531-533
172. In summary, this Court is entitled to rely on what it said in *BDW* and should find that the Court of Appeal treated the statements appropriately in JCA: see Nugee LJ at [144] MHB/233-235

to [149].

Absurdity, anomaly or illogicality etc

173. As set out above, the courts will not interpret a statute so as to produce an absurd result absent clear words which require it to do so: *PACCAR*. Absurdity is treated widely: MHB/1093-1167 anything that is unworkable, impractical, anomalous or illogical would qualify. The greater the absurdity, the clearer the words required.

MHB/265 174. In this case, both the FTT and the Court of Appeal were right to say, and rely upon the fact, that unfair or arbitrary anomalies would be created by not giving section 124 retrospective effect. See JFTT [71], [75] and [76] to [78], in which the experienced MHB/266-267 Judges described the inconsistencies as “*serious*”. Nugee and Newey LJ drew attention to the inconsistencies, in the passages referred to below.

MHB/266-267 175. The FTT was right to identify that a prospective only construction of section 124 would discriminate between individual leaseholders in materially identical circumstances: see JFTT [76] to [78], which bear careful reading. They said:

“The sums involved in remediation are too great, and the consequences for individuals too extreme, for such a haphazard pattern of protection to have been Parliament’s intention.”

176. The Court of Appeal agreed that SVDP/GL’s construction would create those inconsistencies. In short, there is no good policy reason to ‘penalise’ leaseholders whose landlords had acted reasonably by implementing remedial works before the inception of the BSA; and no good reason to prejudice leaseholders who had met their service charge obligations before 28 June 2022 in comparison to those, perhaps even on the same estate, who had not.

177. Consider the position where remedial works were commenced (and costs incurred) on one block before 28 June 2022 but had not been commenced on a neighbouring block on the same estate by that date. It would be anomalous and unfair to treat the leaseholders in those blocks differently. Complications would also arise where remedial works on a single block straddled the date of enactment: see Nugee LJ at JCA [151] and

MHB/236 [152]. Newey LJ was generally alive to the unfairness and inconsistencies that would flow from not giving section 124 retrospective effect: JCA [163].

MHB/238

178. The incoherence of having a split regime, dividing those whose remedial works were carried out before the BSA from those whose works were carried out after it, was expressly recognised by this Court in *BDW* at [116] and [117]. That same point of incoherence applies directly here. Although, as set out above, SVDP/GL seek to minimise the significance of comments made in *BDW*, none of the reasons it gives for doing so apply to these paragraphs. They address section 135, which the Supreme Court was directly considering, and had nothing to do with, and were not informed by, the Explanatory Notes. MHB/650

179. A further reason against a prospective only construction is the existential risk it poses to management companies (such as EVML) who depend on continued reimbursement of their costs to survive. If section 124 cannot be used to pass on pre-BSA costs, a management company may be left without any obvious remedy: see Nugee LJ at JCA [154]. This is particularly so given their lack of funds to pursue litigation against those ultimately responsible. Newey LJ agreed at JCA [163], pointing out that the same could be true of landlords. There is nothing within SVDP/GL's AWC which seeks to address the problems of the type that EVML would have faced. MHB/238

MHB/236-
237

180. Since these absurdities (using the term broadly) are clearly apparent, not difficult to foresee and would be "*serious*", the presumption that Parliament did not intend them applies with considerable force.

181. In the hearing below, SVDP/GL never really grappled with those elements of absurdity that the FTT had rightly identified would flow from not giving section 124 retrospective effect. Nor do they seek to do so now in light of the JCA's adoption of those points. Rather, toward the end of their Written Case, they seek to tackle the point in a different way: by suggesting the anomalies do not take the analysis very far, given other anomalies that arise "*however section 124 is interpreted*": see AWC paragraph 122. MHB/64-65

182. It is no answer to say the wider application of section 124 also contains anomalies. The focus must be on those anomalies which arise from the rival contentions on

retrospectivity in this appeal. In that respect this Court should conclude that it is not constrained by the words Parliament has used to find a prospective only interpretation.

183. As to each sub-paragraph in AWC paragraph 122:

AWC 122.1 The first point is that it is not anomalous to permit the deployment of MHB/64 a newly created statutory remedy for an RCO under section 124 on the suggested facts and yet, on the other, not to preclude the re-opening of a time-barred damages claim that had either been settled or was the subject of judicial determination. They are independent routes to a remedy with discrete criteria and different functions. The second point is that this is not an alleged anomaly borne of giving section 124 a retrospective interpretation. If the settlement or judgment was concluded in, say, 2021, the applicant would be entitled to apply under section 124 for any additional costs expended by the landlord after 28 June 2022 which exceed the settlement or judgment. In any event, the existence of either a contractually binding settlement agreement between the section 124 applicant landlord and the respondent developer, or a judgment between them, would always be a potential reason for why it may not be just and equitable to make an order under section 124. So too would the effects of the length of time which had elapsed since the settlement or judgment. Since the BSA came into force, and has been interpreted as having retrospective effect, there are no known cases of the theoretical example given by SVDP/GL ever being a reality.

AWC 122.2 Here SVDP/GL criticise the fairness of section 124 itself, pointing out MHB/64 that section 124 gives rise to a non-fault based liability, whereas fault must be proven in order to succeed in a civil claim against those downstream entities (contractors etc.) primarily (or more) to blame. However, that is inherent in the statutory scheme which was plainly intended by Parliament. It is not an anomaly at all but a necessary consequence of the need to remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account: see *BDW* at [84]. It is not right to describe this MHB/643 as creating a ‘harsher’ outcome on developers. They, and landlords, are far better placed to provide immediate funding and then pursue fault-based claims against contractors than the leaseholders and, in the meantime, remedial works will have been undertaken, whether pursuant to section 123 or section 124. The East Village

development is in point. The scale of the downstream TCC claims being pursued, and likely to be pursued, against the original contracting teams is immense and far beyond the means of EVML and any leaseholders. Moreover, once again, this supposed anomaly is not a matter relating to the date upon which costs were incurred. It is a fact that section 124 is not a fault based remedy, in contrast to claims under section 1 of the DPA, and that is equally the case for costs incurred after 28 June 2022.

AWC 122.3 It is not anomalous to contrast those leaseholders who sold their flats before the BSA came into force with those who did not. It is entirely unsurprising that a leaseholder in situ should enjoy a greater selection of rights than one who has already chosen to sell and move on. They still have a civil claim under the DPA for the same loss but would have to prove breach of duty to recover it. In reality, of course, the posited scenario of a sale is unlikely to have occurred. As referred to already above, a key reason for enacting the BSA was precisely because leaseholders could not sell their flats by reason of building safety defects: see the evidence referred to by Newey LJ in *Adriatic* at [27]. In any event, it ill lies in the developer's mouth to complain of unfairness on the grounds that it cannot also be liable under section 124 to those leaseholders who had sold their flats pre-BSA. MHB/64-65 MHB/513

AWC 122.4 There is no unfairness on the leaseholder, who is the intended beneficiary of the legislation, since in this scenario they recover their costs from the current landlord. The current landlord can pass on that claim to the developer or responsible landlord if it is an associate of the developer. It may also have a contractual remedy against the landlord from whom it purchased, depending on the terms of the sale contract. MHB/65

AWC 122.5 Again, the prospect of a claim for service charges paid over 30 years ago seems a vanishingly remote scenario and not one which has manifested in the case law so far, as would be expected if such a claim was likely to be pursued. There is a justifiable difference between the temporal reach of these provisions. Schedule 8 has immediate and absolute effect to bar further payments whereas section 124 requires an application to be made and is subject to the just and equitable discretion to be exercised. As to the limit placed by paragraph 5 of Schedule 8, see paragraph [117] above. MHB/65

184. The plea of unfairness in AWC paragraph 123 is really one, or no more than one, that MHB/65 the BSA and/or section 124 is, itself, unfair because it exposes current landlords to liabilities (whether under section 123 or section 124) for the cost of repairing historic building safety defects which they had done nothing to bring about, beyond being the current owners. Viewed in that way, the fact that the cost may have been incurred pre-BSA, but for exactly the same reasons, does not pose any additional degree of unfairness. In any event, the current landlord has its remedies against those culpable, pursuant to the DPA.

185. In respect of the presumption against absurdity, the neutrality of the words “incurred or to be incurred” works entirely against SVDP/GL. There is nothing in that phrase, or in the section more broadly, to indicate that Parliament clearly intended the absurd outcomes identified in the JFTT and the JCA.

186. The highly predictable and “serious” absurdities which both the FTT and Court of Appeal had identified far outweigh the points relied upon by SVDP/GL, which are somewhat theoretical and lack substance.

Overall Conclusion and Summary of Reasons

187. The Supreme Court is invited to dismiss this appeal and to decide that section 124 BSA applies to costs incurred before it came into force on 28 June 2022. The principal reasons for this are as follows:

- (1) The language of section 124 is entirely consistent with it having retrospective effect;
- (2) The remedial purpose of Part 5 of the BSA is consistent with section 124 having retrospective effect;
- (3) It would be absurd, anomalous and incoherent to distinguish between different groups of leaseholders in the same position, particularly where remedial works had been undertaken in the five year post-Grenfell period with the strong encouragement of the Government.

- (4) There is no, or no material, unfairness in construing section 124 as having retrospective effect. Any unfairness in a given case is mitigated by the ‘just and equitable’ safety valve.
- (5) Different language is used in respect of retrospectivity in other BSA provisions where their purpose and effect require it. None of those instances means section 124 does not have retrospective effect, rather they confirm the retrospective operation of Part 5.
- (6) A conclusion that section 124 operates retrospectively provides consistency with the carefully considered statements of the Supreme Court in *BDW*.

8 October 2026

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