

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

Appeal Reference: UKSC-2025-0156

STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP AND GET LIVING

Appellant

and

(1) TRIATHLON HOMES

(2) EAST VILLAGE MANAGEMENT LTD

Respondents

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES
AND LOCAL GOVERNMENT

Intervener

AND BETWEEN:

Appeal Reference: UKSC-2025-0157

ADRIATIC LAND 5 LIMITED

Appellant

and

THE LONG LEASEHOLDERS AT HIPPERSEY POINT

Respondent

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES
AND LOCAL GOVERNMENT

Intervener

SECRETARY OF STATE'S WRITTEN CASE

*References to the judgments of the Court of Appeal under appeal are in the form "Triathlon CA"
and "Adriatic CA".*

I. INTRODUCTION

1. These appeals concern the interpretation of two provisions in Part 5 of the Building Safety Act 2022 (“BSA”), Parliament’s response to the building safety crisis following the Grenfell Tower fire. The Secretary of State for Housing, Communities and Local Government (“Secretary of State”) intervenes in both appeals.

MHB/501 -565 2. The first appeal (“*Adriatic*”) concerns §9 of Schedule 8, which provides: MHB/ 419

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

3. The second appeal (“*Triathlon*”) concerns s.124(2), which provides: MHB/ 372

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

4. The issue in *Adriatic* is whether §9 prevents recovery through the service charge of legal and professional costs incurred before the relevant provisions of the BSA came into force on 28 June 2022. The issue in *Triathlon* is whether a remediation contribution order (“RCO”) may be made in respect of remediation costs incurred before that date.
5. The Secretary of State’s case is that the answer to both questions is “yes”; and that the Court of Appeal answered both questions correctly for the reasons that it gave. In each case, the legislative framework is concerned with the consequences of historical building safety defects and forms part of a wider scheme designed to protect leaseholders, secure remediation of unsafe buildings, restore confidence in the residential property market, and ensure that the financial burden of remediation is shared more broadly. A prospective-only interpretation would materially undermine those objectives for the reasons developed below.
6. That conclusion is consistent with this Court’s analysis in *URS Corporation Ltd v BDW Trading Ltd* [2025] 2 WLR 1095 (“*URS*”), which recognised that retrospectivity is central to the operation of Part 5 of the BSA and to the achievement of its legislative purposes.

MHB/ 598-694

II. FACTUAL BACKGROUND AND LEGAL FRAMEWORK

7. The key factual background is set out at *Adriatic CA* §§4–12, 27–30, 35–36 and 145–162 and *Triathlon CA* §§26–46. MHB/513- 514

MHB/ 206-209 MHB/516

MHB/548- 553

The building safety crisis and the response of the Government and Parliament

8. On 14 June 2017, a fire broke out at Grenfell Tower in West London, starting on the fourth floor and quickly spreading throughout the building. Seventy-two residents lost their lives, eighteen of whom were children. The main reason why the fire engulfed Grenfell Tower so quickly was the use of unsafe aluminium composite material cladding around the outside of the building: Adriatic CA §§27 and 152. MHB/ 513 MHB/ 551
9. It subsequently became apparent that large numbers of buildings needed to be remediated so that homes could be made safe. The types of building safety defects identified included (i) the widespread use of unsafe cladding; (ii) fire safety defects unrelated to cladding, such as the lack of compartmentation between flats; and (iii) structural safety defects: Adriatic CA §§27 and 153. The costs of remediation work have been significant, stretching in aggregate into the many billions of pounds: Adriatic CA §27. The situation escalated into an increasingly urgent crisis, as very large numbers of flats were affected: Adriatic CA §154. MHB/513 MHB/551 MHB/513 MHB/551
10. Large numbers of leaseholders were unable to afford the costs of works and therefore were stuck in homes they knew or feared were dangerously unsafe, were faced with increased insurance premiums, were unable to sell their properties as a result of a frozen lending market as mortgagees declined to lend, and/or feared losing their homes through forfeiture for non-payment of service charges: Adriatic CA §160. These concerns had a significant mental health impact: Adriatic CA §§29 and 160. Moreover, there was real unfairness in circumstances where leaseholders were not responsible for causing the safety issues in their buildings and could not reasonably have known at the point of purchase the nature or scale of the issues with which they would be faced in the aftermath of the Grenfell Tower fire. MHB/ 513 MHB/552-553 MHB/552-553
11. In short, the mischief addressed by the “remediation provisions” in the BSA is summarised in a passage from the first witness statement of Mr Murphy dated 6 December 2024 (“**Murphy WS**”) at §146, that was endorsed by Newey LJ in Adriatic CA (in the context of his discussion of the alleged incompatibility with A1P1, on which the Court was unanimous): “[w]ithout intervention, leaseholders would have continued to face unaffordable bills, building safety defects would have gone unremedied, the lending market would have remained frozen, and leaseholders would have been forced to continue living in unsafe buildings, worried that they might be the victims of a catastrophic fire.” Essentially the same mischief and aims were identified in URS at §84, per Lords Hamblen and Burrows, concluding that the BSA “is part of the Government’s response to the need to identify and MHB/ 545 MHB/643

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/53
MHB/513
12. In response, the Government initially took the position that landlords and developers should voluntarily pay to remediate unsafe buildings and for other fire safety measures. This approach had limited success. Accordingly, on 10 January 2022 the Government announced a reset in its approach to building safety (the “**Building Safety Reset**”): *Adriatic CA* §§29 and 161. The Building Safety Reset was followed by amendments to the Building Safety Bill, which had been introduced to Parliament in July 2021. Those amendments included the introduction of the remediation provisions, which became ss.116-124 and Schedule 8 to the BSA: *Adriatic CA* §§29 and §161. MHB/513
13. In recognition of the scale, urgency and exceptional nature of the building safety crisis, the Government has made increasing amounts of funding available over time to remediate unsafe cladding, totalling many billions of pounds: *Adriatic CA* §35. A significant proportion of that funding will be obtained from developers, under the “*Building Safety Levy*”, a levy on new housebuilding introduced pursuant to s.58 BSA, which is forecast to raise £3.4bn. Billions will also be borne by developers under the “*Responsible Actors Scheme*”, introduced pursuant to ss.126-129 BSA, in accordance with which developers carry out, or reimburse the taxpayer for, the remediation of life critical fire safety defects under the “*Developer Remediation Contract*” (launched in 2023): *Adriatic CA* §36. Where the Government or developers have covered remediation or associated costs, neither leaseholders nor landlords like Adriatic are required to shoulder them. MHB/516
MHB/376-383
MHB/516
14. Schedule 8 to the BSA reallocates costs between leaseholder and landlord. Where those costs are not covered by grant funding and industry contributions, the BSA significantly improves the existing private law mechanisms which can be used to recover from developers, contractors and other third parties responsible for building safety defects: Murphy WS §60. The key measures introduced by the BSA are: (i) the RCO mechanism at s.124 BSA;¹ (ii) the building liability order (“**BLO**”) mechanism at s.130 BSA; (iii) the new extended limitation period under s.135 for actions under s.1 of the Defective Premises Act 1972 MHB/384-385
MHB/392-393

¹ For example, see the successful use of this mechanism by a landlord against a developer and a large number of associated corporate entities in *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership* [2026] UKUT 18 (LC), which is due to be heard by the Court of Appeal next year.

(“DPA”); and (iv) the new cause of action at s.149 BSA, which can be used to hold the manufacturers and sellers of unsafe cladding products to account. MHB/ 399-400

15. Thus, the Grenfell Tower fire and its aftermath led to a clear appreciation of a very significant set of safety issues that needed to be rectified for buildings to be safe to live in. The rectification of those issues was essential and urgent. It was also going to be enormously expensive. The funding of that costly burden involved, as a matter of Government and legislative policy, sharing the costs of remediation between various groups, including developers, those responsible for the design and construction of defective buildings (as was the subject matter in *URS*), the taxpayer (through Government funding), landlords and leaseholders. The point for present purposes is that the set of decisions, including legislative decisions, addressed those issues by reference to the fair division of the remediation costs themselves. The date on which such costs might have been, or be, incurred was at best of minimal importance to the question of where the responsibility for meeting them should fall.

The importance of retrospectivity to the statutory scheme

16. The central importance of retrospectivity to the statutory scheme has already been recognised by this Court in *URS*, an appeal which amongst other things considered s.135 BSA, which retrospectively extends the limitation period for claims under s.1 of the DPA, and certain claims in negligence and contribution actions, from six years to 30 years.² MHB/ 392-393
17. As part of their reasoning, Lords Hamblen and Burrows considered s.135 BSA in its wider statutory context, identifying at §86 a number of other “*backward-looking provisions*” at Part 5 of the BSA, which they concluded “*makes a number of changes to the law in order to address the problem of historical building safety defects*”. Those changes include (i) the RCO mechanism at s.124; (ii) s.130, which provides the High Court with a power to grant BLOs³; and (iii) ss.147 to 151, which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account.⁴ The Supreme Court MHB/ 392-393
MHB/6 43-644
MHB/ 372-373 MHB/ 384-385
MHB/ 395-404

² The extension of the limitation period “*is to be treated as always having been in force*”: s.135(3). MHB/392

³ Section 130(3) provides that the liabilities to which such an order might attach may have arisen “*before or after commencement*”. This power is designed to allow access to assets of a wider corporate group where, for example, the primarily liable party is a thinly capitalised special purpose vehicle. MHB/ 384

⁴ Those causes of action include, at s.148, a new prospective cause of action where the use of a construction product in construction works causes or contributes to a dwelling being unfit for habitation on completion of those works. Section 149 provides for a similar retrospective cause of action in respect of cladding products only, in relation to which s.149(2) provides that “*Condition A*” may be met “*at any time before the coming into force of this section*”. MHB/3 99-400 MHB/ 397-398

MHB/644 concluded at §87 (see also §102) that all sets of provisions had some degree of retrospective MHB/ 647 effect, and endorsed the Secretary of State's explanation from her written submissions that:

"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, whatever level of the supply chain they operated at."

18. In the same vein, in Adriatic CA, Nugee LJ at §146 noted that, whilst some of the Part 5 MHB/ 549 BSA provisions were *"also forward-looking ... others, including those with which we are concerned, are intended to address the historic problems associated with existing safety defects in buildings"*. Similarly, Newey LJ recognised at §74 that the BSA *"was plainly MHB/ 527 intended to have implications in relation to cladding and other defects which had arisen before it was enacted. Parliament evidently took the view that the historic problems which had come to light following the Grenfell Tower fire called for backward-looking measures."*

The remediation provisions (s.116-124 and Schedule 8 to the BSA)

- MHB/5 09-512 19. Part 5 of and Schedule 8 to the BSA contain the *"remediation provisions"*, key features of which were summarised in Adriatic CA by Newey LJ (§§13-22) and Nugee LJ (§§163-176).⁵ MHB/553-556
- The remediation provisions are a comprehensive set of leaseholder protections designed to achieve the central aim of remedying building safety defects (and in this regard ensuring funds for remediation are made available). They are directed at holding those responsible for building safety defects accountable; reducing the financial burden on leaseholders and restoring stability to lending markets: Adriatic CA §148. Where the person at fault no longer MHB/549 exists or is now legally remote from the building which they constructed, the leaseholder protections also set out on whose shoulders the burden should be borne. As Nugee LJ explained (at §163), these provisions *"amount to a very significant intervention by Parliament in ... the typical and familiar contractual scheme applicable to a block of flats"*. He further observed (at §163):
- MHB/553 -554

"That might indeed be thought very unfair to landlords such as Adriatic who are as blameless for the original defects as the leaseholders; but it is a necessary consequence of Parliament's decision to relieve leaseholders of such costs. In circumstances where the driving consideration was that many leaseholders could not afford to pay the costs of remediation, the protection of leaseholders was bound to push costs onto others."

⁵ See also Nugee LJ's summary of his analysis in Triathlon CA §23.

The service charge provisions (s.122 and Schedule 8)

20. Five points bear emphasis in relation to the service charge provisions. **First**, the provisions at Schedule 8 only apply to multi-occupied residential buildings of at least 11 metres in height or with at least five storeys: s.117 BSA.
- MHB/416-417 21. **Second**, contributions are based on the degree of culpability: *Adriatic CA* §§165-166. Pursuant to §2 of Schedule 8, where the landlord is also the developer or is connected to the developer, it is required to meet all non-cladding remediation costs for the whole building. MHB/54
- MHB/359-363 22. **Third**, costs are borne by those most likely to be able to contribute: *Adriatic CA* §§167-169 and 173. As a result of ss.119(2) and 119A BSA, the protections at §§3-9 of Schedule 8 only apply to “qualifying leases” or “connected replacement leases” respectively, both of which are limited to leaseholders living in their own properties or who, on 14 February 2022, owned no more than two dwellings in the UK in addition to their interest under the lease. MHB/54-555 MHB/417-419
- MHB/417 a. Pursuant to §3 of Schedule 8, landlords cannot pass on costs to qualifying leaseholders where their corporate group has a net worth of at least £2 million per relevant building owned by the group.
- MHB/417 b. Pursuant to §4 of Schedule 8, costs relating to relevant defects cannot be passed on to owners of the lowest value qualifying leases (who are less likely to be able to meet service charge demands). The thresholds for these lower value properties are set at £325,000 in Greater London and £175,000 elsewhere.
- c. Owners of the highest value qualifying leases are required to contribute more. The “permitted maximum” for service charge caps at §§5-6 of Schedule 8 is generally £15,000 for leaseholders in Greater London and £10,000 elsewhere. However, where the lease is worth more than £1 million, that maximum increases to £50,000 pursuant to §5(3). Where the lease is worth more than £2 million, that maximum increases further to £100,000 pursuant to §5(4). MHB/418-419
- MHB/420 d. Where a building has multiple landlords (e.g. a freeholder and a separate head lessee) liability is apportioned according to their level of interest in the building: see Regs.3-5 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022, made pursuant to §12 of Schedule 8 to the BSA. MHB/472-475
23. **Fourth**, there are certain costs – namely cladding remediation and relevant legal and professional costs – that cannot be charged to qualifying leaseholders at all, pursuant to §§8 MHB/419

MHB/5
55

and 9 of Schedule 8 respectively: Adriatic CA §§170-172. As explained at Murphy WS §89, §9 was included within the leaseholder protections for two main reasons: (i) to ensure that the protections were comprehensive so that they would meet their aims of providing leaseholders with certainty and to restore confidence to the property market; and (ii) concerns that excluding legal costs could drive behaviours that might undermine the purpose of the protections (e.g. landlords bringing lengthy proceedings regarding the construction and application of the protections on the assumption they might recover their costs from those leaseholders), or encourage landlords to pursue disproportionately costly and/or unrealistic claims against third parties.

24. **Fifth**, the leaseholder protections at Schedule 8 are supplemented by various other measures which enable landlords to seek to recover remediation costs from others, including the RCO mechanism and other “backward-looking” measures at §17 above. As Nugee LJ observed at §176 of Adriatic CA, “*this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities*”.

MHB/5
56

The RCO mechanism (s.124)

MHB/3
72

25. Section 124(2) BSA enables the First-tier Tribunal (“FTT”) to make, on the application of an interested person as defined in s.124(5), an order requiring a specified body corporate or partnership to make payments to a specified person for the purpose of meeting costs incurred or to be incurred in remedying relevant defects relating to the relevant building. A clarifying amendment, which took effect from 31 October 2024, introduced the words “*or otherwise in connection with*” and a new s.124(2A) which listed among the costs falling within RCOs those incurred or to be incurred in taking relevant steps, obtaining an expert report, and temporary accommodation costs.

III. APPLICABLE PRINCIPLES OF INTERPRETATION

MHB/1
107-
1108

26. The approach to statutory interpretation was summarised by Nugee LJ in Adriatic CA §§142-144, including with reference to R (PACCAR Inc) v Competition Appeal Tribunal [2023] 1 WLR 2594 per Lord Sales at §§40-41 and R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at §8 per Lord Bingham. Words are to be interpreted in accordance with their meaning in context.
27. The importance of a legislative scheme operating coherently across all its provisions was emphasised by the Supreme Court in For Women Scotland v Scottish Ministers [2025] 2

MHB/5
48

MHB/1
171

WLR 879, in particular at §§9-14 and the detailed analysis of the relevant provisions in that case at §§166ff (e.g. 172, 192, 209-210, 265), per Lord Hodge, Lady Rose and Lady Simler. MHB/8 97-900

28. A key part of the interpretive approach involves identifying the purposes that the legislation and the provision being considered seek to serve and promote (or, in ECHR terms, its legitimate aims).

29. In relation to purpose, in *R (DK) v Revenue and Customs* [2022] 4 WLR 23 at §44, Singh LJ commented that “it is often useful for the court to be assisted by a witness statement on behalf of the Government, which sets out the legislative background and history. This helps the court to ascertain the context and purpose of legislation. This is not the same thing as the subjective policy intentions of any individual minister or Government department”. Having quoted this passage at §149 of *Adriatic CA*, at §150 Nugee LJ questioned the extent to which witness evidence recording information going beyond that which was in the public domain could be relied on for the purposes of statutory interpretation. However, having noted at §150 the lack of “any substantial argument opposing the admissibility of Mr Murphy’s statement for this purpose”, he at §151 made clear that these issues did not apply to the Murphy WS as there was “no mystery about the background to the BSA” or “anything contentious in what Mr Murphy says about it, the majority of which is evidenced by official documents of one form or another that are publicly available, and much of which is notorious common knowledge”. MHB/1 086 MHB/5 50 MHB/5 50-551

The presumption against retrospectivity

30. The applicable presumptions and the principles governing their application were common ground (see e.g. Nugee LJ at §143 of *Adriatic CA*). At §§134-139, Nugee LJ expressly adopted Newey LJ’s summary at §§53-64 and drew attention to four further points. MHB/5 46-547

31. At §56 of its Written Case, *Adriatic* nevertheless takes issue with two aspects of Nugee LJ’s approach. **First**, it suggests that Nugee LJ relied on Lord Neuberger’s dicta at §55 of *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230 to “water down” the presumption, and suggests that *Odelola* is irrelevant because it “did not concern any accrued right at all”. However: MHB/5 20-525

a. It is clear from Nugee LJ’s summary of the issues at §140 of *Adriatic CA* that he gave the presumptions substantial weight: “[t]he presumptions are concerned with the question whether Parliament intended to take away the landlords’ existing rights; both MHB/5 47-548

presumptions act in tandem to make that unlikely; both however may yield to a sufficient Parliamentary intention to the contrary".⁶

- b. Lord Neuberger's comments were not *obiter*: he made clear at §§55 and 57 that questions of unfairness arose regardless of whether a vested right was involved. In any event, this point does not detract from the force of his observation that "*the presumption against retrospectivity is itself a rule of construction, or, perhaps more accurately, a factor to be taken into account when interpreting a statute or rule. It is not some sort of substantive, or even procedural, legal right*". Adriatic's Written Case at §80 suggests Odelola is inconsistent with "*the weight of authority*" on retrospectivity, including L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486 ("*Cherifien des Phosphates*"). However, as Lord Mustill noted at p.525 of that case, "[p]recisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case". As Lord Leggatt more recently emphasised in URS at §274, "[t]he presumption against retrospective operation of a statute is, nonetheless, only a presumption", and that unfairness to those affected "*may be considered by the legislature to be a necessary price of achieving an important policy goal*".

MHB/
1033

MHB/5
21-
523

MHB/
994-
1037

MHB/
687-
688

32. **Second**, Adriatic suggests that Sunshine Porcelain Potteries Pty Ltd v Nash [1961] AC 927 is inconsistent with later authorities. However, in that case, Lord Reid said that the presumption against retrospectivity "*may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it*". This formulation reflects the fact that common law presumptions must be approached as part of an assessment of the purpose and scheme of the legislation as a whole. So, for example:

MHB/
1319-
1336

- a. In DB Symmetry Ltd v Swindon Borough Council [2023] 1 WLR 198 (SC) at §41, Lord Hodge made clear that a previous statement of principle from Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners [1927] AC 343⁷ "*remains good law, subject to Lord Reid's qualification*" in Westminster Bank Ltd v

⁶ Underlined emphasis added here and throughout unless otherwise stated.

⁷ Namely the "*principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.*"

Beverley Borough Council [1971] AC 508, at p.529 “that such a parliamentary intention may appear ‘by irresistible inference from the statute read as a whole’”.⁸

- b. In S Franes Ltd v Cavendish Hotel (London) Ltd [2019] AC 29, at §16, Lord Sumption recognised that any interference with property rights “should be carried no further than the statutory language and purpose require”.
33. A mechanistic approach that focuses too heavily on the language of the statute risks frustrating Parliament’s intention, as Lord Mustill warned against in Cherifien des Phosphates at p.525, noting as part of his reasoning that “the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted” will vary from case to case. MHB/ 1033
34. Finally, Adriatic’s Written Case involves arguments that are inconsistent with Article 9 of the Bill of Rights (§§13, 74 and 94-97). First, as to the purported lack of scrutiny and transparency, it is impermissible to invite the Supreme Court to pass judgment on the quality and nature of Parliamentary debates: see, for example, Lord Reed in R (SC) v Secretary of State for Work and Pensions [2022] AC 223 at §165. Whilst it is permissible in the context of an ECHR proportionality analysis to consider at a high level whether an issue was debated or not (SC at §§182-184), the same principles do not apply in a statutory interpretation context. Second, no attempt is made to explain how the Hansard extract relied on at §§95-96 of the Written Case satisfies the conditions from Pepper v Hart [1993] AC 593.

The presumption against interferences with property rights

35. Adriatic relies on the presumption against interferences with property rights. When considering the meaning and effect of general words in primary legislation, the principle of legality may apply, but only where fundamental rights would otherwise be “overridden”: R (Dolan) v Secretary of State for Health and Social Care [2021] 1 WLR 2326 at §§66-67; R (W) & Ors v Secretary of State for Health [2016] 1 WLR 698 at §§53-55. However this facet of the principle of legality has no application in circumstances where the Court of Appeal unanimously concluded in Adriatic CA that §9 of Schedule 8 was compatible with Adriatic’s rights under A1P1 of the ECHR (§§96-131, 133 and 206), and this Court has refused Adriatic permission to appeal in relation to the A1P1 issues.⁹ In any event, Nugee

⁸ If Lord Reid in Westminster Bank Ltd had wished to depart from or distinguish his earlier analysis in Sunshine Porcelain Potteries, he would surely have said so.

⁹ Pursuant to the Supreme Court’s Order of 6 November 2025.

LJ was right at Adriatic CA §140 to avoid double counting the weight of the presumptions against retrospectivity and interference with property rights. MHB/ 547-548

Explanatory Notes

36. Explanatory Notes may cast light on the meaning of a statutory provision: see, e.g. R (O) v Home Secretary [2023] AC 255, per Lord Hodge at §30. In this case, a question arises as to the correct approach to be applied in relation to Explanatory Notes post-dating Royal Assent of a statute. It may be that this issue does not need to be grappled with given that (although providing some assistance) the Explanatory Notes to the BSA are not central to the Secretary of State’s submissions on the appeal. MHB/ 1091
- MHB/ 526 37. At §70 of Adriatic CA, Newey LJ commented that “*where explanatory notes have been published only after a statute has already been enacted*” they “*may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings*”. Nugee LJ agreed with this analysis at Adriatic CA §141. (In the event, neither judgment appeared to place any weight on the Explanatory Notes: §76 and 141; and see also Triathlon CA §150). MHB/ 548 MHB/ 527 MHB/ 548
38. The Explanatory Notes to the BSA are no different to other “*official statements in the period immediately following promulgation of legislation by the government department which is responsible for administering it*”, which Sales J (as he was) recognised “*may be treated as an aid to its interpretation, as a form of contemporanea expositio*” in Harrow Borough of London v Ayiku [2013] PTSR 365 at §29. Whilst explanatory notes post-dating Royal Assent may therefore not attract as much weight as those that do, it is submitted that they can properly be given weight. MHB/ 992
- MHB/ 647-648 39. Accordingly, it was appropriate for the Supreme Court to rely on the Explanatory Notes to the BSA in URS at §105 (per Lords Hamblen and Burrows). It is clear, however, from URS that the Explanatory Notes were regarded as consistent with, but not determinative of, the Court’s analysis of the overall purposes of the BSA: see, in particular, §104.¹⁰

¹⁰ For the avoidance of doubt, the Secretary of State did not in her Written Case in URS suggest that the final Explanatory Notes to the BSA were identical to those before Parliament during the passage of the BSA. Although the Secretary of State was not given permission to make oral submissions in URS, and did not attend the hearing, it appears from the transcript of the hearing that some misapprehension may have stemmed from a submission made by counsel for BDW about the Explanatory Notes insofar as they concerned s.135 BSA. Transcript of Day 2 of the hearing, p.277. Counsel for BDW was referring to s.135 BSA specifically when he submitted that “*Your Lordships will see no material change between those two explanatory notes*”. The Supreme Court may have MHB/ 325

IV. THE ADRIATIC APPEAL

Wording of the legislation

40. Nugee LJ was right to recognise in *Adriatic CA* §199 that the language “favours the line being drawn” where the Secretary of State contended it should be (see also §203):¹¹

MHB/
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565

MHB/
563

“The various paragraphs of schedule 8 provide simply that “no service charge is payable” (paragraphs 2, 3, 4, 8 and 9), or “a service charge ... is payable only if” it does not take the total over the permitted maximum (paragraph 5) for the various matters referred to. Since these provisions came into force on 28 June 2022 ... this means “on and from 28 June 2022 no service charge is payable”. On Sir James’ construction this is exactly what the legislation provides; from 28 June 2022 no service charge will thereafter be payable (regardless of whether costs have already been incurred or service charges already been demanded, or indeed fallen due). ... There is nothing on the face of the legislation providing that the protections in schedule 8 are to be deferred until all the costs that had already been incurred, or all the costs that had already been demanded, or fallen due, should have been paid. If that had been Parliament’s intention, one might have expected the legislation to specify with more precision when the protection was to take effect.”

41. In ordinary language, a service charge is “payable...under a qualifying lease” when a contractual liability to make payment has arisen. Service charges will very rarely, if ever, become payable by a leaseholder at the date on which the costs for services are incurred by landlords and the language of “accrued rights” in *Adriatic’s* Written Case §68 is apt to mislead. Service charges may be payable in advance of those costs being incurred, as in the common case where on-account service charges are payable on fixed dates on the basis of estimated costs for the service charge period, or payments are required to build up a sinking fund. They may be payable after costs have been incurred, as where a balancing payment falls due following certification of the actual costs incurred during the service charge period. Costs may be incurred in one service charge period but payable in another. All these features are reflected in the definition of “service charge” imported by Schedule 8 §1(1) from the Landlord and Tenant Act 1985 (“LTA 1985”).

MHB/
416

42. Schedule 8 is clearly intended to operate side-by-side with the LTA 1985, given §1(1) and the reference to ss.18-30 of that Act in §10. For this reason, as all parties accept, Parliament is likely to have intended that the time at which costs are “incurred” for the purposes of Schedule 8 should be the same as under the LTA 1985: *Adriatic CA* §38, citing *Burr v OM Property Management Ltd* [2013] EWCA Civ 479, [2013] 1 WLR 3071.

MHB/
516

MHB/
704-
711

understood the submission to be directed to the Explanatory Notes more generally.

¹¹ The Upper Tribunal [2023] UKUT 271 (LC) shared this view, concluding at §165 (see also §151) that “the words ‘No service charge is payable’ mean what they say. As from 28th June 2022, when Paragraph 9 was brought into force, no service charge is payable in respect of Qualifying Services”.

43. In s.27A of LTA 1985, which gives the FTT jurisdiction to determine a wide range of issues relating to service charges, “payable” is given an extended meaning, to cover also charges which have already been paid: see s.27A(2). Thus in ss.19 and 27A “payable” now means what may properly be charged to, rather than what is due from, the leaseholder: Termhouse (Clarendon Court) Management Ltd v Al-Balhaar [2021] EWCA Civ 1881, [2022] 1 WLR 1529.¹² It is easy to see why Parliament wished to ensure that the FTT’s jurisdiction was broad enough to cover cases where charges had been paid. Schedule 8 does not contain the equivalent of s.27A(2); the purpose for which it has been enacted is different from the purpose which underpins s.27A and the factors considered below point against giving “payable” in §9 the same extended meaning.
44. Contrary to Adriatic’s Written Case at §67(c), giving “payable” its ordinary meaning does not prevent the FTT’s jurisdiction operating under s.27A in the usual way. §9 of Schedule 8 provides that, from 28 June 2022, a leaseholder is not contractually liable to pay service charges in respect of certain legal or professional services. If, nevertheless, the leaseholder pays such charges after that date, the FTT under s.27A LTA 1985 has jurisdiction to determine that they should not have been paid.
45. The Court of Appeal majority were right (Adriatic CA §201) that there is no textual justification for either interpretation of §9 proposed by Adriatic. Adriatic’s primary case, that the provision applies only to costs incurred after it came into force, confuses the incurring of costs by the landlord with the payment of service charges by the leaseholder: §9 is clearly concerned with the latter, not the former. Its secondary case, under which service charges which have accrued due remain payable after commencement, is contrary to the legislative injunction that “no service charge is payable...”.
- MHB/4 20 46. Schedule 8 §10 “contains the mechanism by which the result is achieved that no service charge is payable”: Adriatic CA, §78. It makes clear how §§2-4, 8 and 9 are to be implemented, given the differences in timing between costs being incurred and service charges being payable. §10(2)(a)(i) ensures that costs which the landlord is prohibited from charging to leaseholders under the earlier paragraphs are removed from the service charge calculations. §10(2)(a)(ii) ensures that landlords cannot recover such costs from a reserve

¹² Earlier authority on a predecessor provision (s.19(2A)) had determined that the tribunal’s jurisdiction was limited to considering service charges which remained unpaid: R v London LVT ex p. Daejan Properties Ltd [2002] HLR 25.

fund (defined in §10(3)). §10(2)(b) ensures appropriate adjustment of the accounts between leaseholder and landlord.

Context and purpose

47. Nugee LJ was correct at *Adriatic CA* §§201-204 to conclude that the retrospective interpretation advanced by the Secretary of State accurately reflected the purpose and scheme of the BSA (which he summarised at §§145-162).

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48. In enacting the remediation provisions, Parliament recognised that unprecedented challenges arising from historical building safety defects giving rise to the building safety crisis could only be met through backward-looking measures.

49. The aims and purposes of the BSA have been addressed at §§8-18 above. Those aims and purposes were not in dispute, either as between the parties (*Adriatic CA* §§130(i) and 148) or between the majority and minority of the Court of Appeal. For example, Newey LJ at §84(i) recognised that “*Adriatic’s interpretation of schedule 8 would result in tenants facing bills which they could not have anticipated and which they might not be able to afford*”.¹³

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50. In summary, it would have made no sense for Parliament to have excluded from the scope of the remediation provisions the very same costs that had prompted a legislative response to the building safety crisis. The objective of protecting leaseholders from unaffordable liabilities would not be achieved unless leaseholders were relieved of the obligation to meet both existing liabilities which they could not afford to discharge and future liabilities arising from costs previously incurred. The objective of restoring stability to the lending market would not be achieved unless purchasers and lenders could be certain that they would not be faced with large and/or unknown charges in the future. Both interpretations proposed by *Adriatic* would serve to defeat these key objectives.¹⁴

51. Nugee LJ accurately summarised the position at *Adriatic CA* §§202-203, concluding that interpreting §9 prospectively:

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“... would to my mind cut across the evident legislative purpose of relieving leaseholders from their immediate predicament of facing large and often unaffordable bills; it would also I think tend to prevent the market from being freed up as intended. It would mean that far from

¹³ *Adriatic* suggests that, as remediation projects take a number of years, such costs were foreseeable. This misunderstands the point made by Newey LJ, which was that such costs were unforeseeable when leasehold agreements were entered into prior to the onset of the building safety crisis.

¹⁴ It is no answer to these points to say that service charge demands must be made within 18 months of costs being incurred under s.20B(1) LTA 1985: *Adriatic’s* Written Case §25.

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leaseholders not having to pay a penny for cladding remediation, they might still have to pay many thousands of pounds. It would not put an end to questions being raised by MPs with ministers, or stories in the press about leaseholders facing ruin. In short I do not think it would achieve what can be seen to be the legislative purpose of addressing the immediate crisis of leaseholders trapped in their flats facing ruinously expensive bills.

In those circumstances I consider that Parliament cannot have intended that leaseholders should still continue to face the uncertainties and difficulties of the large and unaffordable bills that the legislation was designed to address. The only way to give effect to the Parliamentary intention of breaking the logjam and protecting leaseholders is to my mind to interpret the provisions that “no service charge is payable” as meaning what they appear to say, namely that from the date of such provisions coming into force no such service charge is indeed payable. ...”

52. Further, **first**, the Secretary of State’s interpretation is consistent with the overall scheme of the remediation provisions. Conversely, interpreting §9 of Schedule 8 inconsistently with other provisions would result in further complexity, thereby undermining the objective of providing leaseholders with security and stability: c.f. Murphy WS §155, quoted in Adriatic CA §127 in the context of the AIP1 issues. The complementary retrospective measures in question include:

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- a. §5 of Schedule 8, which applies to costs incurred during the 5-year “*pre-commencement period*”. Nugee LJ was correct to conclude that this provision supported the Secretary of State’s interpretation: Adriatic CA §200. The Appellant criticises this reasoning, but overlooks the fundamental point identified by Nugee LJ: as with §9, §5 of Schedule 8 limits the recoverability of service charge demands in relation to costs incurred by a landlord prior to 28 June 2022.
- b. The RCO mechanism at s.124, which is the subject of the *Triathlon* appeal and therefore considered below. As regards the *Adriatic* appeal, however, the Secretary of State disagrees with the suggestion at §§83(g) and 90(c) of *Adriatic*’s Written Case that a retrospective interpretation of s.124 BSA achieves Parliament’s purpose of protecting leaseholders without the need for a retrospective interpretation of §9 of Schedule 8. Placing the burden on leaseholders to apply under the novel RCO mechanism would not have provided the kind of comprehensive protection intended to give leaseholders and lenders certainty, in particular given the costs and time involved in any such application.
- c. The various other “*backward-looking*” provisions in the BSA summarised at §86 of URS, which in particular make it easier for landlords to pursue wrongdoers responsible for building safety defects (and associated persons) through private law causes of action: see §17 above.

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53. **Second**, the interpretation of §9 advanced by the Appellant would have enabled landlords to circumvent its protections by incurring costs or issuing service charge demands prior to the protections coming into force: c.f. Murphy WS §152.¹⁵

54. **Third**, the Explanatory Notes to the BSA, in particular, §986, explain that the protections at Schedule 8: MHB/4
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“... apply equally irrespective of when any service charge demands were issued by landlords or managing agents. This means that, even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule. In practice, this means that managing agents and landlords will need to rescind service charge demands issued prior to commencement where they relate to historical building safety defects. Where landlords are entitled to recover some costs from leaseholders according to the Schedule, they will need to issue new service charge demands which comply with the provisions set out in the Schedule.”

See also §1759, which summarises the effect of §9:

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“Costs already incurred by leaseholders prior to commencement under this paragraph do not count against the “permitted maximum” totals set out in paragraph 6 (unless those costs are also classified as a “relevant measure” under paragraph 1). However, any costs not yet incurred by leaseholders under this paragraph are not payable from the date of commencement onward, even if those costs were incurred by the landlord prior to commencement.”

Adriatic overstates the weight to be afforded to the presumptions

55. Nugee LJ correctly concluded that, whilst the presumptions carried substantial weight, the extent of any unfairness had been overstated by Adriatic. Four points bear emphasis.

56. **First**, the extent of any unfairness falls to be considered within the context of the overall legislative purpose: Adriatic CA §203. The comments of Lord Leggatt in his concurring judgment in URS at §274 apply with similar force in this appeal:

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“Sometimes the unfairness to potential defendants of reviving expired rights and corresponding liabilities may be considered by the legislature to be a necessary price of achieving an important policy goal. This was obviously the view taken in enacting the BSA. A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs.”

¹⁵ For another example of attempts within the BSA to prevent circumvention, see s.119(2), which defines the “qualifying time” as 14 February 2022 (i.e. before Royal Assent). As set out in the Explanatory Notes at §§947-948: “... the choice of qualifying time means that the provisions could not be manipulated or pre-emptively avoided in the period between the original publication of the amendments and the provisions becoming law”. MHB/3
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57. **Second**, Nugee LJ was right at *Adriatic CA* to focus on the extent of any incremental unfairness to landlords arising from a retrospective effect – i.e. unfairness beyond that arising from a prospective approach. He rightly held at §196 that “[o]nce Parliament had decided that an intervention on such a scale was necessary to address the problem, it was bound in any event to cause very significant unfairness to landlords (and others contractually entitled to service charges)”. This led to the conclusion at §203 that, once “the decision to deprive landlords of their contractual right to pass certain costs on to leaseholders at all” had been made, “I do not think that the unfairness of depriving landlords of accrued rights adds very much”. As part of this analysis, Nugee LJ disagreed that “any sharp distinction can be drawn between the unfairness to landlords who have committed themselves to contracts, or to those who have incurred liabilities, or to those who have demanded service charges, or indeed to those who have not yet started on the process of repair” (§198), in particular as the process of recovering service charges “may take a number of years” (§196). Adriatic takes issue with this analysis, contending at §§83(a), (d)-(e), 88-89 and 91 of its Written Case that the majority’s interpretation still produces harsh or arbitrary results. However, any cut-off would produce a hard edge. Some degree of ‘swings and roundabouts’ is inherent in a legislative scheme of this kind. On the Appellant’s preferred construction, costs incurred in early June 2022 could have been passed on in the service charge, whereas costs incurred a month later could not.

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58. The fact that Adriatic could not have known its costs would be barred at the point it brought the dispensation application does not carry *additional* weight. This point is inherent in the effect of §9 (which in part protects against attempts to circumvent the provisions: *Adriatic CA* §165). Nugee LJ recognised that retrospectivity resulted in unfairness.

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- a. The Appellant overlooks the reasons why leaseholders may have been unable to meet service charge demands prior to 28 June 2022. As noted at Murphy WS §170(d), “[i]n many cases, leaseholders were not paying these bills due to being unable to afford them”.
- b. There is in any event no evidence demonstrating that the hypothetical cases relied on by Adriatic were commonplace.

59. **Third**, §9 of Schedule 8 only operates to preclude landlords from recovering legal and other professional costs (whenever incurred) from the date of its commencement. The Court of Appeal rejected the leaseholder Respondents’ submission that §9 should impact on any service charges paid by leaseholders prior to this date, which might re-open transactions that

had taken place decades ago, and had long since been thought to be settled: Adriatic CA §§184-193.

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60. **Fourth**, an assessment of fairness of §9 of Schedule 8 (and by extension the other relevant paragraphs) must be undertaken first by considering the extensive limitations on the scope of their potential application, and then those features of the BSA, and associated Government measures, which further mitigate it.

Adriatic's comparison with other retrospective BSA provisions

61. Adriatic relies on comparisons with other retrospective provisions in the BSA. As to this, **first**, as noted above, the plain wording of §9 of Schedule 8 is supportive of the Secretary of State's interpretation.
62. **Second**, the purposive points made above are critical. Parliament was dealing with the allocation of the costs of remediation and the manner in which that burden should be shared. Purposive coherence suggests that that was an allocation to be dealt with on its merits and not artificially altered by the application of temporal cut-offs which would not shape, or even bear on, those legislative policy decisions. Moreover, there is no convincing answer offered by the Appellants as to why in legislative policy terms, on its case, some provisions were retrospective (and thus involved making provision for the allocation of the costs burden as just indicated) and others were not.
63. **Third**, with each of the specific provisions relied on by the Appellants, there is a clear policy reason why Parliament chose to express the degree of retrospectivity intended, which does not apply to §9 of Schedule 8 or s.124:
- a. **Section 135**: This provision retrospectively extends the limitation period for existing causes of action which had accrued before 28 June 2022 and may have already been statute-barred. It was therefore necessary for Parliament to be clear, at s.135(3) BSA, that "[t]he amendment ... is to be treated as always having been in force". Section 135(3) is designed to achieve the maximum possible degree of retrospectivity and, given that it reopens already-barred causes of action, it was appropriate for Parliament to include an ECHR safeguard in s.135(5), reflecting the fact that the compatibility of s.135(3) BSA invariably turns on the facts of each case.¹⁶ In contrast: §9 is less far-

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¹⁶ For example, as Coulson LJ recognised in the Court of Appeal's judgment in URS [2024] 2 WLR 181 at §170, a party might show "*they had destroyed some critical documents which might have provided a defence to the claim under the DPA, because they assumed that under the existing law any*

reaching: see Nugee LJ at §185 of *Adriatic CA*, rejecting the Respondent's preferred interpretation; and s.124 creates an entirely new right to apply to the FTT. Nor was there in either case any need to include an equivalent ECHR safeguard to that found at s.135(5) BSA. §9 is compatible with the ECHR in all cases, so there is no need for a case-by-case human rights safeguard; and respondents to applications under s.124 are suitably protected by the just and equitable threshold for the making of an RCO. MHB/5 58

- b. **Section 130:** This provision does not give rise to a cause of action of itself, but it allows an order to be made extending liability for a range of causes of action (arising for example by statute or in contract or tort) to associated entities. It was therefore appropriate for Parliament to make clear (in s.130(3)) that a BLO could be made in respect of a pre-existing cause of action which had already accrued, including against an entity which had already been dissolved (s.130(5)). Parliament did not consider it necessary to include in §9 of Schedule 8 the "*just and equitable*" test found at s.130(1) BSA (or s.124(1)) because it took the view no service charges falling within scope of the former provision should ever be payable. MHB/3 84
- c. **Section 125:** Similarly to s.130(5), s.125(3) (which has been repealed) made clear that the section could apply where winding up proceedings were on foot at commencement.
- d. **Sections 149 and 150:** express retrospective wording ("*at any time before the coming into force of this section*") was required at "Condition A" at s.149(2) BSA – which forms part of a new cause of action for unsafe cladding products – as the very similarly worded "Condition A" at s.148(2) – which forms part of a new cause of action for unsafe construction products more generally – only operates prospectively ("*at any time after the coming into force of this section*"). Section 150(2) complements s.149 by providing for different limitation periods depending on whether the right of action accrued before or after commencement. MHB/3 99
- e. **§5 of Schedule 8:** The wording at §5 of Schedule 8 to the BSA is more prescriptive because §5(1) identifies the two main components of the "*permitted maximum*" calculation to ensure that it includes both the latest service charge and previous service charges. §5(2) is designed to exclude from the cap service charges that fell due prior to the "*pre-commencement period*" and therefore sets out what kinds of service charges are included. §9 of Schedule 8 does not require this level of specificity. MHB/4 18

relevant claims were statute-barred".

64. **Fourth**, and in any event, it is clear from an overall assessment of the backward-looking provisions in Part 5 of the BSA that Parliament used a range of linguistic techniques to achieve the intended policy effect. Whilst Parliament could have adopted express words for each retrospective provision, this is not the approach it took. For example, in URS the Supreme Court had to look beyond the plain language of s.135 to determine the extent to which Parliament intended this provision should apply retrospectively.

V. THE TRIATHLON APPEAL

Section 124 in Context

- MHB/2 38 65. As Newey LJ recognised at Triathlon CA §164, s.124 imposes a new liability based on defects arising from works undertaken and costs incurred before the BSA was enacted. Section 124 provides a mechanism by which the costs of remediating historical defects may be reallocated. Thus, the observations in URS about the overall aims and purposes of the remediation provisions, including the various backward-looking measures identified at §86 of Lords Hamblen and Burrows’ judgment, are apposite as to its interpretation. In this regard, ss.116–124 and Schedule 8 provide for a coherent and consistent scheme designed to protect leaseholders from the potentially ruinous costs of remediation.
66. The Appellants’ criticism of the Court of Appeal’s reliance on URS (§118) is misplaced. MHB/6 2-63 The observations in URS do not of course determine the outcome of the present appeal. Nevertheless, URS remains highly significant. The Court’s identification of s.124 as one of the principal backward-looking measures in Part 5 forms part of its explanation of the statutory context in which the BSA operates and of its core legislative purposes. It confirms the importance of retrospective mechanisms within the overall legislative scheme, which URS authoritatively describes.
67. The Appellants contend that s.124 lacks express retrospective wording. However, the presumption against retrospectivity can be rebutted by the statutory wording and an overall consideration of context and purpose: see §§32-33 above. The contrasting functions of other provisions which do use express language have been addressed in §§61-64 above. Further, Parliament did not confine the application of s.124 to costs incurred “*at any time after the coming into force of [that] section*” to borrow the language used in other sections deployed in support of the Appellants’ argument. It could have done so, but did not.
68. The temporal ambit of s.124 derives from the definition in s.120 of “*relevant defect*”, a MHB/3 65-366 defect which causes a building safety risk, and which was created in the “*period of 30 years*

ending with the time the section comes in force". No further language is needed to establish that RCOs extend to costs incurred before commencement. The Appellants do not identify any valid reason why, having defined the scope of the RCO mechanism with reference to this backward-looking definition of "*relevant defect*", the mechanism should only apply where costs were incurred in remedying that defect after commencement of the BSA.

69. The Appellants refer to s.116(7) of the Leasehold and Freehold Reform Act 2024 ("**LAFRA**"), which provides that the amendments made to s.124 apply to proceedings already on foot and to costs incurred before as well as after those amendments came into force. They contend that this demonstrates Parliament understood express temporal language to be necessary whenever costs incurred before commencement are to be brought within the scope of s.124. That submission is unsound. MHB/4
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70. Section 116(7) was concerned with the temporal application of the 2024 amendments themselves. Parliament was introducing new language ("*or otherwise in connection with*") and new subsections identifying categories of recoverable costs. It was therefore necessary to specify whether those amendments applied to pending proceedings and historical expenditure. The provision answers that question and no more. It does not assist in determining the meaning of the original enactment. In any event, s.116(7) is entirely consistent with the Secretary of State's interpretation. Parliament proceeded on the footing that s.124 already operated in relation to historical defects and historical costs, and the purpose of s.116(7) was to ensure that the expanded and clarificatory amendments applied equally to existing proceedings and expenditure. MHB/4
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71. Further, the costs and liabilities encompassed by DPA claims (under s.135) and BLOs (under s.130) are potentially materially different from those addressed by s.124(2). A DPA claim requires a claimant to establish a cause of action arising from a dwelling being unfit for habitation on completion and is directed at holding those responsible for defective work to account. A BLO is ancillary to that process, extending existing legal liability to associated entities where it is just and equitable to do so. By contrast, s.124 creates a freestanding contribution jurisdiction. An RCO may be made without proof of fault and against persons who are not themselves responsible for any defect, including landlords and associated persons. Its purpose is therefore broader than merely imposing liability on wrongdoers and associated persons: it enables funding to be obtained for remediation, reallocates the financial consequences of historical building safety defects, and protects leaseholders from bearing those costs. The jurisdiction also extends to categories of expenditure which may

not be recoverable through DPA claims or BLOs at all. For example, there is no dispute that service charges can fall within the scope of an RCO, whereas it is far from clear on what legal basis they could be recovered under the DPA or through a BLO. An RCO therefore fills gaps left by those private law remedies by enabling costs to be recovered where the applicant may have no existing cause of action and the respondent may be under no pre-existing legal liability in respect of the defects.

72. There will, then, at least be a category of costs of which leaseholders would be deprived of recovery were the Appellants correct that RCOs cannot apply to costs incurred before commencement. Even were that not the case, however, it is significant that the venue chosen for RCOs is the generally costs-neutral and more procedurally flexible FTT, which is also the tribunal which manages service charges disputes. Section 124 was intended to provide a route to contribution that avoids “*what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court*”: Triathlon CA per Nugee LJ at §151. For an example of the complexity of such litigation, see Crest Nicholson v Ardmore [2026] EWHC 789 (TCC).¹⁷

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73. There is no good policy reason why leaseholders applying in relation to costs incurred after commencement should use RCOs and the FTT, while those applying in relation to costs incurred before commencement should be required to bring proceedings in the High Court and apply for BLOs. Given Parliament was particularly concerned with protecting impecunious leaseholders – including, as §9 of Schedule 8 demonstrates, from legal costs – it is inconceivable that it intended to send them to the High Court. This is especially so where the just and equitable criterion introduces an element of uncertainty for applicants and therefore the risk of an adverse costs order.

Scope of RCOs

74. The core of the Appellants’ argument is that the purpose of s.124 cannot be to ensure that those responsible for relevant defects are held liable. That is, however, not the only purpose of s.124 upon which the Secretary of State relies. It is also significant that the leaseholder protections identify who is required to pay, in what is essentially a cascade, and that RCOs can unlock funds to allow remediation to take place.

¹⁷ This judgment is under appeal and is due to be heard by the Court of Appeal later this year.

75. The Appellants further contend that s.124 is merely complementary to s.123 and was intended only to fund remediation works carried out after commencement. On that analysis, s.123 supplies the forward-looking obligation to remedy defects and s. 124 merely supplies a funding mechanism for compliance with that obligation.
76. That submission cannot be reconciled with the statutory language. Section 124 is not confined to the costs of complying with a remediation order. Nor does it require that an application under s.123 has been made, or that a remediation order has been or could be granted. It creates a freestanding jurisdiction to order contributions towards costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects. It is a flexible, multi-purpose remedy designed to help bring the building safety crisis to an end.
77. In particular, Parliament deliberately referred to “*costs incurred or to be incurred*”. If s.124 were concerned only with funding remediation still to be undertaken, reference to costs “*to be incurred*” would have been sufficient. The jurisdiction performs both a prospective funding function and a reimbursement function. The Appellants’ contention that it only includes costs incurred after commencement requires words to be read into the section which are not there, as the Appellants concede at §6 of their Written Case.
78. The classes of applicant, beneficiary and respondent are also wider than would be required for a jurisdiction concerned only with financing compliance with a remediation order. An interested person may apply for payment to a specified person, and an RCO may be made against a landlord, a landlord at the qualifying time, a developer or an associated person. That structure is consistent with a freestanding contribution jurisdiction capable of reallocating the financial consequences of historical building safety defects.
79. It is correct that s.124 also facilitates prospective remediation and may operate alongside s.123. But it is not co-extensive with it.

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Parliament’s allocation of liability for RCOs

80. The Appellants’ argument proceeds on the basis that, because blameless persons can be targeted, past landlords cannot be targeted, past tenants cannot apply, and many who are ultimately responsible cannot be targeted, RCOs are not intended to achieve the aim of holding those responsible to account. This is a fallacy. These features do not mean that the policy of s.124 is not as identified by the Court of Appeal, nor that RCOs cannot be made in respect of costs incurred before 28 June 2022. This can clearly be seen from the fact that many of the matters of complaint are also a feature of s.124’s prospective effect.

81. More specifically, the fact that former leaseholders and former landlords do not invariably have standing to apply, and that every former landlord cannot be made the subject of an RCO, is not inconsistent with retrospectivity. Retrospectivity describes the temporal scope of the costs in respect of which the jurisdiction may be exercised. It does not require Parliament to confer standing upon every person historically affected or to make every former participant in the relevant transactions a potential respondent.

82. Parliament was entitled to, and clearly did, define potential respondents to an RCO by reference to current ownership, ownership at the qualifying time, development responsibility and specified associations. That reflects the immediate objectives of securing the remediation of present defects, protecting current leaseholders and providing a workable means of allocating current financial burdens. Those criteria produce an administratively workable jurisdiction and reduce the need for potentially complex inquiries into remote historical ownership.

83. The limitations identified by the Appellants may mean that s.124 does not provide a remedy in every case. That is not unusual. A statutory remedy may pursue a policy without achieving it universally. The relevant question is whether the remedy which Parliament did confer extends to costs incurred before commencement. Limitations on standing and the class of potential respondents do not answer that question.

84. Further, the Appellants' interpretation produces arbitrary results which cannot be reconciled with the overall aims of the legislation and coherence of the wider statutory scheme:

- a. As Nugee LJ considered at *Triathlon CA* §151, in the same way this Court in *URS* MHB/2 36 recognised at §§115-116 there was no good reason to “*penalise*” those developers who had been pro-active in investigating, identifying and remedying defects, and had thereby acted responsibly”, in the s.124 context, “there is no good policy reason why Parliament would have decided to “penalise” leaseholders whose landlords (perhaps at the leaseholders’ own instigation) had acted responsibly and got on with repairs; a fortiori there is no good reason why Parliament should have prejudiced leaseholders who had themselves (possibly at great sacrifice) discharged their service charge debts as opposed to those who had not.”
- b. Nugee LJ at §152 gave a further example of a situation which Parliament could not MHB/2 36 have intended, namely a situation where a “leaseholder who has started paying a large service charge by instalments which straddle the commencement date” is protected

only in respect of some of those costs. Similarly arbitrary distinctions would arise depending on whether the relevant service charges were paid in advance or in arrears where the service charge year straddled the commencement date.

Unravelling completed transactions

85. The Appellants further submit that a retrospective interpretation of s.124 is objectionable because it may interact with historical settlements, judgments or tribunal determinations. They place particular reliance on s.135(6), which expressly protects settled and finally determined claims under the DPA. MHB/3
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86. The comparison is misplaced. Section 135 revives causes of action that would otherwise be barred by limitation. Parliament therefore considered it appropriate to provide expressly that claims already settled or finally determined should remain closed. By contrast, s.124 does not revive an existing cause of action. It creates a distinct statutory contribution jurisdiction exercisable only where the FTT considers it just and equitable to do so.
87. The existence of a settlement, judgment or other concluded transaction may provide a powerful reason why an order should not be made. But it does not follow that Parliament intended to exclude historical costs from the scope of the jurisdiction altogether.
88. Nor does an RCO necessarily re-open or unwind the earlier transaction itself. The prior settlement or judgment remains what it always was. The question is whether, in light of the statutory scheme subsequently enacted by Parliament, it is just and equitable that a party falling within s.124 should contribute towards specified remediation costs.
89. The Appellants again seek to make an argument against retrospectivity by referring to the consequence that the FTT would have jurisdiction to unravel completed transactions. They do not deal with the fact that the possibility of revisiting accounts which may, in any other context, have been settled has been a feature of residential service charge regulation for over half a century, such that it is often meaningless to talk about “*completed transactions*”.
90. Section 27A of the LTA 1985 confers upon the FTT the jurisdiction to determine the payability and reasonableness of service charges. Section 27A(4)(a) provides that no application may be made in respect of a matter which has been agreed or admitted by the tenant. However, as s.27A(5) clarifies, “*the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*”. Thus, payment alone does not mean a landlord is safe from a future application: G&A Gorrara Ltd v Kenilworth MHB/4
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MHB/9 66-968 Court Block E RTM Co Ltd [2024] L. & T.R. 25. Section 27A(6) also interferes with other provisions commonly found in service charge machinery to give certainty to landlords, e.g. by a surveyor serving a certificate expressed to be conclusive. MHB/4 92

91. There is no limitation period for s.27A applications to the FTT. In, for example, Warwickshire Hamlets Ltd v Gedden [2010] UKUT 75 (LC), the leaseholder's s.27A application was made on 27 July 2007 and challenged service charges paid in every year from 1987. An interpretation of s.124 of the BSA which enables applications to be made in respect of costs incurred before commencement is consistent with previous intervention in this area and what is now half a century of established practice.

Consistency with *Adriatic*

92. The Secretary of State's interpretation of s.124 is consistent with her interpretation of Schedule 8. It is noteworthy that the Appellants do not offer an interpretation of Schedule 8 which they say is consistent with their interpretation of s.124.
93. If the *Adriatic* appeal is dismissed, then a retrospective interpretation of s.124 is required to ensure the statutory scheme operates coherently. Nugee LJ recognised this point in Triathlon CA at §154. This is not, as the Appellants would have it, circular. The Court of Appeal correctly concluded that its decisions in *Adriatic* and *Triathlon* were harmonious and reached complementary conclusions which enabled Schedule 8 and s.124 to be interpreted together as part of a coherent whole. MHB/2 36-237

The “Just and Equitable” Criterion

MHB/3 72

94. Finally, any unfairness arising from a retrospective interpretation is significantly tempered by the “just and equitable” criterion in s.124(1). Nugee LJ was correct at §153 of Triathlon CA to describe this as a “safety-valve against unfairness”. MHB/2 36
95. There is no reason why the FTT should not, at the discretionary stage in a case where the RCO relates to costs incurred before commencement, take into account that those costs are service charges, to what those service charges relate, that they were incurred in a historical period, that they were the subject of a settlement, that the landlord may have changed, that a developer may or may not be available to sue, etc. The phrase is untrammelled by any statutory limitation and if the FTT were to decline to make an RCO on such grounds it would not be disapplying a significant element of the scope of s.124. The Appellants argue at §70.2 of their Written Case that “[i]f it is found that Parliament intended section 124 to have MHB/4 5-46

retrospective effect, it is difficult to see how the FTT could properly conclude that it is unfair / not just and equitable to make an RCO in respect of costs incurred before section 124 came into force” and cite the FTT’s decision in support. What the FTT was saying is that something more than the costs simply being incurred before 28 June 2022 is required. It does not require an imaginative respondent to raise arguments about why the historical nature of the costs prejudices them in some way.

96. This is also an exercise which the FTT is particularly well-placed to carry out, given that “*just and equitable*” or the similar “*just and convenient*” appears in its other jurisdictions, such as the limitation of legal costs being part of service charges under s.20C of the LTA 1985 and the appointment of a manager under s.24 of the LTA 1987. The factors that can be taken into account are notoriously wide and defy categorisation.
97. Section 130, as discussed above, uses a different form of drafting to achieve retrospectivity because some causes of action on which it is ultimately based already existed at the date of commencement. By contrast, there is no question of having compromised an RCO before 28 June 2022, because recourse to such did not exist.
98. Thus, the just and equitable criterion can, as the Court of Appeal found, act as a safety valve to mitigate any unfairness.

VI. CONCLUSION

99. For the reasons given above, the Court is invited to:
 - a. Endorse the reasoning of Nugee LJ in Adriatic CA, and Nugee and Newey LJ in Triathlon CA; and
 - b. Reject the Appellants’ submissions in both appeals, which are inconsistent with the language of the provisions in issue, the statutory scheme and Parliament’s overall intention in enacting the remediation provisions at Part 5 and Schedule 8 to the BSA.

**SIR JAMES EADIE KC
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7 October 2026