

IN THE SUPREME COURT OF THE UNITED KINGDOM

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

B E T W E E N:

(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

WRITTEN CASE FOR THE SECOND RESPONDENT

INTRODUCTION

1. The issue to be determined on this appeal is whether a remediation contribution order ('RCO') under section 124 of the Building Safety Act 2022 ('BSA') can be made in respect of costs incurred before section 124 came into force on 28 June 2022. MHB/372-373
2. Each of the First Tier Tribunal ('the FTT'), the Upper Tribunal and the Court of Appeal answered the said question in the affirmative.¹

¹ The procedural history of this RCO application is a little unusual. It was listed to be heard in the Upper Tribunal (Lands Chamber). It became clear during the hearing, however, that the Upper Tribunal had no jurisdiction to make an RCO, so the President and Deputy President of

3. So as to avoid confusion, this Written Case will continue to use the definitions used in the Agreed Statement of Facts and Issues. Further, as with the Appellants' Written Case:

3.1. References to the Judgment of the FTT will take the form 'JFTT'; and

3.2. References to the Judgment of the Court of Appeal will take the form 'JCA';

THE RCO: A NEW REMEDY

4. The RCO was a new remedy created by section 124 of the BSA. Sections 124(1) and MHB/372 (2) describe the RCO jurisdiction as follows:

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

(2) *"Remediation contribution order", in relation to a relevant building, is an order requiring a specified body corporate or partnership to make payments to a specified person, for the purposes of meeting costs incurred or to be incurred in remedying [or otherwise in connection with]² relevant defects or specified relevant defects relating to the relevant building."*

5. The "Interested Persons" who may bring an application for an RCO were listed in MHB/373 section 124(5) of the BSA:

"(a) *the Secretary of State;*

(b) *the regulator (as defined by section 2) [that is, the Building Safety Regulator];*

(c) *a local authority (as defined by section 30) for the area in which the relevant building is situated;*

the Upper Tribunal (Lands Chamber) reconstituted themselves as the FTT. The subsequent appeal to the Upper Tribunal then proceeded in form only. With the consent of all the parties, MHB/198 the Upper Tribunal dismissed the appeal for the reasons given by the FTT, in order to facilitate a swift appeal to the Court of Appeal. See JCA, para [3]

² The text in square brackets was added with effect from 31 October 2024 by sections 116(2) of the Leasehold and Freehold Reform Act 2024. At the time of the trial before the FTT, the amendment had not yet been made. MHB/497

- (d) *a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated;*
- (e) *a person with a legal or equitable interest in the relevant building or any part of it; or,*
- (f) *any other person prescribed by regulations made by the Secretary of State.”*

6. Pursuant to the power in section 124(5)(f), and with effect from 5 August 2003, MHB/373 regulation 2A of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022/859 has provided that the following are also prescribed as an interested person for the purposes of section 124(5):

- “(a) *the Homes and Communities Agency;*
- (b) *the named manager in relation to the relevant building;*
- (c) *the RMC in relation to the relevant building; and*
- (d) *the RTM company in relation to the relevant building.”*

7. The “Specified Persons” who might be subject to an RCO are listed in section 124(3) MHB/372 of the BSA and are limited to a body corporate or partnership that is:

- “(a) *a landlord under a lease of the relevant building or any part of it*
- (b) *a person who was such a landlord at the qualifying time,*
- (c) *a developer in relation to the relevant building, or*
- (d) *a person associated with a person within any of paragraphs (a) to (c).”*

8. The costs for which an RCO might be made are limited to the costs, incurred or to be incurred, in remedying (or otherwise in connection with) relevant defects to relevant buildings.

9. “Relevant Defects” are defined in section 120 of the BSA:

MHB/365-366

“120 *Meaning of “relevant defect” [and “relevant steps”]*

- (1) *This section applies for the purposes of sections 122 to [124]³ and Schedule 8.*
 - (2) *“Relevant defect”, in relation to a building, means a defect as regards the building that—*
 - (a) *arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and*
 - (b) *causes a building safety risk.*
 - (3) *In subsection (2) “relevant works” means any of the following—*
 - (a) *works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;*
 - (b) *works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;*
 - (c) *works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).*

“The relevant period” here means the period of 30 years ending with the time this section comes into force.
 - (4) *In subsection (2) the reference to anything done (or not done) in connection with relevant works includes anything done (or not done) in the provision of professional services in connection with such works.*
- [(4A) “Relevant steps”, in relation to a relevant defect, means steps which have as their purpose—*

³ As originally enacted, the definition applied for the purposes of section 120 to 125. Section 118 of the Leasehold and Freehold Reform Act 2024 repealed section 125 with effect from 24 July 2024.

- (a) *preventing or reducing the likelihood of a fire or collapse of the building (or any part of it) occurring as a result of the relevant defect,*
- (b) *reducing the severity of any such incident, or*
- (c) *preventing or reducing harm to people in or about the building that could result from such an incident.]*⁴

(5) *For the purposes of this section—*

“building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from—

- (a) *the spread of fire, or*
- (b) *the collapse of the building or any part of it;*

“conversion” means the conversion of the building for use (wholly or partly) for residential purposes;

“relevant landlord or management company” means a landlord under a lease of the building or any part of it or any person who is party to such a lease otherwise than as landlord or tenant.”

10. “Relevant Buildings” are defined in section 117 of the BSA to mean, in general terms, *“a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and - (a) is at least 11 metres high, or (b) has at least 5 storeys.”* MHB/356-357

11. Even if all the various definitions and requirements are satisfied, an RCO will only be made if and to the extent that the Court considers it “just and equitable” to do so. The FTT and Court of Appeal concluded that it was just and equitable to make an RCO against the Appellants in respect of the N26 works even though:

11.1. The developer, SVDP, was under the control of the ODA at the time of the initial construction and the subsequent conversion. It was the ODA who benefited

⁴ The text in square brackets was added with effect from 31 October 2024 by sections 116(2) of the Leasehold and Freehold Reform Act 2024. At the time of the trial before the FTT, the amendment had not yet been made. MHB/497

from the construction and subsequent conversion and sale of the blocks on the East Village;

- 11.2. Get Living, and the investors who stand behind Get Living (and, in practice, will have to fund SVDP's and Get Living's liabilities), had no or no substantive involvement with the East Village at the time of the initial construction and the subsequent conversion; and
 - 11.3. The works were being funded and so the RCO was not required to deliver remediation.
12. In doing so, the Court of Appeal provided some guidance, in particular, on the application of the "just and equitable" test in cases where the works were being funded by the Building Safety Fund and the policy of the Act that, in the first instance, developers should pay the costs of remediation works pending recovery from third parties such as designers, architects or contractors.
 13. The Appellants were refused permission to appeal the Court of Appeal's conclusion that the FTT were not wrong to conclude that it was "just and equitable" to make the RCOs sought.

PRINCIPLES OF STATUTORY INTERPRETATION

14. In *R (O) v Secretary of State for the Home Department* [2023] AC 255, at [29] to [31], Lord Hodge DPSC, giving the leading judgment, explained the principles of statutory interpretation in the following oft-cited terms: MHB/1091-1092

“29. *The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context’ (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase*

*or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'*

30. *External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity...*
31. *Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered ..."*

15. Accordingly, when interpreting a statute, the Court starts with the words used by Parliament, but then proceeds in an iterative way, considering the various other

interpretive criteria that might help to demonstrate the meaning of the words that Parliament chose to use to effect its intention. Those interpretive criteria include the following, all of which are likely to be relevant to this appeal:

- 15.1. The purpose of the legislation;
- 15.2. External aids to construction which, in this case, include the Explanatory Notes and the other regulations which contribute to the delivery of Parliament's legislative intention;
- 15.3. The presumption against retrospectivity; and
- 15.4. The possible effects of the rival interpretations and "the presumption against absurdity".

(i) *The Purpose of the Legislation*

16. Lord Hodge's reference in *R(O)* above to the "purpose" of the legislation recognises that Parliament legislates *for a reason*; and, consequently, that the *purpose* of a statutory provision – what it was trying to achieve – will often assist with the construction of that provision. That was emphasised most recently in *For Women Scotland v Scottish Ministers* [2025] UKSC 20; [2026] AC 315. Having quoted the above passage from *R(O) v Secretary of State for the Home Department* with approval, Lord Hodge DPSC, Lady Rose and Lady Simler JJSC addressed the importance of the purpose of the legislation in the following terms:

MHB/872 -
965

MHB/898-
899

"10 In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

"The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a

whole should be read in the historical context of the situation which led to its enactment.”

- 11 *The general approach of focusing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature’s purpose outside the provision in question, including the external aids described in para 30 of R (O) quoted above, must be given significant weight. As Lord Sales JSC has stated in an extra-judicial writing,*

“sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place” (see “The role of purpose in legislative interpretation: inescapable but problematic necessity”, Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024).

Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.”

17. Similarly, in *Bilta (UK) Ltd v Tradition Financial Services Limited* [2025] UKSC 18; [2026] AC 140, at [20] to [22], Lord Hodge DPSC and Lord Briggs JSC, delivering a judgment with which the rest of the Supreme Court agreed, emphasised the importance of the purpose of the statute, and the mischief against which it was directed. MHB/701-702

18. This Written Case will therefore start by considering the purpose of section 124 and its place in the legislative scheme by which Parliament intervened in established landlord and tenant relationships.

(ii) *The Presumption against Retrospectivity*

19. The presumption against retrospectivity was famously explained by the House of Lords in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816 to be based on fairness. At [19] Lord Nicholls explained: MHB/1226-1227

*“The answer to this difficulty [whether section 3 of the Human Rights Act 1998 applies to pre-Act events] lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724:*

“the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.”

20. Similarly, Lord Hope explained, at [98]:

MHB/1228-1229

“Then there is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future on events that have happened in the past does not offend against the presumption. ...”

21. The same point was made by Lord Reed JSC in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] AC 868: MHB/595-596

*“120 In the criminal sphere, the Convention allows only a limited scope for retroactive legislation: the principles encapsulated in the maxim nullum crimen sine lege, nulla poena sine lege are reflected in article 7. The position is different in the civil sphere. Changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even although the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment. The same point could be made in respect of other types of right and obligation of a civil character. As Lon L Fuller observed in *The Morality of Law* (revised ed 1969), p 60: “If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.”*

121 *A distinction might, however, be drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations retrospectively. To the extent that laws of the latter kind may undermine legal certainty more severely, they may be more difficult to justify, but there can be no doubt that justification for such laws sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As Fuller remarked, at p 53:*

“It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.”

22. *Bennion* comments at para 7.14 that:

MHB/1339

- “(2) The strength of the presumption varies from case by case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.*
- (3) The greater the unfairness the clearer the language required to rebut the presumption.”*

and that:

“The presumption against retrospective effect does not operate in isolation of the other interpretive criteria: when considering the presumption it is necessary to consider other factors that may compete with it or support it.”

23. This Written Case will therefore consider the presumption against retrospectivity in the context of the fairness (or otherwise) of the limited retrospective application which the Court of Appeal found section 124 has, and whether that limited retrospectivity is fair in the circumstances.

(iii) *The Explanatory Notes to the Act*

24. As explained by Newey LJ at [31] to [34] of his judgment in *Adriatic Land 5 Ltd v Long Leaseholders of Hippersley Point* [2025] EWCA Civ 856; [2026] 1 WLR 1857 (*‘Adriatic Land’*), section 124 (and Schedule 8) to the BSA were introduced into the Bill at a fairly late stage in its passage through Parliament. The Explanatory Notes to the Bill which were published in April 2022, after the introduction of what became sections 116 to 125 and Schedule 8, bear little relation to the Explanatory Notes to the Act that were published in July or August 2022 (at least as far as those provisions are concerned). The Explanatory Notes are therefore admissible only as a relevant form of *contemporanea expositio* (that is, an exposition of the contemporary understanding of the Act and its meaning), much like an academic article or a textbook. This Written Case will make only passing reference to the Explanatory Notes. MHB/514-516
25. Carrying somewhat greater weight are regulations that were made by the Secretary of State shortly after the Bill was enacted. As explained by Lord Sales JSC in *Regina (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594, at [45], “*When the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, ..., it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament.*” This Written Case will, therefore, consider the Building Safety (Leaseholder Protection) (Information etc) (England) Regulations (SI2022/859) (*‘the LPI Regulations’*). The LPI Regulations were made on 20 July 2022 by the Secretary of State for Levelling Up, Housing and Communities, and came into force on 21 July 2022, three weeks and two days after 22 June 2022. MHB/1109 MHB/470

(iv) *The Possible effects of the Rival Interpretations*

26. The Court must have regard to the consequences of the rival interpretations – see *Bennion, Bailey & Norbury on Statutory Interpretation* (2026) 9th ed, para 10.7. When assessing the consequences of the rival interpretations, Parliament is assumed to want to avoid “absurd” consequences. In *Regina (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594, Lord Sales JSC explained, at [43], that: MHB/1352-1354 MHB/1108-1109

“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 v McCool [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore JSC), citing a passage in Bennion on Statutory Interpretation, 6th ed (2013), p 1753. See now Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 13.1(1): “The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature.” As the authors of Bennion, Bailey and Norbury say, the courts give a wide meaning to absurdity in this context, “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”. The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), “The strength of the presumption ... depends on the degree to which a particular construction produces an unreasonable result”. I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity.”

27. The passage in *Bennion* to which Lord Sales JSC was there referring remains in the current, 9th edition, at paragraph 13.1. This Written Case will make repeated references to the consequences for developers, landlords, management companies and tenants in the event that section 124 is or is not retrospective to the limited extent for which the Respondents argue. MHB/1369
-1374

THE APPLICATION OF THESE PRINCIPLES

(i) The Language of Section 124

28. It is clear that Section 124 is intended to apply to “*costs incurred or to be incurred*”; that is, that it is intended to look backwards from the point at which it is invoked as well as forwards. It is equally clear that the Act does not expressly state that it applies to “*costs incurred (including costs incurred before the commencement of the Act) or to be incurred*”. That is the ambiguity to be determined.
29. When considering the language of the Act, it is important to have regard to the nature of the costs that might, in principle, be recovered via an RCO. The form of section 124 in force at the time of the trial before the FTT provided that an RCO could only be made in respect of the costs of remedying *relevant defects*. Although section 124 is now somewhat wider, it remains the case that the costs must be costs of remedying or otherwise connected with *relevant defects*. That is significant because section 120 BSA provides that, with one limited exception, a relevant defect arises out of something done or not done during “*the relevant period*” (being the period of 30 years ending on 28 June 2022). The one limited exception is where the defect arises out of works done *after the relevant period* in an attempt to remedy a relevant defect (which must ultimately have arisen as a consequence of something done or not done during the relevant period).
30. The RCO remedy is therefore targeted at a specific problem arising out of a limited period of time. It follows that section 124 was not a provision which Parliament expected to have an indefinite and continuing lifespan and influence. As time passes, fewer and fewer RCOs will be made. Similarly, as time passes, Schedule 8 and the LPI Regulations will be invoked less and less. It is submitted that this is relevant when the Court considers:
- 30.1. Whether Parliament really intended to exclude a proportion of landlords, RTM companies, management companies and/or tenants from the protections provided to other landlords, RTM companies, management companies and/or tenants solely because of when the costs of remedying relevant defects were incurred; and

30.2. The degree of unfairness that would result from concluding that an RCO can be made in respect of costs incurred prior to 28 June 2022, provided always that it is just and equitable on the facts of the case for such an RCO to be made.

31. In *Burr v OM Property Management* [2013] EWCA Civ 479; [2013] HLR 29 the Court of Appeal held that, for the purposes of section 20B of the Landlord and Tenant Act 1985, a cost and a liability are separate things and that a liability does not become a “cost” “incurred” until the “obligation to pay has crystallised”. The Court of Appeal did not find it necessary to decide whether that crystallisation arose on presentation of an invoice or demand for payment, or when payment was actually made. Given that the leaseholder protections in Schedule 8, the LPI Regulations and section 124 are so closely connected with the service charge liability of tenants,⁵ it is appropriate to give these words a similar meaning. If that is right, then:

MHB/704-711

31.1. A landlord or management company “incurs” “costs” in remedying relevant defects upon the crystallisation of an obligation to pay for the remediation works, either when presented with an invoice or demand for payment, or when the payment is made; and/or

31.2. A tenant “incurs” “costs” in remedying relevant defects upon the crystallisation of an obligation to pay for the remediation works through the service charge, either when presented with a valid invoice or demand for payment of a service charge, or when the service charge is paid.

(ii) *The Legislative Context in which Section 124 was Enacted and the Purpose of Section 124*

32. In *Adriatic Land* in the Court of Appeal, the Secretary of State adduced evidence from Mr Jonny Murphy, of the Ministry of Housing, Communities and Local Government. That evidence is reflected most clearly in the judgments delivered in *Adriatic Land* by Newey LJ, at [27] to [30], [127] and [130(i)], and Nugee LJ, at paras [151] to [176] and is not considered to be controversial. Nugee LJ referred to these references in JCA at [9]. In that context, the following are particularly relevant:

MHB/513-514

MHB/543-545

MHB/550-556

MHB/199-200

⁵ See paragraphs 32 to 52 of this Written Case, below.

- 32.1. The BSA itself did not receive Royal Assent until 28 April 2022, almost five years after the Grenfell fire;
- MHB/552 32.2. In the meantime, however, the need to repair unsafe residential buildings had already led to very high service charge demands. As Nugee LJ explained in *Adriatic Land* at [159], “*In short the very high costs of remediation resulted in unanticipated and abnormally high service charge demands. These put significant financial strain on leaseholders who were very often unable to meet them, or were only able to do so with great difficulty. That in turn led to a reluctance by landlords to carry out the required works. Many such cases were raised by MPs in Parliament or with ministers, or were the subject of correspondence with the Department; there was also extensive press coverage giving examples of ruinously high bills faced by leaseholders.*”
- MHB/293-294 32.3. In this case, the FTT received unchallenged evidence from three of Triathlon’s shared-ownership tenants as to the very real effects on their lives that the threat of high service charges and the failure to progress repair works had caused. That evidence was summarised at JFTT, paras [231] to [235].
33. Submissions about the background to the BSA were made by the Secretary of State to the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21; MHB/598-694 [2026] AC 409 (*BDW v URS*) and were found to be “*particularly helpful in relation to the background to the BSA, the structure of the BSA and the policy and purpose underlying the BSA in general and section 135 in particular*” – see Lords Hamblen and Burrows JJSC at [78] and [79] to [87]. Whilst the Supreme Court in *BDW v URS* was clearly operating under a misapprehension concerning the Explanatory Notes to the Act (see Newey LJ in *Adriatic Land*, paras [31] to [34]), the discussion by Lords Hamblen and Burrows JJSC of the background to and purpose of the BSA (from paragraphs [78] to [90]) plainly did not turn on the Explanatory Notes; the Explanatory Notes are not mentioned in those passages at all. At [86], and without having referred to the Explanatory Notes, Lords Hamblen and Burrows JJSC concluded in *BDW v URS* that: MHB/642-644 MHB/514-516 MHB/641-645 MHB/643-644
- “*Section 124 sits within a broader suite of “leaseholder protections” at sections 116 to 124 of, and Schedule 8 to, the BSA, which provides for a range of new safeguards that ensure owners of “qualifying leases” in*

medium and high-rise buildings are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating.”

34. The BSA was a comprehensive piece of legislation. A large part of the BSA implemented the recommendations made by Dame Hackitt in her Independent Review of Building Regulations and Fire Safety (which were largely forward looking and sought to ensure that nothing like Grenfell could happen again). It is self-evident, however, that the Act goes beyond and was intended by Parliament to go beyond Dame Hackitt’s proposals. As Nugee LJ describes in paras [163] to [175] of his judgment in *Adriatic Land*, Schedule 8 was a Parliamentary intervention in the service charge arrangements in typical landlord and tenant relationships driven by the circumstances which were already being faced by large numbers of people who lived in high-rise residential buildings.

MHB/553-556

35. It is notable that, whilst the protection afforded by paragraphs 3 to 9 of Schedule 8 applies to “qualifying tenants” as defined in the Act, the protection afforded by paragraph 2 of Schedule 8 applies to *all tenants* of a part of a relevant building – even commercial tenants of units in a relevant building.⁶ Where a superior landlord is responsible for relevant defects or is associated with the person so responsible, then *none* of the other tenants in the building are to pay a service charge in respect of the costs of repairing (or otherwise in connection with) those defects.

MHB/417-419

MHB/416-417

36. Of course, if and insofar as tenants were to be relieved by Schedule 8, either in whole or in part, from paying for the necessary repair works via their service charge, then that would leave the persons carrying out the repairs (typically a landlord, a management company or an RTM company) to bear the costs of those works, either in whole or in part – assuming that they had the money to do so. As Nugee LJ recognised at paragraph [176] in *Adriatic Land*, that is the context in which the other relevant legislative interventions took place; sections 123, 124, 130, 135 and 149 of the BSA and the LPI

MHB/556

⁶ There was briefly some doubt as to whether the references to sections 18 to 30 of the Landlord and Tenant Act 1985 in paragraph 10 of Schedule 2 prevented paragraph 2 from applying to commercial tenants. The position was clarified by regulation 10 of the Building Safety (Leaseholder Protections) (England) Regulations (SI 2022/711) which was brought into force on 20 July 2022.

MHB/476

Regulations were enacted to deal with the consequences or potential consequences of Schedule 8.

37. In case the landlord, management company or RTM company obliged to carry out the necessary repairs but unable to charge the costs through the service charge, might consequently be minded not to carry out the necessary works, section 123 introduced Remediation Orders (a much simpler remedy than specific performance of a repairing covenant).

38. The LPI Regulations were made by the Secretary of State for Levelling Up, Housing and Communities and came into force on 21 July 2022. Of particular relevance are regulations 3 to 5:

MHB/472-475

MHB/472

38.1. Regulation 3 applies if a landlord ('the relevant landlord') "*has paid or is liable to pay*" the cost of a relevant measure relating to a relevant defect which, "*but for paragraph 2 of Schedule 8 to the Act would have been payable as a service charge.*" Paragraph 2 applies if a landlord was "responsible for" the relevant defects or associated with someone "responsible for" the relevant defects. Where paragraph 2 applies, no service charge is payable in respect of the costs of relevant measures relating to the relevant defect by any tenant (that is, even non-qualifying tenants). Regulation 3 provides a quick and simple mechanism whereby the landlord who engages paragraph 2 of Schedule 8 can be made to pay those said costs to the relevant landlord.

MHB/416

MHB/473

38.2. Regulation 4 applies if a landlord ('the relevant landlord') "*has paid or is liable to pay*" the cost of a relevant measure relating to a relevant defect which, "*but for paragraph 3 of Schedule 8 to the Act would have been payable as a service charge.*" Paragraph 3 of Schedule 8 applies if a landlord in the title hierarchy satisfies the "contribution condition" which is, in general terms, the net worth of the landlord group. Where paragraph 3 applies, no service charge is payable by qualifying tenants in respect of the costs of relevant measures relating to the relevant defect. Regulation 4 provides a quick and simple mechanism whereby the landlord who engages paragraph 3 of Schedule 8 can be made to pay those said costs to the relevant landlord.

MHB/417

MHB/474-475 38.3. Regulation 5 applies if a landlord “*has paid or is liable to pay*” the cost of a relevant measure relating to a relevant defect which, “*but for paragraphs 4 to 9 and 11 of Schedule 8 to the Act would have been payable as a service charge.*”

MHB/417 Paragraph 4 of Schedule 8 protects qualifying tenants of low value leases from paying any service charge in respect of the costs of relevant measures relating to relevant defects. The other paragraphs provide for caps to the service charges payable by qualifying tenants in respect of the costs of relevant measures relating to relevant defects. Where these provisions apply, regulation 5 provides a quick and simple mechanism whereby the landlord that is left to shoulder the financial burden of the costs of relevant measures relating to relevant defects might share those costs with all other landlords in the title hierarchy in accordance with the formula set out in regulation 5.

39. It is clear that the LPI Regulations are intended to dovetail with the provisions of Schedule 8. Together, therefore, they may be regarded as providing some evidence of how Parliament intended to resolve the “*Who pays?*” question, at least in the first instance. They are relatively blunt measures designed to shift the costs of relevant measures relating to relevant defects away from tenants (and, in particular, away from qualifying tenants) and towards landlords: landlords who are or are associated with the developer; high net worth landlords or landlords generally.

40. Simultaneously, section 124 introduced RCOs. By applying for an RCO, any tenant or any landlord (or anyone with a beneficial interest in any part of the relevant building) might seek to extract a payment from a body corporate or partnership who is the developer (or an associate of the developer) or a landlord in the title (or an associate of such a landlord). The payment might be made to a third party, such as a management company (as in this case) or an RMC or an RTM company. In principle, and subject always to it being just and equitable to make an RCO in the circumstances of any given case, section 124 might therefore be used in various circumstances including the following:

40.1. An RCO might be made to ensure that the person obliged to carry out the works (whether a landlord or management company) receives the funds required (“to be incurred”) to pay for the works;

- 40.2. An RCO might be made to recover for the person obliged to carry out the works (whether a landlord or management company), the costs that they have actually “incurred” in meeting their obligations;
- 40.3. To the extent to which the application of the LPI Regulations might create an unfair (or unjust and inequitable) distribution of the repair costs amongst the current landlords, an RCO might be made to re-arrange that distribution of the repair costs to restore fairness (or to mitigate the unfairness);
- 40.4. Any tenant – including a commercial or non-qualifying tenant – might seek to recover via an RCO a sum equivalent to a service charge that they might have paid in respect of the costs of remedying relevant defects; and/or
- 40.5. A landlord against whom an RCO application has been brought (for whichever of the above reasons) might themselves seek an RCO against another landlord.⁷
41. In practice, the requirement that an RCO might only be made against a body corporate or a partnership is likely to result in RCOs being made only against a *commercial* developer or landlord.
42. Each of (a) disputes as to whether Schedule 8 prevents a service charge from being payable, (b) applications for ROs, (c) appeals against notices issued pursuant to regulations 3 to 5 of the LPI Regulations, and (d) applications for RCOs may only be brought in the FTT. The FTT provides access to justice which is relatively accessible to those without legal training or experience. The disputes listed above will all be heard in the FTT’s “no costs” environment and relatively quickly – at least in comparison with Court proceedings.
43. For present purposes, it is sufficient to observe that these provisions – Schedule 8, the LPI Regulations and section 124 – create a “*hierarchy of liability*”,⁸ with developers (and their associates) at the top of the hierarchy, and landlords (and their associates)

⁷ This is precisely what is happening in EVML’s application in the FTT for an RCO in respect of the costs of the remaining buildings on the East Village: EVML has applied (LON/00BB/BSB/2025/0603) for an RCO against the Appellants; the Appellants in turn have applied (LON/00BB/BSB/2025/0605) for an RCO against Triathlon in respect of the same costs. At the same time, it is understood that SVDP is pursuing “downstream claims”, including against the main contractor, Galliford Try. See JFTT, para [75].

occupying the spaces beneath them but above the residential tenants protected by the provisions of Schedule 8.

- MHB/598-694
44. As has already been observed, without taking the Explanatory Notes to the Act into account, the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21; [2026] AC 409 appears readily to have accepted that section 124 was intended by the government to have retrospective effect; it is one of the four provisions listed at paragraph [86] which are said at paragraph [87] to have such effect.
- MHB/643-644
- MHB/1290-1318
45. In the same context, it is worth noting in passing that it has been decided by the FTT in *Stratford Village Property Holdings 1 Ltd & another v East Village Management Limited* (LON / 00BB / BSD / 2024 / 0601, 0602 & 0603), albeit relying heavily on the Court of Appeal's decision in *Adriatic Land*, that the LPI Regulations apply to costs incurred prior to the commencement of those regulations. Precisely because the LPI Regulations commenced on 21 July 2022 (rather than 28 June 2022), they would fail to dovetail with Schedule 8 in respect of the period from 28 June 2022 to 21 July 2022 unless they applied to payments made in that period. However, there is nothing in the LPI Regulations expressly making that clear; the work is simply done by the words “*has paid*” in the phrase, “*has paid or is liable to pay*”. One would not even proceed to considering whether a service charge in respect of those costs would have been payable but for the provisions of paragraphs 2, 3 or 4 to 9 and 11 of Schedule 8 if a payment made between 28 June 2022 and 21 July 2022 did not at least constitute a payment “*paid*” for the purposes of regulations 3 to 5 of the LPI Regulations.
46. Quite apart from Schedule 8, the LPI Regulations and section 124, the BSA also provided various further remedies facilitating the recovery of the costs of the repair works from the designers or architects or contractors or sub-contractors who might have caused the relevant defects by breaching the legal obligations that they owed when working on the construction or (re)development.
- MHB/392-393
- 46.1. Section 135 extended the limitation period relating to claims under the Defective Premises Act 1972 (‘the DPA’).
- MHB/312-321
- 46.2. Insofar as the use of corporate group structures might otherwise operate to frustrate proper recovery, then section 130 introduced Building Liability Orders

(‘BLO’s) to spread the liability from the body corporate with liability to other specified bodies corporate.

MHB/395-
404

- 46.3. Finally, sections 147 to 151 BSA introduced various new causes of action to hold the manufacturers and sellers of unsafe construction products liable for the losses caused by the use of their products.
47. Claims under the DPA or for BLOs are brought in court, typically the TCC, and involve all the delay, complexity and expense that is commensurate with such complicated construction litigation. Claims under the new causes of action set out in sections 147 to 151 are also to be brought in Court, and, one might suggest, typically in the TCC. Claims on contractual warranties are also typically brought in the TCC. In general terms, commercial landlords and developers are much more likely to have the broader shoulders required to bear the costs (both financial costs and time costs) of pursuing such remedies than qualifying tenants or individual landlords.
48. It is submitted that, when considered in the round, it is clear that Parliament intended Schedule 8, the LPI Regulations and section 124 to provide a relatively straight-forward means by which the immediate burden of the cost of relevant measures in relation to relevant defects might be shifted away from tenants, and in particular, qualifying tenants and individual landlords towards commercial developers and their associates, or high net worth landlord groups, or commercial landlords (or their associates), or otherwise amongst landlords more generally (or their associates) – without the cost and expense of pursuing expensive construction litigation requiring proof of fault. Further, the relative flexibility of section 124 helps to soften the rigidity of Schedule 8 and the LPI Regulations. Taken together, these provisions create a new status quo for that financial burden. Parliament must be presumed to have considered that, in principle, that new status quo was fairer than the alternative that would apply in the absence of legislative intervention.
- 48.1. Sometimes, the financial burden will remain with those on whom it lies pursuant to Schedule 8, the LPI Regulations and section 124; it will not be shifted any further;
- 48.2. In other cases, the person or persons on whom the burden lies as a consequence of the Schedule 8 leaseholder protections, the LPI Regulations and/or section

124 might bring claims against third parties (architects, designers, independent building inspectors or building contractors, for example) and shift some or all the financial burden onto those third parties. In these cases, the status quo created by the Schedule 8 leaseholder protections, section 124 and/or the LPI Regulations is only an *interim* status quo, or a “forward funding” status quo, pending recovery from third parties.

49. Given that the purpose of Schedule 8, section 124 and the LPI Regulations is to re-assign in a relatively straight-forward way the immediate financial burden of necessary remediation works in that way, a conclusion that section 124 can apply to costs incurred prior to 28 June 2022 would not create unfairness. Indeed, quite to the contrary, it would be unfair (and arbitrary, illogical and inconsistent) were section 124 not to have such effect.
- 49.1. It was and has always been important for landlords and management companies to carry out the works necessary to remedy fire safety defects as soon as possible.
- 49.2. In many cases where works were carried out by diligent landlords and/or management companies between 2017 and 2022, those costs will have been demanded from tenants. Some tenants might have paid; other tenants might not.
- 49.3. Sometimes diligent landlords will have been mindful of the effects of passing on those costs to tenants and will not have done so.
- 49.4. Such diligent landlords and management companies, and their tenants, are no less deserving of assistance and protection than the landlords and management companies which, perhaps recalcitrantly, failed or refused to carry out remedial works to their buildings timeously and the tenants of such dilatory landlords and management companies. It would be anomalous, illogical or arbitrary – so much so as to be profoundly unfair – if the protections offered by the LPI regulations and section 124 were not available to the diligent (and their tenants) as much as to the recalcitrant and their tenants, simply by reason of a most unfortunate accident of timing.

49.5. Further, this appeal is concerned only with section 124. If and in the event that it turns out that Schedule 8 and the LPI Regulations do not apply to costs incurred before their commencement, then fairness demands even more strongly that section 124 should. With RCOs,

49.5.1. A tenant, who is unable to take advantage of Schedule 8 by reason of the accident of timing, might be put, in whole or in part, into the position that they would have enjoyed but for that accident of timing (subject always to it being “just and equitable” to do so); and

49.5.2. A landlord, which is unable to take advantage of the LPI Regulations by reason of the accident of timing, might be put, in whole or in part, into the position that they would have enjoyed but for that accident of timing (subject always to it being “just and equitable” to do so).

50. Protection for all – and not just some – individual tenants and landlords is surely what Parliament intended.

51. Support for the argument that Parliament must have intended RCOs to be made in respect of costs incurred prior to 28 June 2022 can be found in the concept of “the qualifying time”. The qualifying time is the beginning of 14 February 2022 – see section 119. That is the date on which the detail of the Government’s intention to protect residential leaseholders at the expense of developers and landlords was first announced. The Act relies on the qualifying time to determine the extent of the leaseholder protections and the reach of section 124. Whether a lease qualifies as a qualifying lease is to be determined as at 14 February 2022 – see sections 119 and 119A. RCOs might be made against those who were landlords *at the qualifying time* (see section 124(3)(b)) and/or those who were associated with developers or landlords as *at the qualifying time* (see sections 121(2), (3), (4) and (5)). The references in section 124 and 121 to the qualifying time are plainly intended to prevent landlords or the associates of developers and landlords from frustrating the intended operation of the Act by entering into transactions between 14 February 2022 and 28 June 2022. It would be most surprising if the Act nevertheless permitted landlords to escape any liability pursuant to section 124 for any costs incurred during the period between 14 February 2022 and 28 June 2022. There was, however, no need to link the costs for which an

MHB/359-
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RCO might be made to the qualifying time because section 124's use of the word "incurred" already ensured that section 124 applied to costs incurred prior to 28 June 2022.

52. Of course, the Appellants might object that, thus far, the discussion of fairness in this Written Case has focussed solely on those *protected* by Schedule 8, the LPI Regulations and section 124, and not on those who lose out, or might lose out, when those provisions are engaged.

(iii) *The Presumption against Retrospectivity and Fairness*

53. The Appellants rely heavily on the presumption against retrospectivity, in particular urging caution at Nugee LJ's reference in his judgment in *Adriatic Land* to the presumption as "*a tool which assists the Court to arrive at the right construction*".⁹ Indeed, they venture (at para [45]) that the presumption is so "*fundamental*" that, as there is nothing in section 124 expressly displacing it, the Court of Appeal were wrong.

MHB/38-39

54. As explained above, it is submitted that the presumption against retrospectivity does not operate with the rigidity that the Appellants suggest. It falls to be considered in the round, in conjunction with all the other interpretive criteria, and the weight which is afforded to the presumption depends on the fairness or otherwise of the nature and extent of the retrospective effect contended for.
55. Insofar as the Appellants suggest that it is unfair for section 124 to permit an RCO to be made in respect of costs incurred prior to 28 June 2022, even in principle and irrespective of the justice and equity of making an RCO in any particular case, EVML responds as follows.

55.1. Section 124 is a narrow and highly focussed provision.

55.1.1. The point has already been made that section 124 is narrowly focussed at only particular costs relating to safety issues arising out of a defined and finite period of time;

⁹ See para 19 of the Appellant's Written Case.

55.1.2. The persons against whom an RCO might be made, are limited such that, in practice, an RCO is likely to shift the burden of repair costs to those with the broadest shoulders.

55.2. In any event, whether it is fair for commercial developers or their associates, or commercial landlords associated with developers (or their associates), or high net worth commercial landlords or landlords generally to shoulder some or all of the costs of remedying relevant defects is, as a matter of principle, entirely independent of when the costs of remedying the relevant defects were incurred. The accident of timing makes no difference to the fairness or unfairness of shifting the financial burden, in whole or in part, onto such commercial developers and/or landlords (or their associates).

56. It is perhaps unsurprising that it makes so little difference to the fairness of re-arranging the financial burden whether that financial burden was incurred before or after 28 June 2022 because making an RCO in respect of costs incurred prior to 28 June 2022 involves only very limited, and entirely benign, retrospectivity. Such an RCO, to use the words of Lord Reed in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] AC 868, at [121], would only “*alter prospectively the rights and obligations arising from pre-existing legal relationships*”. It is therefore submitted that Newey LJ was correct at JCA, para [164] to conclude that an RCO only permitted the imposition of a fresh liability, operating prospectively. MHB/596 MHB/238
57. The Appellants disagree. They suggest at paras [47] to [55] of their Written Case that making an RCO in respect of costs incurred prior to 28 June 2022 can remove or alter already accrued rights. They do so in order to suggest that construing section 124 to permit such an RCO to be made involves greater retrospective effect than Newey LJ suggests at JCA, para [164], and therefore creates greater unfairness, increasing the weight to be given to the presumption. Such a submission is not correct. MHB/39-41 MHB/238
58. It is entirely fair to note that, if an RCO can be made in respect of costs incurred prior to 28 June 2022, a tenant might make an application for an RCO to recover a sum equivalent to that which had already been paid by a way of a service charge in respect of the costs of remedying a relevant defect. It is, in principle, possible that such an application might be made even if an earlier FTT had decided that the service charge

demanded (prior to 28 June 2022) was reasonable in amount and was payable at the time. Such an RCO might have the effect of restoring to the tenant a sum of money equivalent to the service charges paid, and in that superficial and limited sense only, it might be said that the service charge is being “unravelling”.

59. Without in any way engaging in semantic games, however, the making of such an RCO would not *actually* unravel the completed service charge transaction or remove or alter rights to the service charge that had already accrued. It would not involve or require a conclusion that a service charge paid prior to 28 June 2022 had not, in fact, been payable, or should be repaid as a service charge improperly demanded or mistakenly or wrongly paid. Nor would it involve a challenge to any decision that might have been made (prior to 28 June 2022) by an FTT that the service charge was reasonable in amount and was payable. On the tenant’s service charge account, the service charge debt and the discharge of that debt would remain validly entered.
60. In this context, a contrast can be drawn with the position if, as was found in *Adriatic Land*, Schedule 8 applies to a sum that had become payable as a service charge but not yet paid. In such a case, one can see that the application of Schedule 8 might require a debit on a service charge account, that was regarded as due and payable on 27 June 2022, to be reversed or amended on 28 June 2022 in accordance with paragraph 10 of Schedule 8; and for the corresponding entry on the accounts of the landlord or management company to be written off.
61. Further, and dealing specifically with the unfairness of concluding that an RCO might be made in respect of a cost incurred prior to 28 June 2022 in such a way that a tenant might recover after 28 June 2022 a sum equivalent to a service charge that he had paid prior to 28 June 2022:
 - 61.1. It can be assumed that the FTT would not entertain an application that, on the facts of the application, constituted an abuse of process. That is not to say, of course, that it would necessarily be an abuse of process for a tenant to bring such an application. But any abusive applications will not be entertained;
 - 61.2. An RCO might only be made on such an application if it was considered “just and equitable” to do so. The requirement that the making of an RCO be “just and equitable” is an important substantive safeguard against unfairness to the

respondent. It is not inappropriate to consider it something of a “safety valve” in that respect – see paragraphs 76 to 78 below for further submissions on this issue; and

61.3. The body corporate or partnership against whom an RCO is made might themselves seek to obtain an RCO in respect of (some or all) of the same costs in order to distribute the financial burden in a way that is considered to be more just and equitable.

62. In *Batish v Inspired Sutton Limited* (LON/00BF/HYI/2022/0002) (*‘Batish’*) the FTT concluded fairly readily (albeit in the absence of any meaningful opposition) that it was just and equitable to make an RCO permitting the tenants to recover (from the company that had been the developer landlord at the material times) sums equivalent to the payments which the tenants had made prior to 28 June 2022 as service charges in respect of the cost of repairing relevant defects to the relevant building in which they owned flats. This is the RCO jurisdiction operating precisely in accordance with the language of the statute and as intended by Parliament. Concluding that the FTT has jurisdiction to make an RCO such as that made in *Batish* is not so inherently unfair as to suggest that Parliament cannot have intended it. MHB/124 9-1270

63. In order to demonstrate the unfairness that might arise *in this case*, the Appellants comment in paragraph 51 that QDDAV might now regret releasing, by the settlement of 8 January 2020, the Department for Culture, Media and Sport (*‘DCMS’*) from the warranties that were given to QDDAV by the ODA; that QDDAV “*could ... have acted differently had they had advance notice of the changes.*” QDDAV may now regret surrendering their ability to seek an indemnity from DCMS (or, indeed, acquiring an asset (SVDP) that has turned out (by reason of the introduction of the BSA) to be an onerous asset). However, MHB/40

63.1. That submission focusses on the wrong fairness / unfairness question; and, in any event

63.2. It was fair to make the RCOs in this case.

The Wrong Fairness Question

63.3. The issue on the appeal is whether Parliament intended that an RCO might be made in respect of costs incurred prior to 28 June 2022. The unfairness or potential unfairness that is relevant to the question of statutory interpretation is therefore whether it is unfair (for example, to QDDAV) to conclude that an RCO can be made in respect of costs incurred prior to 28 June 2022. Whether it was or might be considered unfair (for example to QDDAV or the Appellants) to provide in the BSA for remedies that shift the costs of remedying relevant defects onto developers (and their associates) and/or landlords (and their associates) is irrelevant to the narrow question of statutory interpretation at issue.

63.4. The RCOs made in this case demonstrate that clearly. They were made in respect of costs incurred *both* before and after 28 June 2022, albeit that the balance is very much towards the latter than the former. They are all costs incurred in respect of the same project to work up and deliver a scheme to remediate the N26 buildings and, in the meantime, to mitigate the consequences should a building safety risk occur (for example, the costs of a waking watch and fire evacuation officers). In respect of other buildings on the East Village the balance between costs incurred before and after 28 June 2022 might be entirely different. In principle, however, and as the N26 costs for which an RCO was made in this case demonstrates, whether costs are incurred prior to or after 28 June 2022 is entirely independent of whether a respondent to an RCO might have behaved differently prior to 28 June 2022 if it had advance notice of the provisions of section 124. The only exception would be were a respondent to suggest that, if it had advance notice of the provisions of section 124, it would have chosen to incur or to cause its tenants to become liable for costs prior to 28 June 2022 *in order to try to avoid the potential for an RCO to be made*. However,

63.4.1. Either the costs will have been incurred prior to 28 June 2022, in which case it might be thought fair for the FTT to have jurisdiction to make an RCO were it otherwise just and equitable to do so; or

63.4.2. The costs will not have been incurred prior to 28 June 2022, in which case the provisions of section 124 will apply in any event.

63.5. The suggestion that a respondent to an RCO application might have acted differently prior to 28 June 2022 had it foreseen the introduction of section 124 (and the particular example given is of QDDAV’s settlement with the ODA) is actually an argument that goes to the “just and equitable” question. If the facts were such that it was considered not to be just and equitable to make an RCO in respect of costs incurred prior to 28 June 2022 because of something that happened prior to 28 June 2022 (or before 14 February 2022), then an RCO would not be made.

It was Fair to make the RCOs on the facts of this Case

63.6. Whilst it might be stating the obvious, it is important to recognise that both the FTT and the Court of Appeal concluded that, on the facts of this case, it was just and equitable to make an RCO against the Appellants, even if it meant that, in practice, QDDAV and the investors behind QDDAV would be paying the costs – see, generally, JFTT at [187] and [188] and JCA at [115] to [121]. QDDAV’s release of its rights as against DCMS was taken into that account in reaching that conclusion – see generally JFTT at [254] and JCA at [120]. The Appellants were refused permission to appeal that conclusion. This case must therefore be regarded as an example of a case in which it was fair to make an RCO in respect of costs incurred prior to 28 June 2022.

MHB/285

MHB/227-228

MHB/298

MHB/228

64. Finally, the example the Appellants suggest at paragraph 52 of their Written Case, that an RCO in respect of costs incurred prior to 28 June 2022 might act to circumvent a settlement that might have been reached as between a developer on the one hand and a leaseholder or landlord on the other, is precisely the sort of situation in which one can envisage argument as to the just and equitable test. That there might be argument in such a case as to the justice and equity in making an RCO is not a reason to conclude that Parliament intended that an RCO might *never* be made in respect of any costs incurred in any circumstances prior to 28 June 2022.

MHB/40

65. For those reasons, the need to avoid unfairness does not compel the Court to conclude that Parliament cannot have intended for an RCO to be made in respect of costs incurred prior to 28 June 2022. Even if, contrary to the submission above, the Appellants are correct that an RCO made in respect of costs incurred prior to 28 June 2022, might

(albeit only in certain circumstances) remove or alter already accrued rights, that does not create such inherent and inevitable unfairness as to compel the conclusion that Parliament cannot have intended to permit such an RCO to be made.

(iv) Other features of Section 124 that are said by the Appellants to indicate that Parliament cannot have intended RCOs to be made in respect of costs incurred prior to 28 June 2022

66. Between paragraphs 56 and 68 of their Written Case, the Appellants then consider various other features or limitations of the RCO remedy which they submit indicate that Parliament cannot have intended RCOs to be made in respect of costs incurred prior to 28 June 2022. In truth, all these features indicate the limited nature and purpose of the RCO remedy as discussed in paragraphs 32 to 52 of this Written Case above. They are not a defect with the RCO remedy, or an indication that Parliament did not intend an RCO to be made in respect of costs incurred prior to 28 June 2022. They are deliberate features of the RCO remedy that indicate its place in the comprehensive legislative response to the very real crisis that had been created by the realisation, post Grenfell, that there were large numbers of unsafe high-rise residential buildings requiring very expensive remediation works. The point has already been made¹⁰ that the Act's reliance upon the concept of the qualifying time demonstrates its determination not to let landlords and associates of landlords wriggle out of the liabilities which the Act was trying to impose upon them.

MHB/41-45

An RCO can be made against a blameless person

67. The making of an RCO neither requires nor imports blame on the part of the respondent against whom the order is made. That is because, as explained above, an RCO is intended to be a relatively straight-forward means by which to ensure that the costs of remedying relevant defects are borne, at least pending any claims against third parties, by commercial developers and their associates or (other) commercial landlords rather than by qualifying tenants and/or the landlord(s) on whom the repairing obligations otherwise fall. As has been explained, developers sit at the top of the hierarchy of liability and qualifying tenants sit at the bottom of the hierarchy of liability with landlords (including intermediate landlords) sitting between them. An RCO might be made if it is "just and equitable" to do so, and there might be myriad circumstances in

¹⁰ See paragraph 51 of this Written Case, above.

which a Court might consider it just and equitable for an RCO to be made against a developer, a current landlord or an associate of one of them. Similarly, there might be myriad circumstances in which a Court might consider it not to be just and equitable for an RCO to be made against a developer, a current landlord or an associate of one of them.

68. The Appellants refer specifically to the fact that, if an RCO can be made in respect of costs incurred prior to 28 June 2022, then an RCO might, in principle, be made in respect of the relevant costs of repairing a relevant defect sometime during the 30 year period that ends on 28 June 2022. They suggest that it cannot be fair to expose a current landlord (or someone who was a landlord on 14 February 2022) to such a potential liability. Leaving aside the evidential complications that might arise in an RCO application relating to such truly historic costs, it is notable that there have not (yet) been any reported RCO applications made in respect of remediation costs incurred prior to the Grenfell tragedy of 2017. Even in such a case involving historic costs,

68.1. It might nevertheless be just and equitable for an RCO to be made against *the developer* – who might then pursue such remedies as he might have against his design and construction team;

68.2. One can see that it might or might not be just and equitable to make an RCO against a *current landlord*. Given the “just and equitable” safety valve, however, it is not obviously and necessarily unfair to conclude that an RCO can be made in respect of costs incurred prior to 28 June 2022.

69. In this general context, it is of some relevance that there is no limitation period applicable to applications to the FTT pursuant to section 27A of the Landlord and Tenant Act 1985 and the FTT’s jurisdiction to determine whether a service charge is payable (in respect of a previous accounting year) and, if so, in what amount. Service charges from previous years paid and not paid can be considered (and, if appropriate, amended); the only limitation on the FTT’s jurisdiction is that set out in section 27A(4). MHB/491

MHB/4
91-494

An RCO cannot be made against past landlords

70. It is correct that an RCO cannot be made against past landlords who might have actually received service charge contributions in respect of the costs of remedying relevant

defects before 28 June 2022, and before disposing of their interests to new, incoming landlords. Again, that is by design. RCOs are not intended to be a means by which to unravel or reverse a service charge payment. They are intended to be a relatively blunt but straight-forward means by which to ensure that the costs of remedying relevant defects are borne, at least pending any claims against third parties, by commercial developers and their associates or (other) commercial landlords rather than by tenants and/or the landlord(s) on whom the repairing obligations otherwise fall. The commercial developers and their associates or (other) commercial landlords are likely to be best placed to bear the financial burden of such costs and/or to pursue remedies against the design or construction team at fault for the defects.

An RCO cannot be applied for by past tenants or landlords

71. It is correct that former tenants or landlords cannot apply for an RCO. In general terms, former tenants who have been able to sell their flats were not having their lives blighted by the crisis which came to light in 2017. Whilst it might be possible to imagine exceptions for whom that might not be the case – for example, someone who could only move on by selling their flat for a massive reduction in price (realistically, to a cash buyer) – that only demonstrates that the protections provided by Schedule 8, the LPI Regulations and section 124 are fairly blunt in their effect. It is submitted, however, that their intended effect is clear.
72. Similarly, a former landlord who has sold its reversionary interest is not affected by the crisis. If it carried out works prior to 28 June 2022, which works would now be regarded as relevant measures in relation to relevant defects, then it will probably have put those costs through the service charge to the extent that it was able to do so. Even if it was unable to do so (or for some reason chose not to do so), such a landlord is not the person which Parliament intended to protect by the suite of measures to be found in Schedule 8, the LPI Regulations and section 124.

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

73. It is, of course, correct that an RCO cannot be made against the architects, designers, building contractors or sub-contractors who might be most “responsible” for the relevant defects. Pursuing such persons is simply not the function of an RCO. Section

135 (which extends the limitation period for claims under the DPA) and section 130 (which provides for BLOs) facilitate claims against such persons (and their associates).

- MHB/416-417
74. However, it is clear that the BSA regards developers as being “responsible for” any relevant defects in the buildings that might be found in their development – see the language and effect of paragraph 2 of Schedule 8 and regulation 3 of the LPI Regulations. It is submitted that it is not hard to understand why Parliament might have taken that approach. It is not, in principle, unfair for someone who undertakes or commissions works for the purposes of selling flats (inevitably for a profit) to bear the financial cost of defects created by those works. Given that the immediate cost of remediation (pending any recovery from architects, designers, building contractors or sub-contractors) might otherwise be borne by tenants or landlords who did not profit from or control the works, it might plainly be just and equitable for developers to bear that financial burden (pending any recovery by the developer). MHB/472
75. For those reasons, these features of section 124 – the fact that an RCO is a limited remedy, which is available only to a small class of persons and might only be made against a small class of persons in respect of matters arising out of a limited period of time – is no reason to conclude that Parliament did not intend to give the FTT jurisdiction to make an RCO in respect of costs incurred prior to 28 June 2022 when it was just and equitable to do so. Indeed, for the reasons explained above – at paragraphs 32 to 52 of this Written Case – it would not be logical for its provisions to apply only to costs incurred after 28 June 2022, and not prior to 28 June 2022.

(v) *The just and equitable “safety valve”*

76. A key feature of section 124 is that an RCO might only be made if the FTT considers that it is “just and equitable” to do so. It is submitted that Nugee and Newey LJ were correct to consider that the “just and equitable” requirement constitutes a “safety-valve” against unfairness. Neither Schedule 8 nor the LPI Regulations have any equivalent provision. MHB/236 MHB/238
77. It is obvious that provisions that shift or otherwise re-arrange financial burdens that would otherwise fall in accordance with arrangements into which parties have freely entered might, in some cases and depending on the specific facts, produce unfairness. Multiple submissions made in this Written Case are qualified by reference to the just

and equitable test. Further, the RCO remedy itself might be regarded as a “safety valve” resolving any unfairness that might otherwise flow from the operation of Schedule 8 and the LPI Regulations.

78. Accordingly, the Appellants have to argue that the “just and equitable” requirement would have to operate all the time to prevent an RCO being made in respect of costs incurred prior to 28 June 2022; alternatively that it would be wholly ineffective to prevent the inevitable unfairness of an RCO being made in respect of costs incurred prior to 28 June 2022. They seek to do so in paragraph 70 of their Written Case. Taking their arguments in turn:

MHB/45-47

- 78.1. The need for a safety valve does not show the unfairness of retrospectivity. The need for a safety valve is explained above. The safety valve itself applies to all RCO applications, and not just those made in respect of costs incurred prior to 28 June 2022. It cannot therefore be inferred that the very fact of the “just and equitable” test shows that the making of an RCO in respect of costs incurred prior to 28 June 2022 is inherently unfair.

- 78.2. The quote from JFTT, paras [281] and [282] reflects only the following:

MHB/304

- 78.2.1. That the making of an RCO is not necessarily and inherently unfair solely because it relates to costs incurred prior to 28 June 2022. “*Something more is required.*” That can be demonstrated by this case in which there is no practical difference between the fairness of – or justice and equity in – the making of the RCO in respect of the costs incurred by EVMML after 28 June 2022 and the making of the RCO in respect of the costs incurred by EVMML before 28 June 2022.

- 78.2.2. That the FTT recognised that there might be some circumstances – some case in which there is “*something more*” – in which it would not be just and equitable to make an RCO in respect of costs incurred prior to 28 June 2022.

- 78.3. It has already been shown that the making of an RCO in respect of a service charge demanded and paid prior to 28 June 2022 would not unravel a completed transaction. It might permit a tenant to recover from his landlord a sum

equivalent to a service charge that he had paid prior to 28 June 2022; but there is nothing *inherently* unfair about that. In some case it might be unfair (and so not just and equitable); in others not.

78.4. It cannot fairly be said, therefore, that it will often or usually be unfair (and so not just and equitable) to make an RCO in respect of costs incurred prior to 28 June 2022. There is, therefore, no reason to believe that Parliament intended that FTTs would often or usually invoke the just and equitable requirement to decline to make RCOs in respect of costs incurred prior to 28 June 2022.

78.5. The points made about sections 130 and 135 are responded to below, at paragraphs 82 and 83.

(vi) The Broader Statutory Scheme, in particular sections 125, 130, 135, 149, 150, 151 and paragraph 5(2) of Schedule 8

79. The points made between paragraphs 70.5 and 88 of the Appellants' Written Case are the high-water-mark of their case. It is indeed unfortunate that section 124 did not state expressly that an RCO might be made in respect of costs incurred before as well as after commencement. However, the comparisons that the Appellants make with other provisions of the BSA are not sufficient to compel the conclusion that Parliament did not intend section 124 to apply to costs incurred prior to 28 June 2022. The alternative provisions on which the Appellants rely are of an entirely different nature to section 124: they are either anti-avoidance provisions or they are provisions with a much more substantive retrospective effect than anyone suggests section 124 might possibly have. That difference reduces the strength of the comparison which the Appellants seek to make. MHB/46-51

80. Paragraph 5(2) of Schedule 8 is a limited anti-avoidance provision. Paragraph 5 imposes a cap on the sums that are payable as service charges for the cost of a relevant measure in relation to a relevant defect. Paragraph 5(2) provides that, when applying the cap, one is to take into account service charges that might have been paid in respect of the same relevant measure in the previous five years. MHB/418

81. Section 125 permitted RCO-like orders to be made in the context of the winding up of a company. It was, again, an anti-avoidance measure: it only applied when there *were* a company. MHB/374-375

relevant defects and when a landlord was being wound up. It sought to prevent the landlord group from avoiding liability by winding up the landlord company.

82. Section 130 is another anti-avoidance measure. The very purpose of a BLO is to prevent the use of thinly capitalised corporate vehicles – which might already have been dissolved – from frustrating the enforcement of those vehicles’ liability for relevant defects. Further, the new remedy created by section 130 does not stand entirely on its own terms (as section 124 does). Whilst the liabilities to which section 130(3)(b) applies can only have arisen after 28 June 2022, the liabilities to which section 130(3)(a) applies are liabilities under statutes that were in force prior to 28 June 2022 and therefore might have existed prior to 28 June 2022. In those circumstances, it is unsurprising that the Parliamentary draftsmen went out of their way to clarify that section 130 was intended to apply to liabilities that existed before as well as after its commencement. MHB/384-385
83. The retrospective change made by section 135 was dramatic; much more so than the limited retrospective effect of section 124, or indeed any of the other provisions in which express reference is made to periods pre-commencement. That is because it was obvious that the extension of a limitation period *into the past* had the potential to throw up all sorts of issues: it created the possibility that statute barred claims might become enforceable again; it had implications for parties who might have entered into full and final settlements of all claims, known or unknown, that might lie between them. In those circumstances, it is entirely unsurprising that the Parliamentary draftsmen exercised particular care to balance the rights of all those who would be affected by the extension, in particular with sections 135(5) and 135(6). MHB/392-393
84. Sections 149 and 150 create a new statutory cause of action intended to permit claims to be brought against those who contributed to the cladding crisis over the previous 30 years (a) by failing to comply with a cladding product requirement in relation to a cladding product, or (b) by making misleading statements when marketing a cladding product or (c) by manufacturing a defective cladding product. By definition, Condition A can *only* be satisfied by things done or not done prior to commencement of the Act. The limitation period applying to the new cause of action is similar to that in section 135. Even though the cause of action is a new one, and therefore there is no need for provisions equivalent to sections 135(5) and (6), the potentially retrospective effect is MHB/399-402

far greater than that suggested for section 124. It therefore makes sense that more work needs to be done to make it clear that such retrospectivity is intended.

85. As for the amendments made to section 124 by section 116 of the Leasehold and Freehold Reform Act 2024, section 116(7)(b) only applies to the amendments made by section 116; it does not apply (or purport to apply) to those provisions of s. 124 that already exist and survive the amendments. What section 116(7)(b) therefore does is to ensure that the amendments being inserted into section 124 have *the same scope as the original parts of section 124 that survive the amendments*. That being the case, it is relevant that section 116(7)(b) simply provides that the amendments apply “*to costs incurred before as well as after those amendments come into force*”; and does not make it clear that the amendments do not apply to costs incurred prior to 28 June 2022. Section 116 of the Leasehold and Freehold Reform Act 2024 is therefore an indication that section 124 was intended to apply to costs incurred prior to 28 June 2022. MHB/498

(vi) *The Alternative Routes to Redress and Accountability for which the BSA makes provision*

86. Much of what is said in the Appellants’ Case between paragraphs 89 and 114 proceeds on an unduly narrow understanding of the purpose of section 124. The Appellants consider that “*the function of section 124 ... can be seen as providing a means of funding the cost of remediating relevant defects...*” (para [110]); that, “*The purpose of section 124 was to facilitate the remediation of work that remained to be carried out from 28 June 2022 onwards*” (para [111]). It is therefore argued that, where works have been carried out – or are otherwise being funded – there is no place for RCOs. There is therefore no need to find that an RCO might be made in respect of costs incurred prior to 28 June 2022; the works will have been carried out. The Appellants justify that narrow understanding of the purpose of section 124 by suggesting: MHB/51-61 MHB/59 MHB/59

86.1. That those who might be respondents to an RCO application – commercial developers and commercial landlords – are “largely blameless”;¹¹ and

¹¹ See paragraph 100 of the Appellants’ Written Case.

- 86.2. That the routes for holding the blameworthy to account are the other remedies provided or made more available by the BSA: DPA claims, BLOs, claims against the manufacturers of cladding products and so on.
87. Latent within these submissions by the Appellants is something of a collateral challenge to the conclusion of the Court of Appeal – a conclusion from which the Appellants were refused permission to appeal – that it was “just and equitable” to make an RCO against them. Neither SVDP nor Get Living were more to blame for the costs incurred after 28 June 2022 than for the costs incurred prior to 28 June 2022. Trying to link RCOs by reference to the blameworthiness or otherwise of those against whom an RCO might be made is wrong in principle.
88. Further, it must be emphasised that the Appellants’ narrow understanding of the role or purpose of RCOs has not been shared by the Courts thus far. In particular, in each of the following cases, the RCOs made were not required in order to fund the works:
- 88.1. *Batish* – as explained above, the works had been funded through service charges demanded and paid prior to 28 June 2022; MHB/124 9-1270
- 88.2. *Triathlon Homes* – as explained in JFTT, para [215], the N26 works were funded by the Building Safety Fund to such an extent that the FTT was confident that the making (or not) of the RCO would not affect the completion of the works; MHB/291
- 88.3. *Hel favour Limited v Rosco Ingo Limited* (‘1-9 Planetree Path’) (LON/00BH/BSB/2024/0500) – By this RCO application, the tenants sought to recover the costs of works (albeit relatively minor works) that had been carried out. MHB/127 1-1289
89. Additionally, there is no reason to believe that Grey GR Limited would not have complied (and been able to comply) with the Remediation Order made in *Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership* (CAM/26UH/HYI/2022/0004) had it not succeeded with its RCO application in *Edgewater (Stevenage) Limited v Grey GR Limited Partnership* (‘Vista Tower’) [2026] UKUT 18 (LC). Certainly Grey’s ability to fund the works was not an issue before the FTT or the Upper Tribunal in the RCO applications. MHB/781-871

90. In this context, it must also be recognised that RCOs might be made not just in respect of the costs of *repair* (or service charges in respect of the costs of repair), but also the costs of mitigating the damage that might be incurred in the eventuality that a building safety risk materialises (or service charges in respect of the costs of such mitigation). In *Triathlon Homes*, the FTT considered (at JFTT, para [84]) that an RCO might be made in respect of, “*the costs of providing a waking watch and of employing fire evacuation officers to assist residents with limited mobility in the event of a fire, and the costs of installing, servicing and decommissioning additional fire alarms and heat detectors as a temporary measure while remediation works are awaited.*” The RCO made in this case makes provision for such costs. The point has since been put beyond any doubt by the amendments made by section 116 of the Leasehold and Freehold Reform Act 2024. MHB/268
91. Finally, that is not what section 124 says. The section does not refer to or limit the making of an RCO to cases in which the RCO is required to fund the cost of remediating relevant defects. Nor is that the natural meaning of the words of the statute (“*incurred or to be incurred*”), when considered in their proper context. This Written Case has already developed the submission that RCOs are one of a triumvirate of legislative measures that, together, are intended to provide a relatively blunt but straight-forward re-arrangement or shifting of the *immediate* financial burden of repair works away from tenants (particularly qualifying tenants) and towards landlords and their associates, pending recovery from those who might ultimately be responsible for the defects. That re-arrangement does not turn on concluding that commercial landlords are more blameworthy than individual landlords, say; it turns on the recognition that it is more appropriate for the financial burden to lie, at least initially, with commercial developers (or their associates), high net worth landlords or commercial landlords (or their associates) than individual tenants or individual landlords. Indeed, before the Court of Appeal, the Appellants did not dispute the general proposition that “*the policy of the Act is that primary responsibility for the costs should fall on the original developer.*” – see JCA, para [69]. MHB/216
92. For those reasons, the Appellants’ understanding of the purpose of section 124 is overly narrow. That being the case, the fact that the BSA also provides other means to achieve redress, including from developers, designers, architects, contractors or sub-contractors

is not a reason to conclude that section 124 was not intended to have retrospective effect. The whole purpose of Schedule 8, the LPI Regulations and section 124 is to try to limit the extent to which tenants (and particularly qualifying tenants), individual landlords and, albeit to a lesser extent, other landlords, might feel compelled to pursue such expensive and protracted remedies.

93. Contrary to the suggestion at paragraph 113 of the Appellant's Written Case the MHB/61 Appellants' explanation at paragraph 112 of the rationale for the BSA would be MHB/60 objectionable and profoundly unfair.

93.1. Those tenants who, by reason of an unfortunate accident of timing and their own diligence and good faith, have paid a service charge in respect of remediation works prior to 28 June 2022 are left to choose between bearing that cost (which might be a very substantial cost) or pursuing expensive, protracted and risky remedies against defendants with deep pockets in the hope of making recovery;

93.2. Those landlords who, by reason of an unfortunate accident of timing and their own concern to do the right thing and remediate the buildings for which they are responsible, prior to 28 June 2022, without charging their tenants, are left to choose between bearing that cost (which might be a very substantial cost) or pursuing expensive, protracted and risky remedies against defendants with deep pockets in the hope of making recovery;

93.3. In contrast,

93.3.1. Those tenants who did not "incur" any service charges in respect of those remediation works because, by a happy accident of timing, the landlord did not carry out such works are protected by Schedule 8, whether or not *Adriatic Land* is upheld:

93.3.2. Any tenants who are regarded as not having "incurred" any service charges in respect of those remediation works because they refused to pay service charges that were validly demanded of them and fell due prior to 28 June 2022:

93.3.2.1. In the event that *Adriatic Land* is upheld, need to do nothing;

93.3.2.2. If *Adriatic Land* is not upheld, then they will be able to pursue an RCO;

93.3.3. Any tenants who are regarded as having “incurred” any service charges in respect of those remediation works because they were validly demanded of them and fell due prior to 28 June 2022:

93.3.3.1. In the event that *Adriatic Land* is upheld, need to do nothing;

93.3.3.2. If *Adriatic Land* is not upheld, then they will be unable to pursue an RCO either and must either bear that cost (which might be a very substantial cost) or pursue expensive, protracted and risky remedies against defendants with deep pockets in the hope of making recovery;

93.3.4. Those landlords who delayed incurring the costs of remediation works for years until after 28 June 2022 can pursue RCOs against developers.

94. Indeed, tenants, including qualifying tenants, able to take advantage of (and so protected by) section 124 might live alongside other tenants, including other qualifying tenants, not able to take advantage of (and so not protected by) section 124 in the same block of flats.

95. None of that can possibly have been Parliament’s intention.

(vii) *The Explanatory Notes*

96. Although their weight is limited, it remains relevant that the Explanatory Notes to the Act, published shortly after the Act was enacted, suggest that the scope of the RCO remedy was intended by Parliament to extend to costs incurred prior to 28 June 2022. At paragraph [1012] they state as follows:

MHB/465

“As discussed above, freeholders and landlords will have new liabilities to pay for remediation costs under Schedule 8. Remediation contribution orders will allow landlords to seek to recover these costs from the building’s developer by applying to the Tribunal for an order against the developer. Similarly, 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.

(emphasis by underlining added)

97. Whilst the Explanatory Notes might be no more than a commentary by the civil service on what Parliament did by the BSA, rather than contemporaneous evidence of what it was intending to do, it is notable that the Explanatory Notes were published at about the same time as the LPI Regulations were made (and, indeed, the Building Safety (Leaseholder Protections) (England) Regulations (SI 2022/711)). It is submitted that it is appropriate to give them some meaningful weight in the interpretation process.

(viii) The Relationship between this Appeal and Adriatic Land

98. The Court of Appeal's decision in *Adriatic Land* gives Schedule 8 a genuinely, albeit limited, retrospective effect. An accrued right – an enforceable debt – that a landlord might have had on 27 June 2022 became no longer payable on 28 June 2022.
99. However, the submissions in this Written Case are independent of the correctness of the Court of Appeal's decision in *Adriatic Land*. If the decision of the Court of Appeal is upheld, then where a service charge in respect of the cost of remedying a relevant defect fell due prior to 28 June 2022:
- 99.1. Pursuant to *Adriatic Land*, tenants who were unable or had refused to pay on time would be protected by the provisions of Schedule 8; but
- 99.2. Pursuant to section 124, tenants who did pay on time would be protected by their right to seek an RCO in a sum equivalent to their service charges.
100. On the other hand, if the appeal in *Adriatic Land* succeeds, and Schedule 8 does not protect tenants in respect of service charges that became payable but were not paid prior to 28 June 2022, then that would be all the more reason to find that section 124 applied to costs incurred prior to 28 June 2022 because then both the tenant who paid and the

tenant who did not would have to rely on an RCO for relief from the financial burden of the costs recovered pursuant to the service charge.¹²

(ix) *The Supreme Court's Decision in BDW v URS*

101. The Appellants submit that the judgment of Lords Hamblen and Burrows JJSC “*cannot be determinative of the outcome of this appeal*”. EVML makes no such submission. However, as already observed above, the discussion of the general background to and purpose of the BSA that was given by Lords Hamblen and Burrows JJSC between paragraphs [78] to [90] of their judgment did not once mention the Explanatory Notes; rather it appears to have been very heavily influenced by the submissions made by the Secretary of State. Their conclusions are not just to be disregarded because, elsewhere in their judgment, they were operating under a misapprehension.

MHB/641-645

102. Further, although the Appellants criticise¹³ the Court of Appeal for referring so frequently to *BDW v URS*, the references made are measured and are references that cannot fairly be said to have been qualified or undermined by the misapprehension concerning the Explanatory Notes.

102.1. Nugee LJ refers to *BDW v URS* at JCA, paragraph [69], as having confirmed the general proposition that, “*the policy of the Act is that primary responsibility for the costs should fall on the original developer.*”

MHB/216

102.2. Nugee LJ refers to *BDW v URS* repeatedly between paragraphs [144] to [150] as having provided a “*carefully considered statement*” that section 124 should be given a retrospective interpretation.

MHB/233-235

102.3. Newey LJ agrees at paragraphs [162] and [166].

MHB/237-238

(xi) *Anomalies and Fairness*

103. The Appellants conclude by suggesting that concluding that an RCO can be made in respect of costs incurred prior to 28 June 2022 would create several “anomalies”.

¹² The position that would apply if both the *Adriatic Land* and the *Triathlon Homes* appeals succeed has already been set out at paragraph 93 of this Written Case.

¹³ See paragraphs 119 and 120 of the Appellants’ Written Case.

MHB/63

- 103.1. The first proposed anomaly is nothing of the kind. If, on the facts of the case, it was concluded that it was “just and equitable” for an RCO to be made in the circumstances hypothesised (using an RCO in an attempt to re-open a prior, full and final settlement), then it would not be an anomaly, or otherwise unfair, for the RCO to be made. On the other hand, nothing that has been said in *Triathlon Homes* in the Court of Appeal might be said to have given any indication that an RCO *would* be made in such circumstances. The possibility of argument on the point in a particular case is no reason to conclude that section 124 was not intended to apply to costs incurred prior to 28 June 2022 as much as to costs incurred after 28 June 2022.
- 103.2. The second suggested anomaly is nothing of the sort. That the costs might be shifted to a developer without proving that the developer was at fault (in the sense that the developer breached obligations that it owed pursuant to the DPA, for example) is a *feature* – and an essential feature at that – of the BSA scheme. Such costs will, of course, only be shifted if it is just and equitable to do so.
- 103.3. The third suggested anomaly, considering the difference between the two hypothetical groups of tenants who both paid service charges prior to 28 June 2022, simply highlights that Schedule 8, the LPI Regulations and section 124 are a blunt and somewhat imperfect solution. However, the anomaly does not turn on when the costs were incurred and the service charges were paid and/or the applicability of RCOs to costs incurred prior to 28 June 2022. Rather, the anomaly highlighted by this hypothetical scenario turns on the fact that former tenants are unable to make applications for an RCO.
- 103.4. The fourth suggested anomaly is also nothing of the sort; again, it misunderstands the nature and role of RCOs. As explained above, a leaseholder who brings an RCO application in respect of a service charge paid is not “recovering their service charge” from the landlord to whom it is paid. They are shifting the financial burden from themselves to their commercial landlord – because that is a more appropriate place for it to lie (pending any potential recovery from third parties pursuant to a DPA claim).

103.5. The fifth suggested anomaly is fanciful in practice. The fire safety issues identified with high rise residential buildings in the UK following Grenfell constituted such a crisis because there had been no prior awareness of the scale of the defects and the breadth of the crisis. In practice, it is therefore most unlikely that major works to repair fire safety defects would have been carried out during the relevant period. But, if for some reason, such a case can be found, it is no real anomaly for any remaining leaseholders to be entitled at the very least to bring an application for an RCO and try to persuade the FTT that it would be just and equitable to make an RCO.

CONCLUSION

104. For all these reasons, it is respectfully submitted that this appeal should be dismissed.

104.1. The Appellants misunderstand the nature of the RCO as a remedy and its place in the scheme of the Act that seeks, initially, to protect individual tenants and landlords at the expense of developers (and their associates) and corporate landlords (and their associates);

104.2. It would be profoundly unfair – so much so that it can be concluded that it was not Parliament’s intention – if tenants who paid service charges prior to 28 June 2022 and/or landlords who chose not to pass on such costs prior to 28 June 2022 were denied the opportunity to rely on section 124;

104.3. In contrast, the Appellants are unable to identify any unfairness that would result from concluding that, in principle, and subject to it being “just and equitable to do so”, an RCO might be made in respect of costs incurred prior to 28 June 2022. As this case demonstrates, there is nothing inherently more unfair about making an RCO in respect of costs incurred prior to 28 June 2022 than an RCO in respect of costs incurred after 28 June 2022;

104.4. The Appellants wrongly dismiss the contribution that the “just and equitable” requirement makes to the overall fairness of the RCO provision;

104.5. Concluding that an RCO might be made in respect of costs incurred prior to 28 June 2022 would be very much at the benign, unobjectionable end of the

spectrum of retrospectivity; in particular it does not permit the removal or loss of accrued rights;

104.6. The other provisions of the BSA that are said to provide expressly for retrospectivity are all provisions of an entirely different nature and do not, therefore, provide any indication that section 124 was not intended to apply to costs incurred prior to 28 June 2022;

104.7. The suggested anomalies that the Appellants have identified if RCOs can be made in respect of costs incurred prior to 28 June 2022 are, in fact, nothing of the sort.

8 October 2026

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