



But for and retrospectivity: another Building Safety Act story for appeal

It seems that the Upper Tribunal will soon be considering Regulation 3 of the Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2022/859 (“Regulation 3”), specifically how the “but for” test is to apply where there is a Building Safety Fund grant and whether Regulation 3 has retrospective effect.

What is Regulation 3?

In essence, Regulation 3 becomes relevant where a landlord has paid or is liable to pay for the cost of a relevant measure relating to a relevant defect, and the landlord is unable to recover that cost from leaseholders because of paragraph 2 of Schedule 8 to the Building Safety Act 2022 (the “but for” test). That provision states that a leaseholder does not have to pay in respect of relevant measures if a relevant landlord is responsible for the relevant defect or is associated with a person responsible for a relevant defect. Under Regulation 3, the landlord can recover that cost from the person who was the landlord as at the beginning of 14 February 2022 and was responsible for the defect or was associated with the person responsible for the defect. They can also recover that cost from the person who on or after that point in time became the owner of that landlord’s, or superior landlord’s, interest.

The way they do so is by giving notice as to the amount, together with the prescribed information. There is a right to appeal to the FTT within 30 days and Regulation 3 sets out two possible grounds of appeal: (a) that the remediation amount does not represent the cost of the relevant measure; or (b) that the person who sent the notice is not a responsible landlord.

What happened in the FTT?

Stratford Village Property Holdings 1 Limited & Anr v East Village Management Limited (LON/ooBB/BSD/2024/0601 and BSA/2025/0002 and 0003) was heard by the FTT in November 2025 and its decision was given in January 2026. There were 5 issues for the FTT to decide.

1. Does the FTT have jurisdiction to decide matters about the validity of a Regulation 3 notice, which do not concern the two grounds of appeal specifically enunciated in Regulation 3? (Or is the FTT limited to the grounds expressly listed and do other challenges have to be made in the courts?)



2. Is the “but for” test made out where there is also a Building Safety Fund grant in play, the terms of which also restrict the landlord from recovering from leaseholders? (Or is it not made out because the landlord is in fact actually also prohibited from recovering against the leaseholders by this other factor?)
3. Can the notice make the recipient liable for future/contingent costs?
4. Can the notice make the recipient liable for costs paid prior to the coming into force of the Regulations?

The FTT answered as follows:

1. The FTT has jurisdiction. First, the FTT would have to consider that the Regulations are applicable and that a notice is valid and was validly served in order to determine any challenges under the two specified grounds of appeal. Secondly, the FTT being a single forum for disputes is in kilter with the structure of the 2022 Act and provides a more straightforward remedy. Thirdly, given the short period of time for appealing any notice, it would be strange if a recipient had to quickly put in grounds of appeal but then ask for an immediate stay whilst the court examined validity of a notice.
2. The “but for” test is made out. The fact of other funding is anticipated by the grant: other funding would result in a repayment of a proportionate part of the grant. A Building Safety fund grant is not final and generally requires the landlord to use reasonable endeavours to pursue others. There is of course a public interest in the public not having to pay for work when there is a well-resourced commercial entity which can be made liable. That recoverability of a service charge might otherwise be restricted by contract or law is not relevant.
3. The sums recoverable are only extant liabilities. As new liabilities arise, further notices can be served. Or a remediation contribution order application can be made under which the FTT’s jurisdiction is more flexible.
4. Costs incurred prior to the commencement of the Regulations can fall within Regulation 3, unless the Supreme Court takes a different view to the majority of the Court of Appeal in *Adriatic*. In *URS*, the Supreme Court already accepted that retrospectivity is central to achieving the aims and objectives of the Building Safety Act 2022.



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What next?

On 13 March 2026, the FTT gave permitted to appeal on the issues relating to the “but for” test and retrospectivity. This would appear to be the first time that the Upper Tribunal has had to consider the Regulations in proper detail. Human rights challenges form part of the grounds of appeal: Article 1 of Protocol 1 re peaceful enjoyment of possessions and that there be no deprivation of possessions except in the public interest and subject to the conditions provided for by law. It will also be interesting to see whether the Upper Tribunal waits for the Supreme Court to give its view on *Adriatic*, given how central that case was to the FTT’s determination on the retrospectivity issue.

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