



Neutral Citation Number: [2025] EWCA Civ 856

Case No: CA-2024-000196

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Mr Justice Edwin Johnson, Chamber President
[2023] UKUT 271 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2025

Before:

LORD JUSTICE NEWHEY
LORD JUSTICE NUGEE
and
LORD JUSTICE HOLGATE

Between:

ADRIATIC LAND 5 LIMITED	<u>Applicant/ Appellant</u>
- and -	
LONG LEASEHOLDERS AT HIPPERSELY POINT	<u>Respondents</u>
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT	<u>Intervener</u>

Simon Allison KC, Malcolm Birdling and Mattie Green (instructed by **Fieldfisher LLP**) for
the **Appellant**

Mark Loveday and Hugh Rowan (instructed by **Velitor Law**) for the **Respondents**
Sir James Eadie KC, Michael Walsh KC, Jason Pobjoy KC, Camilla Chorfi, Will Perry
and **Richard Miller** (instructed by **The Treasury Solicitor**) for the **Intervener**

Hearing dates: 17, 18 and 21 March 2025
Further written submissions: 27 May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 08 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Newey:

1. The question raised by this appeal is whether the Building Safety Act 2022 (“the BSA”) prevents the appellant, Adriatic Land 5 Limited (“Adriatic”), from recovering service charges from tenants of a building it owns in respect of certain costs which it had incurred before the relevant provisions of the BSA came into force. The Upper Tribunal held that it does. Adriatic now challenges that decision in this Court.
2. In the same week that we heard this appeal, we heard another relating to the BSA: *Triathlon Homes LLP v Stratford Village Development Partnership* (CA-2024-001256) (“*Triathlon*”). By an order dated 14 October 2024, Lewison LJ directed that the two appeals should be heard sequentially by the same constitution. While, however, there is some overlap between the cases, they raise distinct issues. We have therefore written separate judgments for each matter.
3. On 21 May 2025, the Supreme Court gave judgment in *URS Corporation Ltd v BDW Trading Ltd* ([2025] UKSC 21, [2025] 2 WLR 1095) (“*URS*”), in which one of the issues was whether section 135 of the BSA applied to the facts of that case. The parties to both the present appeal and *Triathlon* filed written submissions addressing potential implications of that decision.

Basic facts

4. The building at issue is Hippersley Point in Abbey Wood, London. Hippersley Point was constructed in about 2015 by Development Securities (Abbey Wood) Limited, a subsidiary of Land Securities plc. It has 10 storeys, is more than 18 metres in height, and contains both a commercial unit (on the ground floor) and 32 residential flats which are the subject of long leases.
5. Adriatic was registered as the freehold proprietor of Hippersley Point on 12 April 2017. A witness statement made on behalf of Adriatic by Mr Eyvind Andresen explains that the company holds residential freehold and long leasehold assets and is a subsidiary of entities whose purpose is to issue securities to liability driven investors (pension funds and life insurance companies) so that the investors can receive the long-dated inflation-linked income for which long leases provide. Mr Andresen further explains that the total ground rent payable for Hippersley Point as a whole is at present £9,250 per year. In a second witness statement, Mr Andresen estimates Adriatic’s financial interest in the building, having regard to the limited rents to which it is entitled and the value of the long leases held by tenants, at 2.52%.
6. In the latter part of 2020, it emerged that substantial remedial works were required to deal with defects in the external construction of Hippersley Point which gave rise to fire risk. Interim fire safety works were needed, too.
7. As would be expected, the leases of the flats at Hippersley Point all include service charge provisions. However, section 20 of the Landlord and Tenant Act 1985 (“the L&TA 1985”) barred Adriatic from recovering more than £250 per flat by way of service charge as regards the requisite works unless the “consultation requirements” prescribed by the Service Charges (Consultation Requirements) (England) Regulations 2003 were either complied with or dispensed with.

8. Adriatic applied to the First-tier Tribunal (Property Chamber) (“the FTT”) for the consultation requirements to be dispensed with in respect of the works. In a decision dated 20 December 2021, the FTT acceded to that application. The FTT explained in its decision that “the building is presently unsafe in terms of fire risk” and that it was “simply not an option to delay works to unsafe premises”. It therefore had “no hesitation in confirming that dispensation should be given unconditionally”. It added, however:

“The Tribunal does ... consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. It is considered that they would be unlikely to do this however the Tribunal makes such a determination pursuant to section 20C of the Landlord and Tenant Act 1985.”

9. Following a request for a review of its decision, the FTT substituted the following in a revised decision dated 30 June 2022:

“The Tribunal does ... consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. This is because dispensation is essentially a forbearance by the Tribunal and it would be unfair for the landlord to recover costs from any of the leaseholders living at Hippersley Point in the present case. Although not all of the leaseholders raised objections the Tribunal were satisfied that those that did were making general submissions which applied to all leaseholders. Accordingly, the dispensation is given on condition that the Applicants are prohibited from seeking their costs of this application from the leaseholders at Hippersley Point.”

The FTT thus reversed its order under section 20C of the L&TA 1985 but instead made dispensation conditional on Adriatic not being entitled to recover costs of the dispensation application from tenants.

10. Adriatic sought permission to appeal to the Upper Tribunal (Lands Chamber) against the costs condition. The Deputy President, Martin Rodger KC, granted permission, but he pointed out that an issue arose as to the possible application of paragraph 9 of schedule 8 to the BSA, which had come into force on 28 June 2022.
11. The appeal came before Edwin Johnson J (“the Judge”), the Chamber President. In a decision dated 13 November 2023 (“the Decision”), he concluded that the FTT’s imposition of the costs condition could not be upheld. He also, however, concluded that paragraph 9 of schedule 8 to the BSA applied, with the result that Adriatic could not recover any of the costs of its dispensation application from tenants with “qualifying leases” within the meaning of section 119 of the BSA. The Judge summarised his conclusions as follows in paragraph 180 of the Decision:

“(1) The decision of the FTT to impose the Costs Condition was wrong in law, both as a matter of procedure and as a matter of substance. For the reasons which I have set out, the decision cannot be upheld as lying within the

legitimate scope of the discretion which the FTT were exercising.

- (2) By virtue of Paragraph 9, and for the reasons which I have given, the Costs are not recoverable, by the Service Charge, from those of the Respondents who hold qualifying leases within the meaning of Section 119. The Reviewed Decision was, for this reason, incomplete. The Costs were not recoverable in any event from those of the Respondents who hold qualifying leases. In this context I should also repeat that it does not seem to me that it would be fair to criticise the FTT for this omission.”

12. In the meantime, Adriatic had been informed in June 2023 that Land Securities, as the original developer of Hippersley Point, had agreed to manage and fund all “life-critical fire safety works necessary for your building” pursuant to the “Developer Remediation Contract” (as to which, see paragraph 36 below).

The Building Safety Act 2022

13. The BSA’s long title identifies one of the purposes of the Act as “to make provision about the safety of people in or about buildings and the standard of buildings”. Part 5 of the BSA, comprising sections 116-160, contains, as its heading states, “Other provision about safety, standards etc”. Section 116(1) explains that sections 117-124 and schedule 8 “make provision in connection with the remediation of relevant defects in relevant buildings”.
14. Schedule 8 to the BSA is introduced in section 122. As section 122 states, schedule 8:
- “(a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and
 - (b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it).”

Subject to certain exceptions, a “relevant building” is “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”: see section 117(2). “Relevant defect” is defined by section 120(2) to refer to “a defect ... 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”. By respectively section 120(5) and section 120(3), “building safety risk” is “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” and “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" is specified as the period of 30 years preceding the coming into force of section 120: see section 120(3).

15. Paragraph 2 of schedule 8 to the BSA provides that no service charge "is payable" under a lease of premises in a relevant building in respect of a "relevant measure" (i.e. a measure taken to remedy a defect or a "relevant step" taken in relation to a defect) relating to a relevant defect if the landlord or any superior landlord at the beginning of 14 February 2022 "(a) is responsible for the relevant defect, or (b) is associated with a person responsible for a relevant defect". For the purposes of paragraph 2, a person is "responsible for" a defect if:

- "(a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;
- (b) in any other case, the person undertook or commissioned works relating to the defect."

16. Unlike paragraph 2, paragraphs 3-9 of schedule 8 to the BSA apply only in relation to "qualifying leases". By section 119(2), a lease is a "qualifying lease" if:

- "(a) it is a long lease of a single dwelling in a relevant building,
- (b) the tenant under the lease is liable to pay a service charge,
- (c) the lease was granted before 14 February 2022, and
- (d) at the beginning of 14 February 2022 ... —
 - (i) the dwelling was a relevant tenant's only or principal home,
 - (ii) a relevant tenant did not own any other dwelling in the United Kingdom, or
 - (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease."

A "relevant tenant" is a person who was a tenant under such a lease at the beginning of 14 February 2022: see section 119(4)(c). Where, however, a dwelling was at that point let under two or more leases to which subsection (2)(a) and (b) apply, "any of those

leases which is superior to any of the other leases is not a ‘qualifying lease’’: see section 119(3). (For completeness, I should mention that a new section, section 119A, was added by the Levelling-up and Regeneration Act 2023 to extend the protection for leaseholders where a “qualifying lease” has been extended, varied or replaced by a new lease.)

17. Paragraphs 3-9 of schedule 8 to the BSA all serve to relieve tenants with “qualifying leases” from liability for service charges. By paragraph 3, no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the net worth of the landlord’s group at the beginning of 14 February 2022 was more than a specified multiple of £2 million (the “contribution condition”). By paragraph 4, no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the value of the qualifying lease at the beginning of 14 February 2022 was less than either £325,000 (in the case of property in London) or £175,000 (elsewhere). By paragraph 5, a service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect “is payable” only in so far as service charges over a period extending back five years have not exceeded the “permitted maximum” set by paragraph 6. By paragraph 7, a service charge which would otherwise be payable under a qualifying lease “is payable” only in so far as service charges over the previous 12 months have not exceeded the “permitted maximum”. By paragraph 8, no service charge “is payable” under a qualifying lease in respect of the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system, and is unsafe.
18. Finally, paragraph 9 of schedule 8 to the BSA provides:
 - “(1) No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.
 - (1A) Sub-paragraph (1) does not apply to the extent that the service charge is payable to a management company in respect of legal or other professional services provided to the company in connection with an application or possible application by the company for or relating to a remediation contribution order under section 124.
 - (2) In this paragraph the reference to services includes services provided in connection with—
 - (a) obtaining legal advice,
 - (b) any proceedings before a court or tribunal,
 - (c) arbitration, or
 - (d) mediation”

19. At the times relevant to this appeal, however, paragraph 9 of schedule 8 to the BSA did not include paragraph 9(1A). That was inserted later, by the Leasehold and Freehold Reform Act 2024.
20. Paragraphs 2-4, 8 and 9 of schedule 8 to the BSA are supplemented by paragraph 10. Paragraph 10(2) states:
- “Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing—
- (a) no costs incurred or to be incurred in respect of that thing (or in respect of that thing and anything else)—
- (i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge payable under the lease, or
- (ii) are to be met from a relevant reserve fund;
- (b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly (and any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise).”
21. Returning to the body of the BSA, the following are noteworthy at this stage:
- i) Section 123 empowers the Secretary of State to provide by regulations for the FTT to make “remediation orders” requiring relevant landlords to remedy defects;
- ii) Section 124 empowers the FTT, if “it considers it just and equitable to do so”, to make “remediation contribution orders” requiring specified bodies corporate or partnerships to make payments for the purpose of meeting costs “incurred or to be incurred” in remedying defects. By section 124(3), a body corporate or partnership may be specified only if it 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)”;
- iii) Section 130 empowers the High Court, “if it considers it just and equitable to do so”, to make an order providing for a body corporate which has been associated with another body corporate to share a liability which the latter has incurred under the Defective Premises Act 1972 (“the DPA 1972”) or section 38 of the Building Act 1984 (“the BA 1984”) or as a result of a building safety risk;

- iv) Section 135 extended the limitation period for claims under section 1 or 2A of the DPA 1972 or section 38 of the BA 1984; and
 - v) Section 149 introduced a new liability in respect of cladding products which have rendered buildings or dwellings in them unfit for human habitation.
22. Section 121 of the BSA explains when a partnership or body corporate is “associated” with another person for the purposes of sections 122-124 and schedule 8.

The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022

23. The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (SI 2022/859) (“the 2022 Regulations”) were made in July 2022 in the exercise of powers conferred by the BSA. While regulation 2 makes provision in relation to remediation orders, regulations 3, 4 and 5 enable landlords who are unable to recover service charges from their tenants as a result of schedule 8 to the BSA to pass on costs to other landlords.
24. Regulation 3 of the 2022 Regulations allows a landlord who 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 BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “responsible” landlord(s). By regulation 3(8), the “responsible” landlord is:
- “(a) the person who, at the beginning of 14th February 2022, was the landlord of the tenant referred to in paragraph (1) or any superior landlord and was on that date—
 - (i) responsible for the particular relevant defect to which the relevant measure relates; or
 - (ii) associated with a person responsible for that relevant defect; or
 - (b) the person who, on or after 14th February 2022, became the owner of that landlord’s, or superior landlord’s, interest.”
25. Regulation 4 of the 2022 Regulations allows a landlord who 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 BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “contributing” landlord. By regulation 4(7), the “contributing” landlord is the person who is “the landlord under the qualifying lease referred to in paragraph (1) provided that they met the contribution condition in paragraph 3 of Schedule 8 to the Act on 14th February 2022” or “after 14th February 2022 became the owner of that landlord’s interest”.
26. Regulation 5 of the 2022 Regulations applies where a landlord has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraphs 4-9 and 11 of schedule 8 to the BSA, would have been payable as a service charge by

a tenant under the lease. In such a case, each landlord under any lease in the building is liable to pay a share of the cost.

The origins and development of the BSA

27. The BSA has its origins in the fire which tragically engulfed Grenfell Tower in west London on 14 June 2017. The fire spread rapidly because aluminium composite material had been used in external cladding. Following the fire, it came to be appreciated that many other buildings had the same type of cladding or other cladding that was flammable. Further fire safety issues were also identified, as were certain structural safety defects. Early last year, the Ministry of Housing, Communities & Local Government (“the Department”) estimated the total cost of remedying unsafe cladding on buildings in England over 11 metres in height at £16.6 billion. In January 2022, it had estimated that the mean cost of cladding remediation was £59,000 per flat in the case of a building of more than 18 metres and £27,000 with a building of 11 to 18 metres. It was further estimated that additional costs of £60,000 would result in 21% of leaseholders having negative equity and 34% being in financial stress. To make matters worse, as has been explained by Mr Jonny Murphy of the Department in a witness statement:

“The increased risk associated with these buildings and the potential for significant liability to sit with leaseholders – in some cases exceeding the amount paid for the property – also caused the lending market to freeze, meaning that leaseholders could not sell their properties and were in effect trapped. This was because leaseholders in impacted buildings could not sell to those who needed a mortgage, as mortgage lenders (banks and building societies) would not lend until after a building had been remediated.”

28. The Bill which became the BSA was introduced to Parliament on 5 July 2021. At that stage, the principal purpose of the Bill was to give legal effect to recommendations which had been made in a 2018 report by Dame Judith Hackitt on building regulations and fire safety. The Bill also included (to quote Mr Murphy):

“some measures to protect leaseholders and improve redress in respect of historical building safety defects, namely by retrospectively extending the limitation period under section 1 of the Defective Premises Act 1972 claims from six to 15 years (so that leaseholders would be better able to recover the costs of putting work right from those who caused the problem) and by requiring landlords to explore alternative cost recovery before passing costs on to leaseholders.”

29. On 10 January 2022, the Government announced that it had “reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced

for the first time what became sections 116-125 of the BSA and schedule 8 to it. (Section 125 has since been repealed by the Leasehold and Freehold Reform Act 2024.)

30. The Building Safety Bill received Royal Assent on 28 April 2022 and most of the provisions in Part 5 came into force automatically two months later, on 28 June 2022, by virtue of section 170(3).

Explanatory notes

31. In, it seems, July 2022 (or possibly August 2022), the Government published explanatory notes in respect of the BSA, as by then enacted. The notes in respect of section 122 of the BSA include this:

“984 Schedule 8 makes provision for service charge payments in respect of relevant defects not to be payable by leaseholders in certain circumstances. By limiting or preventing altogether the amounts that are payable in respect of these defects from being passed on to the leaseholders through the service charge, leaseholders are protected from the costs associated with their remediation.

985 Schedule 8 removes the existing legal presumption under most leases that leaseholders are liable in full for the costs associated with remediating relevant defects. The Schedule and powers contained within it make provision for liability to sit in the first instance with landlords who are deemed to be responsible for the creation of those defects, and then with landlords that can afford to meet the costs in full. Where neither of these circumstances applies in respect of any relevant landlord, the Schedule provides for an equitable spread of costs, commensurate with a party’s likely ability to contribute to costs, by allowing for capped leaseholder contributions to be recovered (up to ‘the permitted maximum’) in certain circumstances; and for relevant landlords to be liable for any amounts that are not recoverable from leaseholders.

986 The Schedule sets out that, in relation to historical building safety defects, ‘no service [charge] is payable’ in certain circumstances, and in other circumstances that the service charge is only payable if it ‘does not exceed the permitted maximum’ The protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents. This means that, even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the

provisions set out in the Schedule. In practice, this means that managing agents and landlords will need to rescind service charge demands issued prior to commencement where they relate to historical building safety defects. Where landlords are entitled to recover some costs from leaseholders according to the Schedule, they will need to issue new service charge demands which comply with the provisions set out in the Schedule.”

32. In relation to paragraph 9 of schedule 8 to the BSA, the explanatory notes say:

“1758 The terms of many leases will allow for landlords to pass legal and other professional costs through the service charge. The purpose of Schedule 8 is to protect leaseholders from costs associated with historical building safety defects. Where landlords incur costs in connection with their new liabilities under the Act, this paragraph prevents these costs incurred by landlords from being passed to leaseholders. Without these protections, it would be possible for landlords to pursue spurious or unrealistic legal claims and charge these costs to leaseholders; this paragraph mitigates against that and ensures incentives are aligned by requiring building owners and landlords to absorb the costs of their own legal and other professional advice.

1759 Costs already incurred by leaseholders prior to commencement under this paragraph do not count against the ‘permitted maximum’ totals set out in paragraph 6 (unless those costs are also classified as a ‘relevant measure’ under paragraph 1). However, any costs not yet incurred by leaseholders under this paragraph are not payable from the date of commencement onward, even if those costs were incurred by the landlord prior to commencement.”

33. The passages from the explanatory notes which I have quoted were not, however, available during the passage of the Bill. What have become sections 116-125 and schedule 8 were not, of course, to be found in the Bill in its original form. Explanatory notes published in April 2022 in connection with the amendments to the Bill which had recently been made included the following:

i) In respect of what became section 116 of the BSA:

“Lords Amendment 93 introduces provisions about the remediation of relevant defects in relevant buildings”;

ii) In respect of what became section 122 of the BSA:

“Lords Amendment 99 inserts a new clause which inserts the Schedule (Remediation costs under qualifying leases) which provides that certain service charge amounts relating to relevant defects in a relevant building are not payable and makes provision for the recovery of those amounts from landlords under leases of a building”;

iii) In respect of what became schedule 8 to the BSA:

“Lords Amendment 184 inserts a new schedule which outlines the conditions under which the service charge is not payable in respect of relevant defects. No service charge is payable under a qualifying lease in relation to relevant defects for which landlord or associate is responsible or if a landlord meets the contribution condition. No service charge is payable for cladding remediation. Paragraph 6 provides that the permitted maximum leaseholder contribution is zero, which was introduced through a non-government amendment.”

34. In paragraph 105 of their judgment in *URS*, Lords Hamblen and Burrows (with whom Lords Lloyd-Jones, Briggs, Sales and Richards agreed) quoted from the explanatory notes in respect of the BSA. Lords Hamblen and Burrows said in paragraph 105 that they had been “provided with the Explanatory Notes to the Bill and to the BSA which were in materially the same terms” and, in the next paragraph, that the passages they had set out “show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135”. It is evident, however, that the Supreme Court was under a misapprehension. The explanatory notes to the BSA were by no means in the same terms as those in respect of the Bill. In fact, the explanatory notes to the Bill did not include any of the paragraphs quoted by Lords Hamblen and Burrows. They featured for the first time in the explanatory notes which the Government published after the BSA had already been enacted.

Financial contributions from the Government and developers

35. Significant remediation costs are being borne by the Government, including through the establishment of the “Building Safety Fund”. Mr Murphy has explained that the total taxpayer contribution is expected to be £5.1 billion.
36. Developers have been called on to sign the “Developer Remediation Contract” pursuant to which they take responsibility for work necessary to address life-critical fire-safety defects from the design and construction of buildings at least 11 metres in height. They will also be subject to the “building safety levy” which is to be charged on new housebuilding pursuant to regulations made under section 58 of the BSA. The largest developers have since 2022 further been required to pay the “residential property developer tax” on profits from residential property development.

Matters relating to service charges

37. In common with most other modern leases, the leases of the flats at Hippersley Point contain provision for the tenants to make advance payments in respect of service

charges. The evidence includes a sample lease of such a flat. This provides for the tenant to make payments on account by reference to an estimate of the total cost of building services for the relevant service charge period and for him subsequently to make balancing payments should his share of the cost, as certified in due course, prove to exceed the sums paid on account. If, on the other hand, it transpires that the tenant has paid more than his share of the certified total, “there shall be allowed by the Landlord to the Tenant a sum equal to the difference between the amount of that Building Service Charge and the aggregate of the said sums paid on account”.

38. In *Burr v OM Property Management Ltd* [2013] EWCA Civ 479, [2013] 1 WLR 3071 (“*Burr*”), the Court of Appeal held that “costs” are “incurred” for the purposes of sections 18, 19 and 20B of the L&TA 1985, which are concerned with service charges, when the landlord either is invoiced or pays. “[A] liability must crystallise before it becomes a cost”: “costs are not ‘incurred’ within the meaning of section 18, 19 and 20B on the mere provision of services or supplies to the landlord or management company”: see *Burr*, at paragraphs 11 and 15, per Lord Dyson MR.
39. Section 27A of the L&TA 1985 allows both landlords and tenants to apply to the FTT for a determination as to whether a service charge is payable or would be if certain costs were incurred. Section 27A(5) states that “the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment”.

The present appeal

40. By its appeal, Adriatic challenges the Judge’s conclusion that paragraph 9 of schedule 8 to the BSA serves to bar it from recovering costs of its dispensation application from tenants with “qualifying leases” within the meaning of section 119. The issues to which the appeal gives rise can be summarised as follows:
 - i) Are costs of the dispensation application within the scope of paragraph 9? [“The Scope Issue”]
 - ii) To what extent, if any, does paragraph 9, correctly construed, apply in relation to costs which were incurred before it came into force? [“The Retrospective Construction Issue”]
 - iii) If and in so far as paragraph 9 would otherwise have retrospective effect, should words be “read into” it in order to render it compatible with Article 1 of Protocol 1 to the European Convention on Human Rights (“A1P1”)? [“The A1P1 Issue”]

The Scope Issue

41. Paragraph 9(1) of schedule 8 to the BSA states that no service charge is payable under a qualifying lease “in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect”. Paragraph 9(2) explains that the services in question can include services provided in connection with, among other things, “any proceedings before a ... tribunal”.
42. It is Adriatic’s case that paragraph 9 has no application to the costs of a dispensation application under section 20ZA of the L&TA 1985. The Judge disagreed. He considered that “any person”, as used in paragraph 9(1), “mean[s] what it says” and so

can include anyone who is liable or potentially liable to remedy the relevant defect, adding that “[t]he most obvious example of such a person is a landlord who is obliged to remedy a relevant defect”: see paragraph 105 of the Decision. The Judge further took the view that the words “relating to” are “very wide” and require no more than “a relationship between the services and the liability or potential liability of the relevant person incurred as a result of the relevant defect”: see paragraph 112. In the present case, Adriatic will have had a liability or potential liability to remedy relevant defects under the terms of both the leases of the flats and the BSA (specifically, section 123): see paragraph 113. That being so, the costs of a dispensation application (and, in particular, of the application which Adriatic made) are capable of falling within the terms of paragraph 9: see paragraph 118.

43. Taking issue with this analysis, Mr Simon Allison KC, who appeared for Adriatic with Mr Malcolm Birdling and Ms Mattie Green, argued that the Judge had construed “relating to”, as the words appear in paragraph 9(1), too widely. A dispensation application, Mr Allison submitted, does not “relat[e] to” liability at all and, anyway, “any person” means “any *other* person”, in other words someone other than the person who has incurred the costs which are the subject of the restriction which paragraph 9 imposes. Paragraph 9 will have been aimed at preventing landlords from passing on to tenants costs of pursuing third parties with responsibility for defects or remedying them (developers, say). Treating paragraph 9 as extending to costs of dispensation applications would deter landlords from making them and so delay remediation works, contrary to the evident purposes of the BSA.
44. In my view, however, the Judge was correct. In the first place, having regard both to its repairing obligations under the Hippersley Point leases and section 123 (as supplemented by regulation 2 of the 2022 Regulations), Adriatic will have become liable, or potentially so, to remedy a “relevant defect”. It follows, as it seems to me, that Adriatic has incurred a “liability (or potential liability) ... as a result of a relevant defect” within the meaning of paragraph 9 and, the reference in that paragraph to “any person” not being otherwise circumscribed, Adriatic will have been such a person. While paragraph 9 must extend to costs incurred in pursuing a developer or other third party, I do not see why the words “any person” should not also extend to the person incurring the costs. To the contrary, read naturally, I think they do so.
45. Further, it appears to me that the legal and other professional services which Adriatic obtained for the purposes of its dispensation application “relat[ed] to” the “liability (or potential liability)” which Adriatic had “incurred as a result of a relevant defect”. As the Judge noted, the words “relating to” are wide. In the present case, Adriatic was seeking dispensation from consultation requirements as regards works which were to fulfil obligations it had by reason of a “relevant defect”. In the circumstances, the application can, in my view, fairly be said to have “related to” “the liability (or potential liability) of [Adriatic] incurred as a result of a relevant defect”, and the costs of the application will also have so related. The Judge said in paragraph 112 of the Decision that he found it difficult to see how the requisite relationship could be “said not to exist between the costs of a dispensation application made by a landlord, in relation to works required to remedy a relevant defect, and the liability of that landlord to remedy the relevant defect”. I agree that the necessary relationship between the costs of Adriatic’s dispensation application and “the liability (or potential liability) of [the company] incurred as a result of a relevant defect” existed.

46. The evident purpose of schedule 8 reinforces that conclusion. It is obvious from the terms of the schedule that it is seeking to relieve tenants (and especially “qualifying tenants”) from liabilities to pay service charges arising from “relevant defects” and, in particular, “cladding remediation”. It would, I think, be anomalous if a tenant could nevertheless be required to pay service charges stemming from expenditure on an application to dispense with consultation as regards works addressing such defects. Mr Mark Loveday, who appeared for the respondents (“the Leaseholders”) with Mr Hugh Rowan, posed the question, “Why would [Parliament] contemplate that a ‘person’ who incurred the costs of s.20ZA LTA 1985 related to BSA remediation works *should* still be able to add those costs to the lessees’ service charges?” I agree that Parliament is unlikely to have intended that.
47. The conclusion that costs of the dispensation application are within the scope of paragraph 9 can also be reached by a different (and perhaps simpler) route. The costs in question, in respect of which service charge is claimed, can, I think, fairly be seen as relating to a liability (or potential liability) which *the Leaseholders* had incurred as a result of relevant defects. After all, the “legal or professional services” whose costs are at issue arose from an application designed to enable Adriatic to recover from the Leaseholders costs of remedial work for which they were liable under the terms of their leases. There is, of course, no question of the Leaseholders having become liable to carry out the necessary work themselves, but that cannot matter. It is plain, as it seems to me, that it can suffice for the purposes of paragraph 9 that a person has “incurred as a result of a relevant defect” a *financial* liability (or potential liability).

The Retrospective Construction Issue

The Judge’s analysis

48. The Judge concluded in paragraph 170 of the Decision that “[t]he effect of Paragraph 9 [of schedule 8 to the BSA] is that, as from 28th June 2022, no service charge is payable in respect of Qualifying Services, regardless of when the costs of those Qualifying Services were incurred, and regardless of when the relevant service charge actually became due for payment” and, hence, that the paragraph “is capable of applying to the Costs [i.e. the costs of the dispensation application], notwithstanding the date when Paragraph 9 was brought into force”. In arriving at those conclusions, the Judge said the following:

- i) In paragraph 151:

“Looking at the wording of Paragraph 9, I find it difficult to see how Paragraph 9 can be said not to apply where the costs of the relevant services were incurred prior to 28th June 2022. This is not how Paragraph 9(1) is drafted. Paragraph 9(1) is drafted on the basis that no service charge is payable under a qualifying lease in respect of Qualifying Services If the relevant services qualify as services ‘relating to’ the relevant liability or potential liability of any person incurred as a result of a relevant defect, that is to say (using my definition) if the relevant services qualify as Qualifying Services, I find it difficult to see why it matters when the costs of the relevant services were incurred.

Paragraph 9 is not framed by reference to the incurring of the costs of the relevant services”;

ii) In paragraph 153:

“It seems to me that Paragraph 10 contains the mechanism by which the result is achieved that no service charge is payable. I do not think that it actually changes or affects the opening words of Paragraph 9(1), which are that no service charge is payable”;

iii) In paragraphs 157 and 158:

“157. ... The legislative intention which emerges from these provisions [i.e. sections 116 to 125 of, and schedule 8 to, the BSA], and specifically from Schedule 8, is that certain categories of expenditure, in relation to relevant defects, are no longer recoverable by a service charge, including the costs of Qualifying Services. In terms of the passing on of liabilities for expenditure caught by Schedule 8, there is Section 124 and the ability to apply for remediation contribution orders. Whether an application under Section 124 will produce an equitable distribution of a liability to meet expenditure which is caught by Schedule 8 will depend upon the circumstances of each particular case. What is clear is that Parliament has decided that the specified categories of costs in Schedule 8 are not to be payable by the service charge.

158. Viewed in this light it does not seem to me to be surprising that Paragraph 9, or for that matter other Paragraphs of Schedule 8 are capable of applying to costs incurred before Schedule 8 came into force. This seems to me to be consistent with the overall scheme of Sections 116-125 and Schedule 8. What might be seen as unfair results are, it seems to me, simply a reflection of life in the new world of the 2022 Act”;

iv) In paragraph 167:

“This construction may also be said to be supported by paragraph 986 of the Explanatory Notes”.

The parties' positions

49. Mr Allison took issue with the Judge's analysis. Construed correctly, Mr Allison argued, paragraph 9 of schedule 8 to the BSA has no application to costs which were incurred before 28 June 2022, when it came into force. In the alternative, Mr Allison contended that, even if paragraph 9 is capable of applying to costs incurred before 28 June 2022, it does not do so if and in so far as service charges arising from the costs had become payable by that date. Mr Allison maintained that his submissions were

supported by, among other things, presumptions against retrospectivity and interference with property rights.

50. For his part, Mr Loveday argued that, once the BSA had been enacted, tenants were not only relieved of any liability to pay service charges in the future in respect of legal or other professional fees relating to “relevant defects”, but became entitled to recover, or to credit for, sums paid in respect of such service charges in the past. While focusing largely on the wording and purpose of the BSA, Mr Loveday also relied on the explanatory notes relating to it.
51. Sir James Eadie, who appeared with Mr Michael Walsh KC, Mr Jason Pobjoy KC, Ms Camilla Chorfi, Mr Will Perry and Mr Richard Miller for the Secretary of State for Housing, Communities and Local Government (“the Secretary of State”), who intervened in the proceedings, occupied an intermediate position. It was his case that a line is to be drawn as at 28 June 2022. He did not suggest that tenants can claim back money that they had already paid by that date. However, he submitted that, since then, no tenant has had any liability to pay any service charge in respect of services such as are described in paragraph 9. This interpretation of paragraph 9 appears to me to accord with the Judge’s conclusions. Like Mr Loveday, Sir James sought support in, among other things, the explanatory notes.
52. There was general recognition that the interpretation of paragraph 9 has implications for other paragraphs of schedule 8, which depend on similar language.

The presumption against retrospectivity

53. As Lord Rodger noted in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 (“*Wilson*”), at paragraph 186, “[a]t common law there is a presumption that a statute does not have ‘retrospective’ effect”. Lord Rodger went on to observe in paragraph 187 that, “[s]o far as matters of substance are concerned, the essence of the common law rule is conveniently stated by Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 267:

‘The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.’”

54. Lord Nicholls said in *Wilson*, at paragraph 19, that the underlying rationale of the principle had been well identified by Staughton LJ in the following passage from his judgment in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 (“*Tunncliffe*”), at 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.”

55. In *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 (“*L'Office Cherifien*”), Lord Mustill, with whom Lords Goff, Jauncey and Browne-Wilkinson agreed, said at 524-525 that “it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect”, but that he had “reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same”. That, Lord Mustill commented at 525, “is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule”. Having quoted the passage from *Tunncliffe* which I have already set out, Lord Mustill said at 525:

“Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.”

56. In *URS*, Lord Leggatt noted that there is a “principle that a statute, even though clearly intended to have retrospective effect, should not be construed as having any greater retrospective operation than is clearly necessary”: see paragraph 301. Earlier in his judgment, in paragraph 272, Lord Leggatt had quoted a passage from *Lauri v Renad* [1893] 3 Ch 402 in which Lindley LJ had said at 421:

“It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.”

In paragraph 273 of his own judgment, Lord Leggatt said:

“What Lindley LJ in this passage referred to as a ‘subordinate rule’ is important. The presumption against retrospective operation of a statute does not cease to apply just because the statute is plainly intended to have some retrospective effect. A statute can be retrospective in some respects but not others. Retrospective effect can be a matter of degree. The basic principle requires a court ‘in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose’: *Arnold v Central Electricity Generating Board* [1988] AC 228, 275B (Lord Bridge). See also the statement of Bowen LJ in *Reid v Reid* (1886) 31 Ch D 402, 409, that ‘you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant’.”

57. As Lord Reed pointed out in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 (“*AXA*”), at paragraph 121, a “distinction might ... 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”. Such a distinction was drawn by Buckley LJ in *West v Gwynne* [1911] 2 Ch 1. He said at 12:

“Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.’s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights.”

58. Such a distinction can be seen, too, in *Wilson*. Lord Hope said in paragraph 98 that “[t]he concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2

October 2000 [i.e. the date on which the legislation at issue came into force] should be altered retrospectively”. In paragraph 161, Lord Scott made this comparison:

“If a lease is granted for, say, 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture notice already served, a damages claim already instituted, rent review machinery already in train, and so on.”

For his part, Lord Rodger, in paragraphs 187-189, referred to the need to have regard to the distinction between provisions which “alter existing rights and duties—only prospectively, with effect from the date of commencement” and provisions which “change the substantive law in relation to events in the past” and so are truly “retrospective”.

59. The Court of Appeal recognised the existence of a distinction along these lines in *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747 (“*Granada*”). Giving the judgment of the Court, Patten LJ observed in paragraph 56:

“No one can expect the law to stand still: it must react to changing circumstances and problems as they unfold. Clearly, legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability based on past conduct.”

At paragraph 66, Patten LJ said:

“Legislation which creates a present or prospective liability based on a current state of affairs will often not be classifiable as retrospective even though the present condition of most things is the consequence of past events. Many of the cases use taxation as an obvious example of this. A proposal to levy an annual tax on houses worth over £2m could be said to be unfair because it penalises owners who have lived there for many years and may have purchased the property when it was worth a fraction of its current value. They have had no control over, or responsibility for, house price inflation and could not have anticipated either the rise in value or the possibility of the levy at the time when they bought it. Even those who purchased houses which were worth over £2m at the time may be able to say that, had the tax been anticipated, they would have purchased a cheaper property. But in neither case would the imposition of the tax be retrospective. It would impose a liability on present ownership by reference to present value. Although the circumstances which have led to the taxpayer owning a house of that value will vary, in neither of the cases mentioned above would the tax legislation

depend for its operation on anything but the current value of the property.”

The presumption against interference with property rights

60. *Bennion, Bailey and Norbury on Statutory Interpretation* (8th. ed.) (“*Bennion*”) explains that “[i]t is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law”; that “[e]ven in cases where some degree of interference with a person’s proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require”; and that “[t]he principle against expropriation or other interference with the enjoyment of property rights is likely to carry particular weight in cases where no compensation is available”: see section 27.6.

61. The earliest of the authorities cited by *Bennion* to which we were referred was *Attorney General v Horner* (1884) 14 QBD 245. In that case, Brett MR said at 257:

“it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons’ rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so.”

62. Other cases illustrating the principles include *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 (“*Westminster Bank*”), *Methuen-Campbell v Walters* [1979] 1 QB 525 (“*Methuen-Campbell*”) and *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, [2019] AC 29 (“*S Franses*”). In *Westminster Bank*, Lord Reid (with whom Lords Morris and Guest agreed) said at 529:

“The appellants’ argument is really founded on the principle that

‘a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms’ (*per* Lord Warrington in *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343, 359).

I entirely accept the principle. It flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended. I would only query the last words of the quotation. When we are seeking the intention of Parliament that may appear from express words but it may also appear by irresistible inference from the statute read as a whole. But I would agree that, if there is reasonable doubt, the subject should be given the benefit of the doubt.”

63. In *Methuen-Campbell*, Buckley LJ said at 542 that he agreed with “the view expressed by Goff L.J. that in an Act such as the Leasehold Reform Act 1967, which, although it is not a confiscatory Act is certainly a dispropriatory Act, if there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be dispropriated rather than otherwise”.
64. In *S Franes*, Lord Sumption (with whom Baroness Hale, Lady Black and Lord Kitchin agreed) accepted at paragraph 16 that “as a statutory interference with the landlord’s proprietary rights, the protection conferred by the [Landlord and Tenant Act 1954] should be carried no further than the statutory language and purpose require”.

The significance of explanatory notes

65. In *R (O) v Home Secretary* [2022] UKSC 3, [2023] AC 255, Lord Hodge explained that the “primary source” from which the meaning of a statute is ascertained is “the words which Parliament has chosen to enact as an expression of the purpose of the legislation” and that “[e]xternal aids to interpretation therefore must play a secondary role”: see paragraph 30. He nevertheless acknowledged in paragraph 30 that “Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions”.
66. A distinction is, however, to be drawn between explanatory notes which were available when the legislation was being enacted and those which have come into existence subsequently. A passage from the judgment of Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 (“*PACCAR*”) is relevant in this context. Lord Sales said in paragraph 42:

“It is legitimate to refer to Explanatory Notes *which accompanied a Bill in its passage through Parliament* and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament’s meaning is to be ascertained Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen” (emphasis added).
67. Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.

68. It is to be remembered in this context that, as Lord Reed said in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 (“SC”), at paragraph 166, “the Government is separate from Parliament, notwithstanding the many connections between the two institutions”. Thus, “[t]he reasons which the Government gives for promoting legislation cannot ... be treated as necessarily explaining why Parliament chose to enact it”: see *SC*, at paragraph 166, per Lord Reed.
69. In *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin), [2007] 1 WLR 1407, Lloyd Jones J, with whom Keene LJ agreed, said in paragraph 17:
- “It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions In the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason.”
70. In my view, the position is similar where explanatory notes have been published only after a statute has already been enacted. The notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.
71. *Bennion* says this in section 24.14 about explanatory notes:
- “The rationale for using explanatory notes in the way discussed above appears to be that they form part of the background material available to the legislature at the time at which legislation is passed and may therefore help to inform its interpretation in the same way as other pre-enactment materials. It seems to follow that only the explanatory notes published during the Bill’s passage through the legislature can be used in this way.
- The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other post-enactment expressions of opinion by the government as to the meaning of legislation In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them.

... It should be acknowledged that, in practice, it will not always make a difference since changes between different versions of the notes are often relatively minor”

72. I agree with those observations.

Discussion

73. As was stressed by both Mr Loveday and Sir James Eadie, paragraph 9 of schedule 8 to the BSA is not expressed to be subject to any temporal limitation. It simply states that no service charge of the relevant kind “is payable”. Parliament could have said that the provision should not apply in relation to service charges which had become payable, or costs which had been incurred, before it came into force, but nothing to that effect is to be found in paragraph 9.
74. That paragraph 9 should apply in relation to prior costs can also be argued to accord with the aims of the BSA. Paragraph 9 was introduced into what became the BSA as part of what was avowedly “a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. The legislation was plainly intended to have implications in relation to cladding and other defects which had arisen before it was enacted. Parliament evidently took the view that the historic problems which had come to light following the Grenfell Tower fire called for backward-looking measures. Mr Allison himself accepted that paragraph 9 would bite on costs incurred after its coming into force notwithstanding the fact that the defect giving rise to them had already existed. In *Triathlon*, we have concluded that section 124 allows remediation contribution orders to be made in relation to costs and defects pre-dating the BSA.
75. A specific aim of the BSA was clearly to relieve tenants (and, in particular, those with “qualifying leases”) to a great extent from service charge liabilities arising from defects causing safety risks. On Adriatic’s case, however, tenants would remain liable for such charges in relation to costs which had been incurred and/or sums which had become payable before 28 June 2022. While, moreover, the present appeal involves paragraph 9, the same point arises in relation to other paragraphs of schedule 8. Even those with “qualifying leases” could still, therefore, be called on to pay service charges in respect of work to remove or replace unsafe cladding which had been carried out earlier than 28 June 2022.
76. Mr Loveday and Sir James Eadie also sought support for their submissions in the explanatory notes relating to the BSA. In my view, however, the explanatory notes take matters no further. Those which were available during the passage of what became the BSA said nothing bearing on what is at issue in the present appeal. In contrast, the explanatory notes published in July 2022 contain passages which chime with Sir James’ case. For example, paragraph 986 states that “[t]he protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents” and that, “even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule”. However, this version of the explanatory notes (and, in particular, paragraph 986) was not before Parliament when it was enacting the BSA and the parts on which Mr Loveday and Sir James relied

purported to state the position rather than providing cogent reasoning for it. While, therefore, the explanatory notes may show what the Department understood paragraph 9 to mean, they cannot be taken to provide a reliable guide to Parliament's intentions.

77. That remains my view notwithstanding the Supreme Court's decision in *URS*. As I have mentioned in paragraph 34 above, the Supreme Court attached significance to the July 2022 explanatory notes. It did so, however, on the basis of a misconception. It understood the July 2022 explanatory notes to be in "materially the same terms" as those to the Bill when they were in fact very different.
78. Mr Loveday and Mr Allison each placed reliance on paragraph 10 of schedule 8. Mr Loveday suggested that paragraph 10's reference to costs "incurred or to be incurred" tended to confirm that paragraph 9 extended to costs which had been incurred before it came into force. However, there is no need to read paragraph 10 in that way: the words "incurred or to be incurred" are apt to refer to costs which are to be incurred in the future or have been incurred by a date subsequent to paragraph 9's coming into force. As Mr Allison put it, paragraph 10 captures expenditure in the relevant year and budgeted sums. Mr Allison further argued that paragraph 10 must have been intended to add something to paragraph 9 and that, were Mr Loveday or Sir James right about paragraph 9, there would have been no need for paragraph 10(2)(a) or, probably, paragraph 10(2)(b). The fact, Mr Allison said, that paragraph 10 focuses on costs being *incurred* points to Parliament having intended that paragraph 9 should have no application to costs incurred before it was in force. In my view, however, no such inference can be drawn. The Judge observed that paragraph 10 "contains the mechanism by which the result is achieved that no service charge is payable". I agree. I do not myself think that it adds anything important to Mr Allison's case.
79. The constructions of paragraph 9 espoused by Mr Allison and Sir James Eadie might both be said to produce arbitrary results. On Mr Allison's case, a landlord who had remedied a defect before 28 June 2022 could potentially be entitled to service charges, but no service charges would be payable in respect of any work undertaken after that date. On Sir James' case, a tenant who had not paid a service charge invoiced before 28 June 2022 would be protected, but he would not be able to recover any payment he had already made.
80. The interpretation favoured by Mr Loveday might be said to be less arbitrary. He argued that paragraphs 9 and 10 mean that a tenant can apply for a determination under section 27A of the L&TA 1985 that no service charge is payable for any professional costs which the landlord may have incurred in relation to a person's liability for a "relevant defect" (and, hence, that the tenant is entitled to recover, or credit for, whatever he may have paid in respect of such costs). Similar reasoning would apply in relation to other paragraphs of schedule 8. On this basis, a tenant who had paid by 28 June 2022 would be treated in a comparable way to one who had not. Since, though, a "relevant defect", as defined in section 120, could arise from works up to 30 years before the provision came into force, a tenant could potentially challenge a service charge which had been invoiced and paid many years ago (say, in connection with fire doors provided the best part of two decades ago in compliance with the Regulatory Reform (Fire Safety) Order 2005). Mr Loveday did not shy away from this implication of his contentions. In my view, however, Parliament is unlikely to have intended such consequences.

81. Another argument advanced by Mr Loveday was to the effect that paragraph 9 is not to be regarded as retrospective even if it relieved those with “qualifying leases” of liability to pay service charges which had already been invoiced. In this connection, he pointed out that changes in the law can properly affect legal relationships established before the law was altered.
82. It seems to me, however, that paragraph 9 would plainly operate retrospectively on both Mr Loveday’s interpretation of it and Sir James Eadie’s. Either would mean that a landlord who had not merely incurred costs before paragraph 9 was enacted or even foreshadowed but had rendered a service charge invoice covering those costs would have lost any entitlement to the service charge. On that basis, paragraph 9 would not merely “alter prospectively the rights and obligations arising from pre-existing legal relationships” (to use the words of Lord Reed in *AXA*), but would serve to deprive landlords of “already-accrued rights” such as Patten LJ mentioned in *Granada*. Paragraph 9 would not be comparable to the “legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term” which Lord Scott postulated in *Wilson*. It would rather “alter the rights and obligations of the parties resulting from events that had already taken place” and, as Lord Scott observed, it would be “unusual” for legislation to do that.
83. In the circumstances, the presumptions against retrospectivity and interference with property rights must both be in point. That suggests that we should be slow to accept either Mr Loveday’s interpretation of paragraph 9 or Sir James Eadie’s. As I have mentioned, in *Wilson* Lord Rodger endorsed Sir Owen Dixon CJ’s observation that “a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events”, and the presumption against interference with property rights operates in a similar way. The fact that paragraph 9 is expressed in general terms thus counts in favour of Adriatic rather than the Leaseholders or the Secretary of State. There is nothing in the language of paragraph 9 itself to displace the presumptions or, in other words, to show “with reasonable certainty” that paragraph 9 should have retrospective effect. Nor is such language to be found in other paragraphs of schedule 8.
84. As I have mentioned, in *L’Office Cherifien* Lord Mustill, while noting that it could not be doubted that “the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect”, drew attention to the significance of fairness. In that connection, the following matters may be said to weigh in favour of regarding schedule 8 as having retrospective effect:
- i) Adriatic’s interpretation of schedule 8 would result in tenants facing bills which they could not have anticipated and which they might not be able to afford. The sums at stake are large. Mr Andresen has explained that Adriatic and two similar companies associated with it had alone demanded nearly £87 million from tenants before the BSA’s enactment in respect of work and services which are now deemed to be “relevant measures” to address “relevant defects” and in excess of £70 million remained unpaid as at June 2024;

- ii) Landlords will often be better able to bear the costs than tenants;
- iii) The extent to which giving retrospective effect to schedule 8 would prejudice landlords is mitigated by the financial contributions which the Government and developers have made and are making (notably, through the “Building Safety Fund” and the “Developer Remediation Contract”);
- iv) The prejudice to landlords is mitigated, too, by their ability to pass on liability to developers, other past and present landlords and their associates through claims under, for example, the DPA 1972 and, perhaps more importantly, the mechanisms for which the BSA and the 2022 Regulations provide (including remediation contribution orders);
- v) By no means all service charges relating to pre-BSA remediation would be irrecoverable. Only those with “qualifying leases” would benefit from schedule 8 except in so far as paragraph 2 applied and, if it did, that would be because the landlord was “responsible for the relevant defect” or associated with a person who was. Further, provided that a service charge did not relate to “cladding remediation” within paragraph 8 or professional services within paragraph 9, a tenant would be relieved of liability only if the landlord belonged to a group whose net worth exceeded the figure for which paragraph 3 provides, if the value of the “qualifying lease” was less than the relevant maximum given in paragraph 4 or if the relevant service charge took the total above one of the caps imposed by paragraphs 5-7; and
- vi) On the Secretary of State’s case (though not the Leaseholders’), landlords could retain all sums which they had received by way of service charges before 28 June 2022.

85. On the other hand:

- i) The constructions of schedule 8 for which Mr Loveday and Sir James Eadie contend would both result in landlords being deprived of accrued contractual rights without any compensation;
- ii) Just as tenants would be relieved of large liabilities, landlords would lose large sums;
- iii) The losses to landlords might be out of all proportion to the extent of their financial interests in the relevant buildings. The present case illustrates the point. As I have mentioned, Adriatic is entitled to ground rents totalling £9,250 per year and has been estimated to have a financial interest of 2.52% in Hippersley Point. The tenants have a far greater stake in the building;
- iv) While tenants will not have been responsible for the defects which have been remedied, nor will a landlord such as Adriatic;
- v) As a result of buying their leases, the tenants will have both stood to gain from any increase in value and assumed risks in respect of such problems as might emerge. Landlords such as Adriatic took on no comparable responsibility;

- vi) Tenants will enjoy very substantial protection from service charges for which they would otherwise have been liable under their leases whether or not schedule 8 has retrospective effect;
 - vii) Our decision in *Triathlon* has the consequence that tenants who have to pay service charges in respect of costs incurred in connection with work to remedy relevant defects can apply for remediation contribution orders. Such an order could be made against, among others, the landlord to whom the service charges had been paid if that were considered “just and equitable”;
 - viii) The scope for landlords to pass on liability is limited in a number of ways. In the vast majority of cases, as at Hippersley Point, there will be no other landlord. Moreover, the developer and any associates may no longer exist or be financially able to meet any claim;
 - ix) Mr Loveday’s approach to schedule 8 would be especially prejudicial to landlords since it could result in tenants being entitled to reopen payments made in respect of service charges many years ago;
 - x) Sir James Eadie’s interpretation of schedule 8 would leave a tenant who had paid by 28 June 2022 without a remedy. If Parliament deemed that fair, it is not obvious why it should have considered it unfair that tenants should remain liable for *some* service charges after that date;
 - xi) A retrospective interpretation of schedule 8 would be particularly harsh on a landlord who had not insisted on tenants paying service charges in the hope that some or all of the relevant costs would instead be borne by, say, the developer or the “Building Safety Fund”. Mr Allison postulated this situation in his skeleton argument:

“a landlord that incurred legal and professional costs prior to 28 June 2022, but did not demand them from leaseholders because they hoped to recover them from third parties and wanted to minimise the distress caused to leaseholders, so instead protected recoverability of such costs by the service of a notice pursuant to s.20B(2), [L&TA 1985], will now be unable to recover those costs as a service charge from leaseholders with qualifying leases [if paragraph 9 has retrospective operation]”; and
 - xii) The language which Parliament has used does not provide any “clarity” (to use a word from Lord Mustill’s speech in *L’Office Cherifien*) that retrospectivity was intended.
86. I refer later in this judgment to the difficulties which Courts can face in assessing proportionality. Determining whether it is “fair” for a provision to have retrospective effect may be no easier. On balance, however, the factors relevant to fairness seem to me to come down against retrospectivity and do not, in my view, displace the presumptions.
87. In her supplementary written submissions on *URS*, it was argued on behalf of the Secretary of State that the decision in that case is strongly supportive of her contentions

in this appeal. While recognising the differences in wording between section 135 of the BSA on the one hand and section 122 and schedule 8 on the other, Mr Loveday also suggested that *URS* is of assistance to him.

88. In *URS*, Lords Hamblen and Burrows observed that the BSA is “part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account”, that it is “both forward and backward-looking” and that the “backward-looking provisions are set out in Part 5”: see paragraphs 84-86. Lords Hamblen and Burrows proceeded to explain that “Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects”, identifying the “main changes” as follows:

“(1) Section 135 which provides for a new 30-year limitation period for accrued claims under section 1 of the DPA [1972].

(2) Section 124 which provides persons with a legal or equitable interest (such as leaseholders) in medium and high-rise buildings, the Secretary of State, and other bodies, with a new right to seek remediation contribution orders from the First-tier Tribunal against the building’s developer, landlord, or associate. Such an order requires a respondent to contribute to the costs of remedying historical building safety defects if this is considered ‘just and equitable’ (see section 124(1)). 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.

(3) Section 130 which provides the High Court with a power to grant ‘building liability orders’. Section 130(2) and (4) provide that a building liability order will extend a ‘relevant liability’ of a body corporate to another ‘associated’ body corporate, so that both bodies are jointly and severally liable for the relevant liability.

(4) Sections 147 to 151 which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account.”

In paragraph 87, Lords Hamblen and Burrows said that “[a]ll four sets of provisions have retrospective effect”, adding in paragraph 102 that “the importance of retrospectivity to Part 5” was “reflected not only in section 135 but in all the main changes to the law made by Part 5”.

89. These remarks were all made in the context of the question whether section 135 of the BSA was applicable to the facts of that case. In paragraph 124, Lords Hamblen and Burrows explained that, “in order to achieve its purpose of holding those responsible for building safety defects to account, it is necessary to interpret the general wording

used in section 135(3) as being applicable to claims such as those made in the present case”. In the following paragraph, Lords Hamblen and Burrows concluded:

“When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. More specifically, they apply where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW’s actions in carrying out the remedial works as a matter of legal causation or mitigation.”

In a similar vein, Lord Leggatt said in paragraph 304:

“Section 135 of the BSA makes it possible for BDW to bring claims in these proceedings against URS for damages for breach of a duty owed to BDW under section 1 of the DPA and for contribution. But in relation to its claim for damages in the tort of negligence (which BDW had already begun before the BSA came into force) and the DPA claim, section 135 does not retrospectively affect the answer to the questions of causation, mitigation and remoteness which determine whether BDW can recover compensation from URS for the cost of remedial work carried out before section 135 of the BSA came into force.”

90. The Supreme Court thus saw retrospectivity as important to “all the main changes to the law made by Part 5”, including section 124 of the BSA as it “sits within a broader suite of ‘leaseholder protections’ at sections 116 to 124 of, and Schedule 8 to, the BSA”. However:

- i) The point which the Supreme Court had to decide in *URS* related to section 135. As Lords Hamblen and Burrows noted in paragraph 124, “[t]here is no question that section 135 does apply retrospectively”. That is made plain by its terms. In fact, section 135(5) specifically provides for a claim brought in reliance on the section to be dismissed should that be “necessary to do so to avoid a breach of that defendant’s Convention rights”;
- ii) There was no issue before the Supreme Court as to the extent to which schedule 8 should be understood to have retrospective effect or, in particular, as to “the granular effect of Paragraph 9 in the context of costs incurred in respect of a

dispensation application” (to use words of Mr Allison). Nowhere in schedule 8, of course, is anything comparable to section 135(5) to be found;

- iii) Adriatic does not dispute that schedule 8 has retrospective effect in the sense that, from the date of the BSA coming into force, it affects the liability of leaseholders to contribute to the costs of remedying *historic* building defects; and
 - iv) The Supreme Court was mistaken in thinking that the explanatory notes which it quoted were “in materially the same terms” as those available during the passage of the Bill. In any event, taken together, section 124 (as we have construed it in *Triathlon*) and Adriatic’s interpretation of schedule 8 can be said to achieve Parliament’s purposes in both affording protection to leaseholders and holding those responsible for defects to account.
91. In all the circumstances, I have concluded that the presumptions against retrospectivity and interference with property rights should prevail.
92. Is, then, schedule 8 to be understood as having no application to costs *incurred* by 28 June 2022? Or does it apply to all service charges which had not become *payable* by that date?
93. In my view, the former interpretation is the correct one. Once a landlord had incurred a relevant cost, it had acquired a contractual entitlement to payment of a service charge in respect of it even if the service charge had not yet been demanded. That being so, the presumptions against retrospectivity and interference with property rights appear to me to imply that schedule 8 should not be taken to be applicable. An analogy might be drawn with the “rent review machinery already in train” of which Lord Scott spoke in *Wilson*.
94. In effect, paragraph 9 should, as it seems to me, be understood to mean that no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred *after 28 June 2022* as a result of a relevant defect. That is not, though, to say that words such as I have italicised in the previous sentence fall to be *implied*. It is simply an application of the presumptions which operate in relation to *construction*.
95. I would add that it appears to me that “incurred” must bear the same meaning in this context as that given to the word in *Burr*, in relation to sections 18, 19 and 20B of the L&TA 1985 (as to which, see paragraph 38 above).

The A1P1 Issue

96. It is Adriatic’s case that, by virtue of section 3 of the Human Rights Act 1998 (“the HRA”), paragraph 9 of schedule 8 to the BSA should not be understood as having any retrospective effect even if, applying ordinary principles of statutory construction, it would be. On the basis of my conclusions thus far, the point is academic. I shall nevertheless address it in case the views I have expressed on the Retrospective Construction Issue are wrong.

97. Section 3 of the HRA requires the Court, so far as it is possible to do so, to read and give effect to legislation in a way which is compatible with “the Convention rights”, which include “the rights and fundamental freedoms set out in ... Articles 1 to 3 of the First Protocol”. It is Adriatic’s case that construing schedule 8 to the BSA (and, in particular, paragraph 9 of that schedule) as retrospective would violate A1P1 and, hence, that it should not be so construed even if that would be the result of applying ordinary common law principles.
98. A1P1 reads as follows:
- “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
99. In *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 (“*Sporrong*”), the European Court of Human Rights (“the ECtHR”) noted in paragraph 61 that A1P1 comprises three distinct rules:
- “The first rule, which is of a general nature, [enunciates] the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”
100. As the ECtHR (Grand Chamber) explained in *Hutten-Czapska v Poland* (2007) 45 EHRR 4 (“*Hutten-Czapska*”), at paragraphs 164 and 167, any interference with the right of property must both pursue a “legitimate aim” in the “general interest” and strike a “fair balance” between “the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. There must, in particular, be “a reasonable relationship of proportionality between the means employed and the aim sought to be realised”: *James v United Kingdom* (1986) 8 EHRR 123 (“*James*”), at paragraph 50; see also e.g. *Jahn v Germany* (2006) 42 EHRR 49 (“*Jahn*”), at paragraph 93.
101. In this jurisdiction, the Courts have adopted a four-stage approach to assessing proportionality. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 (“*Bank Mellat*”), at paragraph 74, Lord Reed explained that this involves asking the following questions:

“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”.

102. Various ECtHR decisions refer to national authorities enjoying a “margin of appreciation”. In *James*, the ECtHR said in paragraph 46 that “[t]he Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation”. In *Jahn*, having noted in paragraph 93 that “there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions”, the ECtHR went on:

“In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”

In *Friend v United Kingdom* (2010) 50 EHRR SE6 (“*Friend*”), which involved a challenge to bans on hunting with dogs, the ECtHR said in paragraph 57:

“the Court accepts that a ban on an activity which is introduced by legislation will inevitably have an adverse financial impact on those whose businesses or jobs are dependent on the prohibited activity. Nevertheless, the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made. As stated in *CEM Firearms Ltd v United Kingdom* ‘the legislature’s judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable’.”

103. While the concept of “margin of appreciation” is “specific to the European court”, domestic Courts “allow a correspondingly wide margin or ‘discretionary area of judgment’”: see *SC*, at paragraph 143, per Lord Reed. That is in part because the Courts “have to respect the separation of powers between the judiciary and the elected branches of government” and so “have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination”: see *SC*, at paragraph 281.
104. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016 (“*Recovery of Medical Costs*”), Lord Mance (with whom Lords

Neuberger and Hodge agreed) concluded that a distinction is to be drawn in this context between the fourth of the *Bank Mellat* stages and the other three. With the first three, Lord Mance said, the Court will ask itself whether Parliament's assessment was "manifestly without reasonable foundation" (or "MWRF"), but the position is different as regards the fourth. Lord Mance said in paragraph 52:

"I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of 'manifest unreasonableness'. In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

Lord Mance added in paragraph 54:

"The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2009] AC 173 and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657, per Lord Neuberger of Abbotsbury PSC at p 781, para 71, per Lord Mance JSC at p 805, para 163 and per Lord Sumption JSC at pp 833-834, para 230. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: see the *AXA* case [2012] 1 AC 868, para 131, per Lord Reed and *R (Huitson) v Revenue and Customs Comrs* [2012] QB 489, para 85. But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role."

105. Sir James Eadie argued that the Supreme Court has subsequently changed tack and that MWRF now applies in relation to all four of the *Bank Mellat* stages. In this respect, he referred us to *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 ("*DA*"), *R (Joint Council for the Welfare of Immigrants) v*

Secretary of State for the Home Department [2020] EWCA Civ 542, [2021] 1 WLR 1151 (“*JCWT*”) and *SC*.

106. In *DA*, in which there was said to be discrimination against women and children contrary to article 14 read with article 8 of the European Convention on Human Rights (“the ECHR”) and/or A1P1, Lord Wilson explained in paragraph 64 that in *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492, where it was alleged that there had been discrimination against women in the enjoyment of their rights under article 8 of the ECHR, he had “cited the judgment of Lord Mance JSC in [*Recovery of Medical Costs*] and asserted it to have become clear that, of the four aspects of an inquiry into justification under the Convention of the effect of a measure of economic or social policy, the fourth, relating to a fair balance, fell to be answered by the court for itself and not by reference to whether it was manifestly without reasonable foundation”. Lord Wilson said in paragraph 65 that he had “reached too quickly” for Lord Mance’s observations:

“For by then there was—and there still remains—clear authority both in [*Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545] and in [*R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550] for the proposition that, at any rate in relation to the Government’s need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation.”

“Let there be no future doubt about it”, Lord Wilson added.

107. In the same case, Lord Carnwath, with whom Lords Reed and Hughes agreed, said in paragraph 112 that he thought it “clear ... that the MWRF test remains the appropriate test in the present context”. He observed in paragraph 117 that, “in spite of the presence of Lord Mance JSC, and although [*Recovery of Medical Costs*] was included in the list of authorities cited [in *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550], neither he nor anyone else seems to have regarded it as relevant in that context”. He went on:

“That may well have been because the context in which the issue was considered was quite different from *MA* (and from the present case): not social security benefits, but compensation for asbestos-related disease; and not article 14 discrimination, but interference with property rights under A1P1.”

108. *JCWI*, too, was a discrimination case. Hickinbottom LJ, with whom Henderson LJ agreed, said in paragraph 134 that, “if [he] were required to determine the matter, [he] would say that the manifestly without reasonable foundation criterion applies to the issue of justification in this case”. It had been argued that the MWRF test applied only in the field of welfare benefits, but Hickinbottom LJ was not persuaded of that. He said in paragraph 133(iv):

“Welfare benefits, of course, comprise an area of policy in which both economic and social considerations feature very large.

However, there is no apparent logic or rationale for restricting the socio-economic policy areas in which Parliament and the executive, as democratically-responsible bodies, are uniquely qualified to assess the public interest as against other interests, to those of welfare benefits. There are other sensitive areas, such as social housing and immigration, in which it may equally be said that they are the most appropriate assessors of what is in the public interest and whether the adverse impacts of any proposed or actual measure are proportionate to the benefits in the public interest.”

109. *SC* was also a discrimination case. As Lord Reed, with whom Lord Hodge, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Stephens and Lady Black agreed, explained in paragraph 2(7)(iii), one of the questions was “whether the approach to proportionality under article 14 set out by this court in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, and followed in several later cases, to the effect that the court will respect the policy choice of the executive or the legislature in relation to general measures of economic or social strategy unless it is ‘manifestly without reasonable foundation’, accurately reflects the approach of the European Court of Human Rights ... and should continue to be followed”. Lord Reed’s answer was that, “put shortly, ... the case law of the European court supports a nuanced approach which is not fully captured by a ‘manifestly without reasonable foundation’ standard of review, and which in some circumstances calls for much stricter scrutiny”: see paragraph 2(7)(iii).
110. Lord Reed said in paragraph 158 that, in the light of the jurisprudence of the ECtHR, “it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation”, but that “the intensity of the court’s scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case”. Lord Reed therefore considered it “important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment”: see paragraph 159.
111. Lord Reed explained that the focus should be on “the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case” rather than the “precise definition of the ‘manifestly without reasonable foundation’ formulation”. He said:
 - “160. It may also be helpful to observe that the phrase ‘manifestly without reasonable foundation’, as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues.
 161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the

‘manifestly without reasonable foundation’ formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the ‘manifestly without reasonable foundation’ formulation in circumstances where a particularly wide margin is appropriate.”

112. As he arrived at his overall conclusion on the case before him, Lord Reed said this in paragraph 208:

“The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.”

113. Mr Birdling, who argued this part of the appeal for Adriatic, pointed out that *DA*, *JCWI* and *SC* all involved discrimination claims and submitted that it is not appropriate to look to this line of cases in relation to a case such as the present one, where A1P1 is at issue. In that context, Mr Birdling said, Lord Mance’s remarks in *Recovery of Medical Expenses* remain apposite. The MWRF test should not, therefore, be applied in relation to the fourth of the *Bank Mellat* stages.
114. Having regard, however, to *SC*, it seems to me that the correct question to ask is what margin of discretion (or “judgment”) should be afforded given the nature of the legislation, not as such whether the MWRF test is applicable as regards the fourth *Bank Mellat* stage. What matters is “whether a wide margin of judgment is appropriate in the light of the circumstances of the case”. Where a particularly wide margin is appropriate

(because perhaps a measure relates to economic and social policy, national security or penal policy, or raises sensitive moral or ethical issues), “the ordinary approach to proportionality will accord the same margin to the decision-maker as the ‘manifestly without reasonable foundation’ formulation”. In cases of that kind, indeed, there may be “no legal standards by which a court can decide where the balance should be struck” and democratically elected institutions may be “in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies”.

115. Returning to the three rules which the ECtHR derived from A1P1 in *Sporrong*, as set out in paragraph 99 above, the second of them applies to “deprivation of possessions” while the third relates to “control [of] the use of property”. In *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022, Lord Carnwath said in paragraph 32 that “[t]he Strasbourg cases show that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis”. However, it is apparent from the authorities that the distinction can matter. What is of particular significance in the present context is that compensation will normally be necessary where there is deprivation but may not be where what is at issue is merely control of use. Thus, in *Scordino v Italy (No.1)* (2007) 45 EHRR 7 the ECtHR (Grand Chamber) said in paragraph 95:

“Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Art.1 of Protocol No.1 only in exceptional circumstances. Article 1 of Protocol No.1 does not, however, guarantee a right to full compensation in all circumstances.”

In *Friend*, the ECtHR observed in paragraph 57 that “[t]here is normally an inherent right to compensation in respect of [deprivation of possessions] but not [control of the use of property]”. In *Depalle v France* (2012) 54 EHRR 17, the ECtHR said in paragraph 91 that “where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of art.1 of Protocol No.1”. In *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182, [2018] QB 149 (“*British American Tobacco*”), Lewison LJ, giving the judgment of the Court, said at paragraph 113:

“We accept that even if an interference amounts to a control of use rather than a deprivation, it is possible in principle for compensation to be required if the control is sufficiently severe In practice, however, a requirement for compensation is rare in a case of control of use. The question in each case is one of proportionality: is compensation required in order to achieve a ‘fair balance’ between the public interest pursued and the private property interests affected?”

116. In the present case, the parties differ as to whether paragraph 9 of schedule 8 to the BSA effected deprivation or merely control of use. Adriatic's case is that, were paragraph 9 of schedule 8 to the BSA to be construed as Mr Loveday or Sir James Eadie proposes, the provision would have deprived it of possessions. Mr Birdling submitted that Adriatic had accrued and enforceable contractual rights to service charges which were "possessions" for the purposes of A1P1 and that, if the submissions of either Mr Loveday or Sir James were accepted, those rights would be wholly extinguished. Mr Birdling referred in support of the contention that the contractual rights were "possessions" to *Wilson and Solaria Energy UK Ltd v Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625, [2021] 1 WLR 2349 ("*Solaria*"). In *Wilson*, Lord Nicholls observed in paragraph 39 that "'Possessions' in [A1P1] is apt to embrace contractual rights as much as personal rights", adding that "contractual rights may be more valuable and enduring than proprietary rights". In *Solaria*, Coulson LJ said in paragraph 34 that, "[w]hilst not all contracts are possessions within the meaning of A1P1, the starting point must be that a signed and part-performed commercial contract is, prima facie, a possession".
117. Sir James Eadie did not dispute that accrued contractual rights are protected by A1P1, but he nevertheless maintained that paragraph 9 of schedule 8 to the BSA involved control of use rather than deprivation. He cited in support of his submissions *Mellacher v Austria* (1989) 12 EHRR 391 ("*Mellacher*"), *Hutten-Czapska, Lindheim v Norway* (2015) 61 EHRR 29 ("*Lindheim*") and *British American Tobacco*.
118. In *Mellacher*, property owners complained that legislation had reduced the rent due to them under tenancy agreements. The applicants claimed that the effect of the reductions was such that they could be regarded as equivalent to a deprivation of possessions, but the ECtHR decided otherwise. It said in paragraph 44:
- "The Court finds that the measures taken did not amount either to a formal or to a *de facto* expropriation. There was no transfer of the applicants' property nor were they deprived of their right to use, let or sell it. The contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 applies in this instance."
119. In *Hutten-Czapska*, a landlord complained that a restrictive system of rent controls infringed A1P1. Once again, the ECtHR approached matters on the basis that there was a control of use rather than a deprivation. The Grand Chamber said this:

"160 The Chamber shared the Government's point of view.

It noted that, while it was true that the applicant could not exercise her right of use in terms of physical possession as the house had been occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, had been subject to a number of statutory limitations, she had never lost her right to sell her property. Nor had the authorities applied any measures

resulting in the transfer of her ownership. In the Chamber's opinion, those issues concerned the degree of the State's interference, and not its nature. All the measures taken, whose aim was to subject the applicant's house to continued tenancy and not to take it away from her permanently, could not be considered a formal or even de facto expropriation but constituted a means of state control of the use of her property.

The Chamber therefore concluded that the case should be examined under the second paragraph of Art.1 of Protocol No.1.

161 The Grand Chamber fully agrees with the Chamber's assessment."

120. *Lindheim* concerned legislation which gave lessees the right to extend their leases for an indefinite period on the same conditions as had applied previously. The lessors argued that this amounted to expropriation or de facto expropriation. However, the ECtHR disagreed. It said:

"75. The Court observes that the case under consideration concerns limitations imposed by law on the level of rent that the applicant property owners could demand from the ground lease holder and the indefinite extension of the ground lease contract on the same terms. The applicants continued to receive rent on the same terms they had freely agreed to when signing the ground lease contract, and, being at all times owners, were free to sell their plots of land, albeit subject to the lease attaching to the land.

...

77. The Court shares the applicants' view that the low level of annual rents in their case (less than 0.25 per cent of the plots' alleged market value) and the indefinite duration of the impugned rent limitation interfered to a very significant degree with their enjoyment of their possessions. However, ... the Court is not persuaded by their arguments that the application of s.33 of the Ground Lease Act to them amounted to expropriation or de facto expropriation, or that it meant that 'all meaningful use' had been taken away."

121. In *British American Tobacco*, the claimants complained that restrictions on packaging imposed by the Standardised Packaging of Tobacco Products Regulations 2015 deprived them of trade mark and other intellectual property rights. The Court of Appeal concluded in paragraph 113 that "the question of whether the interference with the marks and designs requires the payment of compensation in order to avoid a breach of

A1P1 falls to be determined on the basis that the Regulations amount to a control of use, not a deprivation”. The Court had said in paragraph 96:

“One part of the test for deprivation as opposed to control of use is whether, following the interference, the complainant has retained any meaningful use of the possession in question. If the answer to that question is ‘yes’ then the interference is unlikely to amount to a de facto deprivation or expropriation: *Pine Valley Developments Ltd v Ireland* (1991) 14 EHHR 319, para 56, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 19. The rights may lose some of their substance, but provided that they do not disappear it is unlikely that the interference will be treated as a de facto expropriation: *Elia Srl v Italy* (2001) 36 EHRR 9, para 56.”

On the facts, the claimants’ rights had not lost all utility or value. As regards national trade marks, the Court of Appeal said in paragraph 106:

“The Tobacco Appellants argue, no doubt rightly, that the Regulations make these rights far less valuable than they were before. They also argue, again no doubt rightly, that in cases involving smuggling or counterfeiting other agencies (such as HM Revenue and Customs or the police) may take the lead in enforcement. But the fact that there is a residual utility in these negative rights coupled with the retention of legal title means, in our judgment, that it cannot be said that the Tobacco Appellants have been *deprived* of their national marks.”

122. Mr Birdling argued that these cases do not assist the Secretary of State. The relevant possession in the present case, he said, is not Adriatic’s freehold interest in Hippersley Point but its contractual entitlement to service charges in respect of past costs, and that would be lost entirely on the Secretary of State’s construction of paragraph 9 of schedule 8 to the BSA. None of the cases on which Sir James Eadie relied, Mr Birdling submitted, dealt with a comparable situation. As regards *Mellacher*, Mr Birdling pointed out that the applicants’ complaint was that they had been deprived of “a substantial proportion of their *future* rental income” (emphasis added), not rent which had already become payable: see paragraph 40 of the judgment.
123. On the other hand, there is no question of schedule 8 as a whole, let alone paragraph 9 in particular, having served to deprive Adriatic of its ownership of Hippersley Point even if interpreted as suggested by Sir James Eadie or Mr Loveday. More specifically, Adriatic would not have lost the benefit of any of the provisions in the leases entitling it to service charges; to the contrary, those provisions would plainly still have a “meaningful use”. Nor is it even certain that Adriatic would be wholly unable to insist on *any* payment in respect of any specific service charge invoice. An invoice relating to costs within the scope of schedule 8 may well take account of other costs as well, and Adriatic would still be entitled to that element of the invoice.
124. On balance, therefore, I agree with Sir James Eadie that schedule 8, including paragraph 9, if construed as he or Mr Loveday contends, is to be seen as effecting control of use rather than deprivation for A1P1 purposes.

125. Two other points can be made at this stage. First, “[i]f it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court’s assessment, because of the respect which the court will accord to the view of the legislature”: *SC*, at paragraph 182, per Lord Reed. On the other hand, “the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility”: *SC*, at paragraph 184, per Lord Reed.
126. Secondly, the need for legislation to lay down general rules which may not achieve justice in every individual case has been recognised. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, Lord Bingham said in paragraph 33:

“[L]egislation cannot be framed so as to address particular cases. It must lay down general rules A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.”

See also *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, at paragraph 108; *R (Z) v London Borough of Hackney* [2020] UKSC 40, [2020] 1 WLR 4327, at paragraph 85; and *In re JR123* [2025] UKSC 8, [2025] 2 WLR 435, at paragraph 56.

127. Turning to the facts of the present case, Mr Murphy addressed a number of options which could have been pursued in relation to what became paragraph 9 of schedule 8 to the BSA. One of these was “includ[ing] paragraph 9 within the leaseholder protections” but on the basis that it would “apply prospectively only” so that “legal costs already incurred or demanded by landlords could have been recovered through the service charge, but there could have been a bar on recovery of costs not yet incurred or demanded at the time of commencement”: see paragraph 151 of Mr Murphy’s statement. Mr Murphy said as to this possibility:

“152. One problem with this approach would have been that landlords could have sought to circumvent the legislative measures by incurring costs or issuing service charge demands before the protections came into force (i.e. in the intervening period between the introduction of the measures to Parliament and commencement, in this case between 14 February and 28 June 2022).

153. This risk could in theory have been addressed by limiting the retrospective effect of the provision through an anti-forestalling measure, such that the scheme was retrospectively backdated to the date the measures were introduced to Parliament (i.e. from 14 February 2022 onwards) and only caught service charges incurred or demanded from this date onwards. However, even with

such an anti-forestalling measure in place, there would still have been clear shortcomings with this approach.

154. In particular, such an approach would not have met the policy objective of providing comprehensive protection to leaseholders. Building safety-related legal costs would already have been incurred in response to the building safety crisis, including (but not limited to) litigation. As I have described above, the crisis unfolded from 2017, almost five years before the leaseholder protections were introduced into Parliament. In many cases prior to February 2022, landlords had already incurred costs to carry out remediation and some were now recharging remediation and related costs to leaseholders through the service charge. This would have applied equally in respect of legal costs. Indeed, it was this situation that resulted in the protections being conceived and judged to be necessary.
155. Applying paragraph 9 prospectively only, or limiting its retrospective scope through an anti-forestalling measure would have been inconsistent with the retrospectivity of the rest of the Schedule 8 and would therefore have introduced further complexity. The protections were already a multifaceted intervention that would take leaseholders and the sector considerable time to get to grips with. Introducing further complexity by making some provisions apply retrospectively and others prospectively only would have made them even more complex and challenging to implement. This approach could have introduced additional complexity due to the difficulty of working out whether costs were incurred before or after the date the measures were introduced to Parliament. Relatedly, this would have risked undermining the Department's objective of providing leaseholders certainty and security and restoring stability to the lending market."
128. Mr Birdling did not accept that these matters could justify paragraph 9 having retrospective effect. He did not dispute that the BSA pursued a legitimate aim in the "public" or "general" interest or that paragraph 9, as it applies prospectively, is rationally connected to that aim. However, he denied that a retrospective application to paragraph 9, or schedule 8 more generally, would strike a fair balance or be proportionate.
129. Amongst the points which Mr Birdling made were these:
- i) Schedule 8 makes no provision for landlords to receive any compensation and the absence of compensation is a significant factor to be taken into account even in a "control of use" case;

- ii) Paragraph 9 would, if given retrospective effect, serve to throw an excessive burden (in fact, the entire burden of achieving the policy objectives underlying retrospectivity) onto landlords;
- iii) There is no provision in the legislation for individualised consideration of the circumstances of landlords and tenants even though it cannot be assumed that landlords will have broader shoulders than tenants;
- iv) A retrospective construction of paragraph 9 was not the result of a properly informed and reasoned legislative process, considering the competing interests of landlords, tenants and wider society;
- v) A retrospective construction would produce manifestly absurd results such as are referred to in paragraph 85(x) and (xi) above; and
- vi) Any danger of circumvention such as Mr Murphy mentioned in paragraph 152 of his witness statement could have been simply addressed by an anti-forestalling measure along the lines described in paragraph 153 of the statement.

130. On the other hand:

- i) The BSA was directed at a very real crisis. As Mr Murphy said in his witness statement:

“Without intervention, leaseholders would have continued to face unaffordable bills, building safety defects would have gone unremedied, the lending market would have remained frozen, and leaseholders would have been forced to continue living in unsafe buildings, worried that they might be the victims of a catastrophic fire”;
- ii) It is not inapt to speak, as Mr Murphy has, of the leaseholder protections for which the BSA provides as “an exceptional intervention, strictly targeted to address the unique circumstances surrounding the building safety crisis”;
- iii) Schedule 8 is one part of a wider scheme;
- iv) Landlords are not left to bear the burden of remediation alone. Aside from the contributions which the Government and developers have made and are making as mentioned in paragraph 84(iii) above, the BSA and the 2022 Regulations provide mechanisms by which landlords can seek to pass on liability to developers, other past and present landlords and their associates. In broad terms, the legislation seeks to allocate responsibility by reference to likely degree of culpability and likely ability to contribute. A “bright lines” approach has been adopted, but that can be legitimate: see paragraph 126 above;
- v) While lack of compensation is a factor to be taken into account in a “control of use” case, it “is not of itself sufficient to constitute a violation of [A1P1]”: see *Depalle v France*, as quoted in paragraph 115 above. “In practice, ... a requirement for compensation is rare in a case of control of use”: see *British American Tobacco*, as quoted in paragraph 115 above;

- vi) The framing of the BSA, including schedule 8 and, specifically, paragraph 9, involved considerations of economic and social policy in respect of which, as it seems to me, a wide margin of judgment is applicable. Parliament was better placed than the Courts “to reflect a collective sense of what is fair and affordable” and “of where the balance of fairness lies” (to use the words of Lord Reed in *SC*, at paragraph 208) in addressing the building safety crisis. The choices implicit in the legislation are not readily susceptible to the application of legal standards; and
 - vii) The fact that there may not have been Parliamentary debate as to whether schedule 8 should operate retrospectively cannot be treated as a reason supporting a finding of incompatibility: see paragraph 125 above.
131. In all the circumstances, I would answer the A1P1 Issue in favour of the Leaseholders and the Secretary of State. Supposing, contrary to my view, that paragraph 9 of schedule 8 to the BSA would otherwise have retrospective effect, section 3 of the HRA would not require the Court to “read in” words negating that. Retrospectivity would not violate A1P1.

Conclusion

132. While I have not been persuaded by Adriatic’s submissions on the Scope Issue or the A1P1 Issue, I would determine the Retrospective Construction Issue in its favour and so allow the appeal.

Lord Justice Nugee:

133. I am very grateful to Newey LJ for his clear exposition of the facts and issues in this appeal. I agree with him on Ground 1 (the Scope Issue) and Ground 3 (the A1P1 Issue) and do not wish to add anything to his analysis of either point. But I have come to a different conclusion on Ground 2 (the Retrospective Construction Issue) and I would dismiss the appeal accordingly.

The presumption against retrospectivity

134. Newey LJ has set out the relevant principles at paragraphs 53ff above. They are relatively well settled, and it is not necessary for me to go over them again. I will simply draw attention to certain points. (In doing so, I would like to pay tribute to a very helpful joint “Note on Retrospectivity of Legislation”, in fact prepared by counsel instructed in the *Triathlon* appeal although nothing in it is intended to be controversial).
135. First, the exercise we are engaged on is ultimately one of statutory construction: what is the legal effect of the words used by Parliament in the statute under consideration? The presumption against retrospectivity is a tool which assists the Court to arrive at the right construction. It is “not some sort of substantive or even procedural legal right”; it is “a rule of construction, or, perhaps more accurately, a factor to be taken [i]nto account when interpreting a statute or rule”: *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 (“*Odelola*”) at paragraph 55 per Lord Neuberger.

136. Second, it has long been recognised that the question is not a simple one of asking whether a statute is retrospective or not; there are degrees of retrospectivity, and the greater the degree of retrospection and the more unfairness involved, the more potent the presumption becomes: see the passage cited by Newey LJ at paragraph 54 above from the judgment of Staughton LJ in *Tunnicliffe*. (The actual decision in *Tunnicliffe* was later overruled in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, but Staughton LJ's statement of principle has been cited with approval several times in the House of Lords: see *L'Office Cherifien* at 525D per Lord Mustill, *Wilson* at paragraph 19 per Lord Nicholls and at paragraph 200 per Lord Rodger, and *Odelola* at paragraph 57 per Lord Neuberger.)
137. Similarly Patten LJ referred in *Granada* to a "spectrum" of retrospective effect at paragraph 57 as follows:

"In approaching this issue, the courts have avoided adopting a rigid or mechanistic rule for determining whether the legislation in question is to be treated as retrospective. Instead, they have recognised the various forms and degrees of retrospective effect which can be incorporated into legislation as a spectrum, and have approached the issues of construction by reference to the degree of unfairness which the particular measure may produce. This is necessarily an objective question which falls to be determined by looking at the legislation and its potential effects in general terms."

138. Third, the presumption "may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it": *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 at 938 per Lord Reid.
139. Fourth, there is, as Newey LJ has referred to, a well-recognised distinction between laws which alter for the future rights and obligations arising from existing legal relationships and laws which affect existing rights and obligations: see paragraphs 57 to 59 above. Lord Reed referred to this distinction in *Axa* (at paragraph 121), but he went on to say:

"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." "

The presumption against interference with property rights

140. So far as the presumption against interference with property rights is concerned, I agree with what Newey LJ has said about the principle (paragraphs 60 to 64 above). In practical terms the rights concerned in the present case are the rights of landlords to pursue their lessees for service charges and I do not think that in the present case the

presumption against interference with these rights adds anything significant to the analysis over and above the presumption against retrospectivity. Both presumptions are concerned with the question whether Parliament intended to take away the landlords' existing rights; both presumptions act in tandem to make that unlikely; both however may yield to a sufficient Parliamentary intention to the contrary.

The significance of explanatory notes

141. I agree with the analysis and conclusion of Newey LJ at paragraphs 65 to 72 above.

Approach to construction

142. As I have said the exercise we are engaged on is one of statutory construction. The general principles applicable to such an exercise have been authoritatively laid down in a series of cases in the House of Lords and Supreme Court and I think can be considered as well settled.
143. A convenient recent summary can be found in the judgment of Lord Sales in *PACCAR* at paragraphs 40-41. At paragraph 40 he said (by reference to *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 ("*Spath Holme*") at 396 per Lord Nicholls) that the basic task was clear: the Court was required to identify the meaning borne by the words in question in the particular context.
144. At paragraph 41 he referred to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, referring to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph 8 per Lord Bingham ("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") and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546 at paragraph 10 per Lord Mance ("in matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance"). Lord Sales summarised the position as follows:

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

So I find it helpful to approach the question of construction before us by first orientating ourselves by reference to the legislative purpose and scheme of the BSA.

Legislative purpose

145. The BSA was Parliament's main legislative response to the Grenfell Tower tragedy. Much of it was designed to implement the recommendations of the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackett whose final report had been published in 2018 and whose recommendations had been accepted by the Government. This is true of Part 2 (sections 2 to 30), which is headed "The regulator and its functions" and which establishes the Health and Safety Executive as the new building safety regulator; of Part 3 (sections 31 to 60), which is headed "Building Act

1984”, and which creates a new regulatory regime for the design and construction of higher-risk buildings under which the building safety regulator (rather than local authorities) is the sole building control authority in relation to them; and of Part 4 (sections 61 to 115), which is headed “Higher-risk buildings” and which provides a new regulatory regime for the ongoing management of occupied higher-risk buildings. These Parts can all be characterised as forward-looking: they are designed to establish a new regulatory regime for high-rise buildings, improving the focus on safety both at the design and construction stage and at the stage when buildings are occupied.

146. Part 5 (sections 116 to 160), which is headed “Other provisions about safety, standards etc”, contains provisions dealing with a variety of matters. Some of these are also forward-looking. But others, including those with which we are concerned, are intended to address the historic problems associated with existing safety defects in buildings. This was not something included in the review led by Dame Judith, as that had not been tasked with considering how remedial work on existing stock should be carried out or how it should be paid for.
147. The first group of sections in Part 5 (originally sections 116 to 125, although section 125 has now been repealed) are grouped together under the heading “Remediation of certain defects”. As explained in section 116(1), they (together with schedule 8) make provision in connection with remediation of relevant defects in relevant buildings. I will refer to these sections and schedule 8 together as “the remediation provisions”; by section 170(3)(a) of the BSA, they all came into force together two months after the BSA was passed, that is on 28 June 2022.
148. There was no dispute between the parties as to the general purpose of the remediation provisions. Mr Allison himself identified the broad purposes as fourfold:
 - i) To ensure that historic safety defects were remediated.
 - ii) To protect leaseholders.
 - iii) To ensure that those responsible for the defects were held liable.
 - iv) To restore stability to the lending market.
149. Mr Murphy’s witness statement goes into these matters in very considerable detail. It was adduced for the purposes of the AIP1 argument, Lewison LJ having permitted the Secretary of State to adduce evidence on the question whether the statute was compatible with Convention rights, for the reasons given by him in a judgment delivered on 20 September 2024 at [2024] EWCA Civ 1381. But Sir James Eadie said that Mr Murphy’s statement was also admissible on the question of construction, not for anything he said about the meaning of the BSA or Parliament’s intention in passing the legislation, but for the legislative background and history, which in turn helps to inform the Court of the context and purpose of the BSA. He relied on the statement of Singh LJ (with whom Bean and Andrews LJJ agreed) in *R (DK) v Revenue and Customs Commissioners* [2022] EWCA Civ 120, [2022] 4 WLR 23 (“DK”) at paragraph 44 as follows:

“She [counsel for the Commissioners] observes that the modern approach to statutory interpretation is to give the words used in

legislation their true meaning in the light of their context and their purpose: see e.g. *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875, at para 119 (Singh LJ). As I explained there, by reference to authority from the House of Lords and Supreme Court, the purpose of legislation is nevertheless objective and not subjective. Evidence by the maker of the legislation or anyone else is therefore irrelevant. Nevertheless, I agree with the fundamental submission on behalf of the appellants that it is often useful for the court to be assisted by a witness statement on behalf of the Government, which sets out the legislative background and history. This helps the court to ascertain the context and purpose of legislation. This is not the same thing as the subjective policy intentions of any individual minister or Government department. In the end, I did not understand Mr Cox to take any issue with this approach as a matter of principle. Accordingly, I would grant the application to adduce the witness statement of Mr Naim but only insofar as it contains objective matters and not subjective expressions of opinion.”

150. We did not hear any substantial argument opposing the admissibility of Mr Murphy’s statement for this purpose, and where it is properly before the Court in any event on the AIP1 issue, it is somewhat artificial to ignore what he says about the background to, and impetus for, the BSA. I am therefore content to follow the guidance of Singh LJ in *DK*. But I admit to having some reservations about the practice in general, at any rate if the evidence adduced goes beyond simply collating in a convenient fashion what is already in the public domain. Acts of Parliament are addressed to the public, and, as Lord Nicholls said in *Spath Holme* at 397F, citizens are intended to be able, with the assistance of their advisers, to understand them. For that purpose they (or more realistically their skilled advisers) may have recourse not only to what assistance can be obtained from other provisions in the statute and the statute as a whole, which may provide the relevant context, but also to external aids such as Law Commission reports, reports of Royal Commissions and advisory committees, Government White Papers and (subject to the caveats expressed above) Explanatory Notes: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraph 30 per Lord Hodge. Such external aids, as he there says:

“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”.

But what is noticeable is that all these external aids are in principle available to the public, and hence to their advisers when advising on the effect of a statutory provision. Evidence that is adduced in the form of a witness statement on behalf of Government in a particular case is obviously not available in the same way to those seeking to understand a statute, and if it goes beyond what is already in the public domain there would seem to me to be a risk of the Court being asked to interpret a statutory provision with the benefit of material that could never be available to the ordinary citizen, however well advised. That might be thought questionable, or even to give Government

a privileged position in litigation that was not in practice available to other litigants. In those circumstances I think the appropriateness of this practice might require further argument in a future case – it is noticeable that in *DK* counsel for the respondent did not argue against it in principle.

151. In the present case however there is no mystery about the background to the BSA, nor was it suggested that there was anything contentious in what Mr Murphy says about it, the majority of which is evidenced by official documents of one form or another that are publicly available, and much of which is notorious common knowledge. In those circumstances Mr Murphy's evidence does seem to me to provide a convenient and valuable summary of the position, and I am as I have already said content to follow the guidance of Singh LJ in *DK* in having regard to it.
152. The background to the remediation provisions in Part 5 of the BSA has been referred to by Newey LJ at paragraphs 27 to 29 above. I think it is helpful to expand a little on this, with the help of Mr Murphy's evidence, as follows. The Grenfell Tower tragedy exposed a fundamental flaw in the assumptions behind the design of blocks of flats. Most had been designed on the assumption that in the case of fire each flat would operate as a self-contained unit and hence the occupants of other flats would not be affected (and so could safely stay put). The Grenfell Tower fire demonstrated that this assumption was disastrously and tragically wrong if the building was clad in flammable cladding such as the aluminium composite material ("ACM") cladding in that case. Any such building was therefore unsafe and the occupants at serious risk.
153. That led to a need to identify and remedy buildings with unsafe cladding, in the first instance those with ACM cladding, although subsequently other types of unsafe non-ACM cladding were also identified. In due course other fire safety defects (such as lack of compartmentation between flats, flammable balconies, and ineffective fire safety doors) were identified; and buildings were also found to suffer from various structural defects.
154. Over time the scale of the crisis expanded, and very large numbers of flats were found to be affected. In September 2024 the Department estimated that there were 260,000 dwellings in the occupied private and social sector in residential buildings over 11m tall with unsafe cladding that it was monitoring, of which an estimated 116,000 dwellings were in buildings that had not started remediation.
155. Most flats in affected blocks are owned by leaseholders on long leases. Where work is needed to such a block, the questions which arise are: (i) who is to be responsible for doing the work and (ii) who is to pay for it? These questions are normally resolved contractually, without the need for significant legislative intervention, by the terms of the leases under which the flats are held. Leaseholders are usually each responsible for the internal maintenance of their own flat. But it makes no sense for repairs to the structure and exterior of the block to be carried out directly by individual leaseholders, so the leases will allocate responsibility to carry out such repairs to someone else, typically the landlord (or one of the landlords where there is a chain of superior interests) or to a management company. But the costs will usually be borne by the leaseholders through the service charge provisions in their leases. This is a very familiar arrangement. It has the obvious advantages that a single person is responsible for carrying out structural and exterior repairs to the block as a whole, but that the costs

are borne by the leaseholders who have the greatest practical and financial interest in the repairs being carried out.

156. This contractual allocation of costs is subject to limited legislative intervention in the shape of sections 18 to 30 of the Landlord and Tenant Act 1985 which (broadly) prevent recovery of service charges unless reasonable. The fact that Parliament regarded it as necessary to intervene (and that the provisions have had to be amended and expanded several times since) no doubt shows that the division between responsibility for doing the work and responsibility for paying for it, and the divergent interests of landlords and leaseholders that this causes, can lead to real practical difficulties. Nevertheless in principle such an arrangement is a well understood and well tested contractual scheme. And although in particular cases it can lead to leaseholders having to meet unexpected costs, that might in the general run of things be thought not unfair: they have bought their flats and like owners of other property, the risk of unanticipated expenditure on maintaining their property might be thought naturally to fall on them – they after all usually live in them as well as benefiting directly from maintaining or increasing the value of their flats. Landlords who own a freehold reversion on a block of flats where the flats are all let on long leases often have a quite limited economic interest in the block, consisting largely if not wholly of the right to ground rents, the ability to charge other fees during the lifetime of the leases, and the value of the reversion when the leases expire, the present value of which is likely to be minimal if, as is often the case, the leases have many years to run. As Newey LJ has referred to (see paragraph 5 above) Adriatic's evidence in the present case estimated its financial interest in Hippersley Point at a mere 2.52%.
157. The difficulty with the cladding crisis however was that this typical and familiar contractual scheme had the effect of imposing very large, unexpected, and wholly disproportionate costs on leaseholders. As Newey LJ has referred to (see paragraph 27 above), an analysis by the Department in January 2022 estimated the mean cladding remediation costs per leaseholder at £59,000 in a building over 18m tall, and £27,000 in a building between 11m and 18m tall; roughly 40% of leaseholders had no savings and around 2/3 had less than £16,000; and if leaseholders were required to meet £60,000 of extra costs, it was estimated that 21% of them would be in negative equity and 34% in financial stress (defined as a loan-to-income ratio of 4.5 or more).
158. The Department does not have the same data with respect to the other (non-cladding) fire safety issues or structural defects, where it is not known how many flats are affected, or the likely costs. But these can only add to the problem.
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.
160. There were other adverse knock-on effects. One was that even before defects were remediated there could be significant costs imposed on leaseholders for interim measures such as "waking watches" or the installation of fire alarms. Another was the impact on leaseholders' mental health, both of living with their families in properties

that they knew or feared were dangerously unsafe, and of facing very significant financial strain, including the risk of having their leases forfeited for non-payment of the service charge; a third consequence (referred to by Newey LJ at paragraph 27 above) was that the lending market froze as mortgagees declined to lend until defects were remedied, with the result that leaseholders could not sell to anyone in need of a mortgage (as most flat-buyers are), and were in effect trapped in unsafe homes, facing potential financial ruin and with no way out.

161. That was the context in which Government decided that significant intervention was needed, both to ensure that the defects were actually remedied, and to ensure that leaseholders were protected from unaffordable costs. As Newey LJ has referred to (see paragraph 29 above), on 10 January 2022 Government announced a “reset in its approach.” The Secretary of State, the Rt Hon Michael Gove MP, who had taken office in September 2021, announced the reset in a Press Release in which he said:

“More than 4 years after the Grenfell Tower tragedy, the system is broken.

Leaseholders are trapped, unable to sell their homes and facing vast bills.

But the developers and cladding companies who caused the problem are dodging accountability and have made vast profits during the pandemic whilst hard working families have struggled.

From today, we are bringing this scandal to an end – protecting leaseholders and making industry pay.

We will scrap proposals for loans and long-term debt for leaseholders in medium-rise buildings and give a guarantee that no leaseholder living in their own flat will pay a penny to fix dangerous cladding.

Working with members of both Houses, we will look to bring a raft of leaseholder protections into law through our Building Safety bill.”

162. The Building Safety Bill was already then before Parliament, having been introduced on 5 July 2021. An initial set of amendments was tabled by the Government on 13 January 2022, and a more substantial set on 14 February 2022 at which point the Bill was at Committee stage in the House of Lords. These amendments (with later refinements) became the remediation provisions in sections 116 to 125 of and schedule 8 to the BSA.

The legislative scheme

163. The remediation provisions consist of a series of provisions, summarised by Newey LJ at paragraphs 14 to 22 above, supplemented by some other provisions in Part 5 of the BSA, and by regulations such as the 2022 Regulations referred to by Newey LJ at paragraphs 23 to 26 above. Taken together these provisions amount to a very significant intervention by Parliament in what I have referred to as the typical and familiar contractual scheme applicable to a block of flats. By protecting leaseholders from the significant costs that they would otherwise have to bear, the remediation

provisions undoubtedly cause very substantial disruption to the contractual allocation of risk. That inevitably means that costs that would otherwise have fallen on the leaseholders have to be borne by someone else, such as in the present case Adriatic (since Government did not propose that they all should be borne by the taxpayer). That might indeed be thought very unfair to landlords such as Adriatic who are as blameless for the original defects as the leaseholders; but it is a necessary consequence of Parliament's decision to relieve leaseholders of such costs. In circumstances where the driving consideration was that many leaseholders could not afford to pay the costs of remediation, the protection of leaseholders was bound to push costs onto others.

164. That led to what is a complex series of provisions with a number of different features. The following can be discerned from the remediation provisions taken as a whole.
165. First, if the person responsible for the defect (the developer in the case of an initial defect, or the person who commissioned the works in the case of other defects), or someone associated with them, retained an interest in the building in question, they have to bear the costs of dealing with the defect. This is the effect of paragraph 2 of schedule 8 which provides that if a relevant landlord (that is the landlord in respect of a lease of any premises in a relevant building, or any superior landlord) is responsible for the defect, "no service charge is payable under the lease in respect of a relevant measure" relating to that defect: see paragraph 15 of Newey LJ's judgment above. Unlike the other provisions in schedule 8, this paragraph applies whether or not the lease in question is a qualifying lease (for which see paragraph 16 above). Thus in the *Triathlon* appeal, it was common ground that paragraph 2 applies, with the result that no service charges are payable by the respondent Triathlon Homes LLP despite the fact that its leases cover multiple properties and are not qualifying leases. Like other provisions in schedule 8, the application of this paragraph depends on the position at "the qualifying time" which is 14 February 2022 (see section 119(2)(d)). This is no doubt an anti-avoidance measure, designed to stop developer-landlords from altering their position after the proposals were first introduced into the bill.
166. The premise behind paragraph 2 is self-evidently that if the landlord (whether the immediate landlord or a superior landlord) is the developer, they are responsible for the defects and should not be able to push the costs of remedying the defects onto anyone else. This takes priority over any other consideration and hence applies however large and well off the leaseholders are.
167. The remaining protections for leaseholders however – those in paragraphs 3 to 9 of schedule 8 – only apply to those with qualifying leases, namely those living in their own homes or with small property portfolios (owning no more than two other properties): see section 119, summarised in paragraph 16 above. The focus of the protections is therefore squarely on individual leaseholders living in their flats (although extended to those with very small portfolios). Leaseholders with larger portfolios are left to bear all the costs (other than those covered by paragraph 2) as per the contractual provisions for service charges in their leases.
168. Conversely, if the landlord is part of a corporate group whose net worth is at least £2m per relevant building, they meet the contribution condition and cannot pass on any of the costs to the protected leaseholders. This is the effect of paragraph 3 of schedule 8 which provides that "no service charge is payable" under a qualifying lease in respect of relevant defects if the landlord at the qualifying time met the contribution condition.

169. These two provisions together show that a second feature of the legislative scheme is that where the developer (or an associated company) is not the landlord the costs are borne by those more likely to be in a position to pay – firstly leaseholders with portfolios of more than two properties, and secondly landlords who are part of well-resourced corporate groups.
170. Next, leaseholders with qualifying leases do not have to pay any service charges in respect of cladding remediation. This is the effect of paragraph 8 of schedule 8, which provides that “No service charge is payable” under a qualifying lease in respect of cladding remediation (as defined). It applies even if the landlord does not meet the contribution condition. This can be seen to have implemented the Secretary of State’s announcement that no leaseholder living in their own flat “would pay a penny to fix dangerous cladding”.
171. Similarly the effect of paragraph 9 of schedule 8 is that “No service charge is payable” under a qualifying lease in respect of certain legal or other professional services. This is of course the provision with which we are directly concerned. Again it applies even if the landlord does not meet the contribution condition.
172. Taken together paragraphs 8 and 9 show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs.
173. The fourth feature of the legislative scheme is that in other cases remediation costs can in principle be passed on to leaseholders with qualifying leases but subject to a cap on their liability depending on the value of their flats. If the value at 14 February 2022 was less than £325,000 (in Greater London) or £175,000 (elsewhere), then “no service charge is payable” for relevant defects (paragraph 4 of schedule 8). If the value was over those figures but less than £1m, the leaseholder’s liability is capped at £15,000 (in Greater London) or £10,000 (elsewhere); if the value was between £1m and £2m, the cap is £50,000; and if the value was over £2m, the cap is £100,000 (paragraph 5 of schedule 8). For this purpose there is a limited “look-back” over the 5 years before commencement (paragraph 6 of schedule 8). Again this can be seen to reflect a broad principle that those who are more likely to be able to afford to do so should contribute more, whereas those who are less likely to be able to do so should contribute less, or nothing at all.
174. These are the principal features of the leaseholder protections. But they are supplemented by other provisions in the BSA. As I have already referred to, the inevitable corollary of providing protection for leaseholders was (unless Government was proposing, which it was not, that the taxpayer should pick up all the costs) that costs will be incurred (by whoever is responsible for carrying out the work, whether that be a landlord or a management company) which would otherwise have been recoverable from leaseholders through the service charge provisions in the leases, but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make remediation contribution orders where it is just and equitable to do so (see paragraph 21 ii) above), and regulations 3, 4 and 5 of the 2022 Regulations (see paragraphs 23 to 26 above).

175. Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130): see paragraphs 21 iii) to v) above.
176. As can be seen this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible.

The rival constructions

177. That being the legislative purpose and scheme of the BSA I can now consider the question of construction. We are of course concerned with the construction and effect of paragraph 9 in schedule 8. But it was recognised on all sides that whatever we decide in relation to paragraph 9 is likely to apply to the other provisions in schedule 8, namely paragraph 2 (developer-landlord), paragraph 3 (landlord who meets contribution condition), paragraph 4 (leases worth less than £325,000 / £175,000), paragraph 5 (cap on leaseholder contributions) and paragraph 8 (cladding remediation costs). In each case the relevant paragraph provides either that no service charge is payable, or a capped amount is payable, in the circumstances in which it applies.
178. By the end of the oral argument, it had become clear that four different constructions of paragraph 9 were being advanced (see paragraphs 49 to 51 above). I find it helpful to see how these rival constructions would read if spelt out.
179. The text of paragraph 9 is given by Newey LJ at paragraph 18 above, and I repeat paragraph 9(1) here for convenience:

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

As stated above, this provision came into force on 28 June 2022.

180. Mr Loveday’s construction is the most far-reaching. It is that once paragraph 9 had come into force, the effect was that service charges in respect of the legal or other professional services in question were to be regarded for all purposes as not “payable” and hence as never having been payable, with the result that if unpaid they need not be paid, and if already paid they could be recovered. That, it seems to me, involves reading paragraph 9(1) as if it said:

“(1) *From 28 June 2022, no service charge is payable and no service charge is to be regarded as ever having been payable* under a

qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.”

181. Sir James Eadie’s construction is much more limited in effect. He submitted that once paragraph 9 was in force it prevented any service charge of the relevant type being payable – whether the underlying costs had been incurred, or a service charge had been demanded, or had fallen due – but that it had no effect on payments that had already been made. This construction can be spelt out as follows:

“(1) *From 28 June 2022, no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect whether such services have been provided and billed for, or any service charge demanded or fallen due, before or after 28 June 2022.*”

182. Mr Allison had two alternative constructions. His primary submission was that paragraph 9 did not apply where the person claiming the service charge (usually, as here, the landlord, although it could be a management company) had incurred costs in respect of legal or professional services before 28 June 2022; his secondary submission was that it did not apply where a service charge had become due before that date.

183. These can be spelt out respectively as follows:

“(1) *From 28 June 2022, no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect where the liability to pay for the legal or other professional services was incurred on or after 28 June 2022.*”

And:

“(1) *From 28 June 2022, no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect where the service charge falls due on or after 28 June 2022.*”

Mr Loveday’s construction

184. I consider first Mr Loveday’s construction. As he accepted, the practical effect of this would be very far-reaching. It would potentially re-open transactions that had taken place decades ago, and had long since been thought to be settled. The effect of the definition of “relevant defect” in section 120 is to include defects arising from work carried out in the 30 years prior to 28 June 2022, so long as the defect is one which gave rise to a building safety risk as defined (that is, a risk to the safety of people in or about the building from the spread of fire or collapse of the building or part): see paragraph 14 above. So work carried out to replace defective fire doors 20 years ago would on this view be within the scope of the protections in schedule 8. The cost to the landlord

of carrying out such work might have been duly consulted on, reasonably incurred and of a reasonable amount, so that the cost was quite properly included in service charge demands; and such service charge demands could therefore have been lawfully payable (and paid) at the time. But on Mr Loveday's construction, schedule 8 might have the effect that any such service charge would now be treated as not payable after all. Suppose for example a leaseholder with a qualifying lease of a flat in London worth less than £325,000 on 14 February 2022: by paragraph 4 of schedule 8 no service charge is payable under such a lease in respect of a relevant measure relating to any relevant defect. If Mr Loveday is right as to the construction of paragraph 9 of schedule 8, the same would no doubt apply to paragraph 4, and all service charges in respect of relevant defects arising from work carried out in the previous 30 years paid by the leaseholder would now be treated as not having been payable. Mr Loveday suggested that that meant that the leaseholders would be able to apply to the appropriate tribunal under section 27A of the Landlord and Tenant Act 1985 and seek repayment or an adjustment of accounts accordingly, there being, he said, no limitation period applicable to such a claim. We were not asked to decide if that was right, and I do not propose to do so, but it can be seen that on this view the potential effect of schedule 8 is to re-open transactions from many years past.

185. That would put the potential retrospective effect of schedule 8 at the far end of the spectrum. Such an interpretation is only to be adopted if one can be satisfied that this is what Parliament intended. But I think there are two reasons why it is impossible to be satisfied that this is what Parliament intended. First, there is no textual support for it. One may contrast section 135 where section 135(1) extends the limitation period under the DPA 1972, and section 135(3) provides that the amendment made by section 135(1) in relation to an action under section 1 of the DPA 1972 "is to be treated as always having been in force". Second, and more significantly, there is nothing to suggest that such a reopening of the position was something that Parliament had in mind or that was required to address the problems that the remediation provisions were designed to address. As the background to the legislation clearly shows, the context for schedule 8 was a one-off crisis arising from the safety risks uncovered by the Grenfell Tower tragedy which was leading to many leaseholders facing unprecedented and unaffordable service charges. There is nothing in this to suggest that another concern was to intervene in the contractual scheme of service charges more generally, or to re-open up to 30 years' worth of past service charges. There was an undoubted problem in the inability of leaseholders to pay now; there is no reason to think that another problem was the historic impact of service charges demanded and paid long ago.
186. Moreover when one examines the practical working of schedule 8 in more detail, the effects of Mr Loveday's construction seem so outlandish that it is impossible to believe that Parliament intended the protections for leaseholders in schedule 8 to lead to a reopening of past transactions in this way. Thus for example the availability of almost all the protections (that is, other than that in paragraph 2) is limited to those with qualifying leases. Whether a lease is a qualifying lease depends on a one-off snapshot of the position at the beginning of 14 February 2022. Unless the then lessee, or one of the then lessees, (a "relevant tenant") was either occupying the dwelling as his only or principal home, or owned no more than 2 other dwellings in the UK, at that date, the lease is not a qualifying lease: see section 119 as summarised at paragraph 16 above. If the test is met on that day, the lease is a qualifying lease; conversely if the test is not met, the lease is not (and never will have been) a qualifying lease and none of the

protections for qualifying leases apply. That makes sense if the intention of schedule 8 is to provide protection going forwards. It divides existing leases as at 14 February 2022 into those that are qualifying (and whose lessees will benefit from the protections) and those that are not (and whose lessees will not). But it makes much less sense if the intention was also to provide retrospective protection for up to 30 years before. One would expect the availability of such protection to depend on whether the tenant was occupying the flat as his home (or had no more than 2 other properties) at the time of payment, not on what the position was on 14 February 2022.

187. Thus to take a simple example, suppose a lease under which a leaseholder paid service charges for relevant defects in the period up to the end of 2021, but whose lease had come to an end before 14 February 2022. That lease would not be a qualifying lease and the leaseholder would therefore not benefit from the protections in schedule 8 whereas others whose leases continued past that date would. That might admittedly be thought an unlikely scenario (as most leases are granted for 99 years or more and high-rise blocks of flats are unlikely to be that old), but one can envisage much more probable scenarios. Suppose for example two neighbours in the same block, A and B, who bought their flats at the same time, occupied them as their respective homes, and paid the same service charges from 1992 onwards, including some based on the cost of remedying fire safety defects. On 14 February 2022 A is still living in his flat as his only home and has a qualifying lease. On Mr Loveday's construction, A would be able to reopen payments he had made for service charges in respect of relevant defects back to 1992. B however has sold his flat before that date. Whether B's lease is a qualifying lease depends not on whether it was his only home when he lived there, but on the happenstance of who he sold it to. If he sold it to C who on 14 February 2022 was living in it as *his* only home, then it would be a qualifying lease, and it would appear that on Mr Loveday's construction B could take advantage of the provisions under which service charges under his lease were retrospectively to be treated as not having been payable. But if he happened to sell it to D, an investor with a portfolio of buy-to-let properties, so that on 14 February 2022 D was the leaseholder and owned more than 2 other properties, then the lease would not be a qualifying lease. That would appear to mean that B would not benefit from the protections available to the holders of qualifying leases. Some anomalies are probably unavoidable whatever interpretation is adopted, but if the Parliamentary intention had really been to enable certain leaseholders to reopen certain transactions over the last 30 years, it would seem absurd to make the availability of this dependent not on the position (and presumed ability to pay) of the lessee himself but on that of his successor who happened to be the leaseholder in February 2022.
188. A similar point can be made on paragraph 3 of schedule 8. This is the provision which provides that no service charge is payable under qualifying leases if the landlord meets the contribution condition, namely that it is a member of a corporate group whose net worth exceeded £2m per relevant building: see paragraph 168 above. This test is again dependent on the position at the qualifying time, that is 14 February 2022. Suppose a case in which the landlord from 1992 was a small landlord that did not meet the contribution condition. If that landlord was still the landlord on 14 February 2022, or had sold to another small landlord which did not meet the contribution condition on that date, then paragraph 3 would have no application. But suppose the landlord had before February 2022 sold the reversion to a successor which was part of a wealthy corporate group such that the contribution condition was met on 14 February 2022. That would

mean that paragraph 3 would apply, and the leaseholders with qualifying leases would not pay anything towards relevant defects. On Mr Loveday's construction, it would appear that past service charges would also be treated as not having been payable, thereby entitling the leaseholders to re-open transactions back to 1992 even though the landlord at the time was not itself a wealthy landlord who met the contribution condition. Again it would seem bizarre that the ability of the leaseholders to re-open past transactions would depend not on the wealth (and presumed ability to pay) of the landlord at the time that the service charges were demanded and paid, but on the wealth of a successor landlord at 14 February 2022.

189. Another example can be found in the provisions of paragraphs 5 and 6 which concern the maximum that leaseholders of qualifying leases can be required to pay. Paragraph 6 gives the various amounts of the permitted maximum, ranging from £10,000 to £100,000 depending on the value of the qualifying lease and whether the premises are in Greater London or not. Paragraph 5 provides:

“5(1) A service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect is payable only if (and so far as) the sum of—

- (a) the amount of the service charge, and
- (b) the total amount of relevant service charges which fell due before the service charge fell due,

does not exceed the permitted maximum.

(2) In this paragraph “relevant service charge” means a service charge under the lease in respect of a relevant measure relating to any relevant defect that—

- (a) fell due in the pre-commencement period, or
- (b) falls due after commencement.

(3) In sub-paragraph (2) “the pre-commencement period” means the period—

- (a) beginning 5 years before commencement or, if later, on the day the relevant person became the tenant under the qualifying lease, and
- (b) ending with commencement.

“The relevant person” means the person who was the tenant under the qualifying lease at commencement.

(4) In this paragraph—

“commencement” means the time this paragraph comes into force;

“the permitted maximum”: see paragraph 6.”

190. The effect of this is to require a limited “look-back” over the 5 years before 28 June 2022 when calculating how much a leaseholder of a qualifying lease can be required to pay. If for example a leaseholder had a lease of a flat in Greater London worth more than £325,000 and less than £1m on 14 February 2022, the permitted maximum for the lease would be £15,000 (this is the combined effect of paragraphs 4(1)(a), 6(2)(a) and 6(3)). If the leaseholder had already paid £10,000 in service charges for the remedying of relevant defects in the 5 years before 28 June 2022, the effect of paragraph 5 is that he could only be charged another £5,000.
191. Two things are noticeable about this. First the look-back is limited to 5 years before commencement. So the fact that the leaseholder might have also spent a further £1,000 on the replacement of fire doors in 2000 is to be ignored. This would seem to sit oddly with Mr Loveday’s construction which would enable other service charges impacted by schedule 8 to be re-opened over a much longer period, of up to 30 years. So a leaseholder of a London flat worth £300,000 on 14 February 2022, who by paragraph 4(1)(a) is not liable to pay any service charges in respect of relevant defects, would on his construction be able to re-open past transactions back to 1992, whereas a leaseholder of a slightly more valuable flat worth £350,000 would not be able to look back beyond 2017. That would seem unlikely to be what Parliament intended.
192. Second, there is no express mechanism laid down in paragraphs 5 and 6 for recovery of past amounts even if they exceed the permitted maximum. Suppose for example the leaseholder whose permitted maximum is £15,000 had spent not £10,000 but £20,000 in the 5 years before 28 June 2022. Since paragraph 5 is expressly dealing with a look-back over those 5 years, one would expect the legislation to have made express provision for recovery of payments over the permitted maximum if that had been the intention. It must have been obvious when making provision for the look-back period that leaseholders might have already paid more than the permitted maximum. But there is no hint in the legislation that Parliament intended that leaseholders would have a right to recover the excess. That seems to me to make it unlikely that Parliament intended that the provision in paragraph 5 that a service charge is payable only if it exceeds the permitted maximum should be understood as meaning that service charges in excess of the permitted maximum should be treated as if they had never been payable. But this is the implication of Mr Loveday’s construction.
193. In these circumstances I am not persuaded by Mr Loveday’s submission. It would give a very significant retrospective effect to the legislation; it would go much further than required to meet the problem which the remediation provisions were evidently designed to address; and it would cause a number of difficulties in implementation. In those circumstances it cannot be supposed that Parliament intended the legislation to have this effect.

Sir James Eadie’s construction

194. The practical effect of Sir James Eadie’s construction is that a line is drawn on 28 June 2022. Any service charges paid before that date are unaffected by the legislation; but from that date no further service charges of the relevant type are payable, whether the underlying costs have been incurred, or service charges have been demanded or fallen

due. I agree with Newey LJ (see paragraph 51 above) that this construction in line with the Judge's conclusions.

195. I also agree with Newey LJ that this construction engages the principles that legislation is not normally to be construed as altering the rights and obligations of the parties resulting from events that had already taken place; and that legislation is not normally to be understood as interfering with proprietary rights. Construing the remediation provisions of the BSA as relieving a leaseholder from paying a service charge based on costs that a landlord has already incurred interferes with the landlord's existing proprietary rights arising from events that had already taken place; and even more so if the landlord has not only incurred costs but demanded a service charge which has fallen due. Mr Allison submitted with justification that this would be unfair on landlords who had incurred costs in the bona fide belief that they would be able to pass them on to leaseholders.
196. On the other hand, schedule 8 undoubtedly puts in place very substantial protections for leaseholders, preventing them from being liable to pay service charges that would otherwise be due. On any view this is a very significant statutory intervention in the contractual scheme that would otherwise apply. Once Parliament had decided that an intervention on such a scale was necessary to address the problem, it was bound in any event to cause very significant unfairness to landlords (and others contractually entitled to service charges). The process that elapses between a landlord deciding that expenditure is required and successfully collecting service charges from the leaseholders usually takes a considerable time. Suppose a landlord concludes that work is required to remedy a defect. Unless it applies for dispensation, it first has to consult the leaseholders in accordance with the requirements of the Landlord and Tenant Act 1985. Once that process is complete, it will then enter into a contract for the works. Payments will become due under the contract from time to time in accordance with its terms. The landlord may well, depending on the service charge provisions in the leases, be able to obtain payments on account from leaseholders in advance of the payments becoming due; but will usually only be able to claim the final amount once payments have been made and a reconciliation carried out between payments on account and the final service charges. Leaseholders may or may not then pay; they may or may not challenge the service charges as unreasonable. This whole process may take a number of years.
197. Wherever the line is drawn in this process between service charges that the leaseholders do have to pay and those that under the provisions of schedule 8 they do not, it will cause serious disruption to the orderly collection of service charges. On Mr Allison's primary construction – namely that the protections of schedule 8 do not apply to costs that have been *incurred* before 28 June 2022 – there will nevertheless be landlords who have committed themselves to contracts in the belief they would be able to pass on costs to leaseholders but who find that they are unable to do so as costs are not incurred when the contract is signed but only when invoices are rendered or payments made (see the decision in *Burr*, referred to by Newey LJ at paragraph 38 above). On his secondary construction – namely that the protections do not apply to service charges that fell due before 28 June 2022 – there will be many landlords who have not only committed themselves to contracts but also actually incurred costs in the expectation that they will be able to pass on the costs to the leaseholders, who find that they cannot recover, or that they can only recover payments on account that have already been demanded, but

not balancing payments which have not. And whatever construction is adopted, there will be many landlords who as at 28 June 2022 had not started the remediation process at all; they on any view will be unable to recover the relevant service charges but will still have very significant repairing obligations that they cannot avoid and that they would have expected to be able to pass on the cost of.

198. In these circumstances I do not think that any sharp distinction can be drawn between the unfairness to landlords who have committed themselves to contracts, or to those who have incurred liabilities, or to those who have demanded service charges, or indeed to those who have not yet started on the process of repair. Wherever the line is drawn the impact of the legislation will be to impose significant costs on landlords that they were not expecting to bear, and I do not think the impact is significantly more unfair to a landlord who has not only signed a contract but made a payment under it, or has demanded a service charge which has fallen due. The effect of bringing into force the protections in schedule 8 on 28 June 2022 was bound to cause significant unfairness to all affected landlords regardless of where in the process they happened to be on that date. It was also bound to introduce somewhat arbitrary distinctions, whether that be between those landlords who had been billed and those that had not; or those that had demanded service charges which had fallen due and those that had demanded service charges that had not yet fallen due or those just about to issue a demand; or those whose leaseholders had paid and those whose leaseholders had not.
199. It is of course a matter for Parliament where it chooses to draw the line. So the first consideration is whether there is any assistance in the text of the legislation to indicate where it chose to do so. Here I think, in agreement with the Judge, that the language favours the line being drawn where Sir James said it was rather than where either of Mr Allison's constructions would draw it. The various paragraphs of schedule 8 provide simply that "no service charge is payable" (paragraphs 2, 3, 4, 8 and 9), or "a service charge ... is payable only if" it does not take the total over the permitted maximum (paragraph 5) for the various matters referred to. Since these provisions came into force on 28 June 2022, and I have rejected Mr Loveday's construction, this means "on and from 28 June 2022 no service charge is payable". On Sir James' construction this is exactly what the legislation provides; from 28 June 2022 no service charge will thereafter be payable (regardless of whether costs have already been incurred or service charges already been demanded, or indeed fallen due). On either of Mr Allison's constructions, this will not be the case. Many leaseholders will find that they still have to pay some service charges after that date in respect of the matters referred to. In the present case the sums are relatively modest, but the sums could be vast. A landlord could have entered into contracts for remedying fire safety defects under which it had already incurred millions of pounds of costs; it could have already billed leaseholders, or be in a position to bill them, for £100,000 each. There is nothing on the face of the legislation providing that the protections in schedule 8 are to be deferred until all the costs that had already been incurred, or all the costs that had already been demanded, or fallen due, should have been paid. If that had been Parliament's intention, one might have expected the legislation to specify with more precision when the protection was to take effect. But there are, as is common ground, no transitional provisions at all.
200. Moreover I think that paragraph 5 of schedule 8 lends some support to Sir James' interpretation. As set out above (see paragraphs 179-180) this contains a look-back over the 5 years before 28 June 2022 to see if the leaseholder in question has already

reached the permitted maximum. Suppose a case in which the leaseholder has a London flat worth over £325,000 but under £1m, and hence has a permitted maximum of £15,000, and has by 28 June 2022 already paid £20,000 in that 5 year period. The natural interpretation of paragraph 5 is that, having already paid more than the permitted maximum, the leaseholder cannot be required to pay more. But on Mr Allison's interpretation I think that would only apply to service charges based on costs which had not yet been incurred (or service charges not yet due) with the result that the leaseholder could continue to be required to pay service charges well over the permitted maximum. That seems contrary to the plain language of paragraph 5.

201. So far as it goes therefore I think the text of the Act militates against Mr Allison's interpretations and in favour of Sir James'. But I acknowledge that that by itself that would be a slender basis on which to decide that Parliament had intended to deprive landlords of their accrued rights. Far more significant to my mind is whether one or other interpretation can be seen to be more consonant with the purpose and scheme of the remediation provisions which "provide the basic frame of orientation for the use of the language employed in it" (see paragraph 144 above).
202. Once this is taken into account I think that Sir James's construction is indeed to be preferred to those of Mr Allison. As set out above, the scheme of schedule 8 is to provide a raft of protections for leaseholders, in the case of paragraph 2 for all leaseholders, and in the case of the other paragraphs for leaseholders with qualifying leases. The evident purpose of doing so is, in the case of paragraph 2, to ensure that costs are met by those responsible for the defects rather than anyone else; and, in the case of the other paragraphs, to provide relief for leaseholders facing unprecedentedly large and very often unaffordable service charges. But on either of Mr Allison's interpretations this would not happen for many leaseholders for a wholly unpredictable time. Leaseholders whose landlords were, or were connected with, the original developers would still have to pay for remediation, and leaseholders with qualifying leases would still face, and still have to meet, bills for remediation, so long as in each case costs had been incurred, or service charges had fallen due, before 28 June 2022. Such bills could be very large. That would to my mind cut across the evident legislative purpose of relieving leaseholders from their immediate predicament of facing large and often unaffordable bills; it would also I think tend to prevent the market from being freed up as intended. It would mean that far from leaseholders not having to pay a penny for cladding remediation, they might still have to pay many thousands of pounds. It would not put an end to questions being raised by MPs with ministers, or stories in the press about leaseholders facing ruin. In short I do not think it would achieve what can be seen to be the legislative purpose of addressing the immediate crisis of leaseholders trapped in their flats facing ruinously expensive bills.
203. In those circumstances I consider that Parliament cannot have intended that leaseholders should still continue to face the uncertainties and difficulties of the large and unaffordable bills that the legislation was designed to address. The only way to give effect to the Parliamentary intention of breaking the logjam and protecting leaseholders is to my mind to interpret the provisions that "no service charge is payable" as meaning what they appear to say, namely that from the date of such provisions coming into force no such service charge is indeed payable. I accept as I have said that that causes unfairness to landlords, but the real unfairness is the decision to deprive landlords of their contractual right to pass certain costs on to leaseholders at all. Once

that decision had been made, I do not think that the unfairness of depriving landlords of accrued rights adds very much; and I do not think this additional unfairness is sufficient to justify reading the legislation in such a way as to cut across the legislative purpose of providing protection to leaseholders against unaffordable bills in the way that Parliament obviously intended.

204. I have therefore concluded that Sir James Eadie's construction is to be preferred to those of Mr Allison and I would dismiss the appeal accordingly.
205. I add that I had drafted the substance of this judgment before the Supreme Court handed down their decision in *URS*. As Newey LJ has referred to, we have received further submissions from the parties in relation to the implications of their judgments for this appeal. I mean no disrespect to counsel by saying that nothing in them has caused me to change or reconsider my views, which I believe to be in line with the guidance from the Supreme Court; and I have not thought it necessary to lengthen this judgment by setting out the reasons why I have so concluded.

Lord Justice Holgate:

206. I agree with Newey LJ on grounds 1 and 3 for the reasons he gives. I agree with Nugee LJ on ground 2 for the reasons he gives. Accordingly, I would dismiss the appeal.