



Neutral Citation Number: [2025] EWCA Civ 846

Case No: CA-2024-001256

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)**  
**Upper Tribunal Judge Elizabeth Cooke**  
**Case Nos: LC-2023-134 to LC-2023-138**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 8 July 2025

**Before :**

**LORD JUSTICE NEWEY**  
**LORD JUSTICE NUGEE**  
and  
**LORD JUSTICE HOLGATE**  
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**Between :**

**TRIATHLON HOMES LLP**

**Applicant/**  
**Respondent to**  
**Appeal**

**- and -**

**(1) STRATFORD VILLAGE DEVELOPMENT  
PARTNERSHIP**  
**(2) GET LIVING PLC**

**Respondents to**  
**Application/**  
**Appellants**

**(3) EAST VILLAGE MANAGEMENT LTD**

**Respondent to**  
**Application and**  
**Appeal**

**- and -**

**SECRETARY OF STATE FOR HOUSING,  
COMMUNITIES AND LOCAL GOVERNMENT**

**Intervener**

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**Jonathan Selby KC and Cecily Crampin** (instructed by **Mishcon de Reya LLP**)  
for the **Appellants**

**Alexander Nissen KC and Paul Letman** (instructed by **Gowling WLG (UK) LLP**)  
for **Triathlon Homes LLP**

**Timothy Polli KC** (instructed by **Bevan Brittan LLP**) for **East Village Management Ltd**

**Michael Walsh KC, Camilla Chorfi and Richard Miller** (instructed by the **Treasury Solicitor**) for the **Intervener**

Hearing dates: 19, 20 and 21 March 2025  
Further written submissions: 27 May 2025  
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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on 8 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Nugee:

### *Introduction*

1. This appeal concerns orders known as remediation contribution orders (“**RCOs**”) made by the First-tier Tribunal (“**FTT**”) under powers conferred by Part 5 of the Building Safety Act 2022 (“**the BSA**” or “**the Act**”). The RCOs require the Appellants, Stratford Village Development Partnership (“**SVDP**”) and Get Living plc (“**Get Living**”), to pay substantial sums in respect of the costs of remedying fire safety defects in the external walls of five residential blocks in the East Village Estate in Stratford in East London. SVDP was the original developer of the estate, and Get Living is (now) in effect the owner of SVDP.
2. The RCOs were made on the application of the 1<sup>st</sup> Respondent, Triathlon Homes LLP (“**Triathlon**”). Triathlon is a provider of social housing and has long leasehold interests in the social housing in the blocks. The management of the estate is the responsibility of the 2<sup>nd</sup> Respondent, East Village Management Ltd (“**EVML**”). EVML has incurred the cost of engaging contractors to do the work required to remedy the fire safety defects. But for the BSA, Triathlon would have been liable to contribute to the costs incurred by EVML through its service charges; but it is common ground that one of the effects of the BSA is that Triathlon is not liable to make any such payments. The main effect of the RCOs is to require SVDP and Get Living to pay to EVML what would have been Triathlon’s share of the costs incurred by EVML; they also provide for Triathlon to be reimbursed certain costs it had already paid.
3. The RCOs were among the first made under the BSA. It had initially been intended that the applications for them should be heard by the Upper Tribunal (“**UT**”), and they were transferred to the UT to be heard by Edwin Johnson J and Martin Rodger KC, the President and Deputy President respectively of the Lands Chamber of the UT. But it became clear at the hearing that the UT has no original jurisdiction to make RCOs (the jurisdiction being conferred by the BSA solely on the FTT), and they therefore re-transferred the case to the FTT and continued to hear it sitting in their capacity as judges of the FTT. They concluded that RCOs should be made, for reasons given in a thorough and careful decision dated 19 January 2024 at [2024] UKFTT 26 (PC); and that was given effect to by an Order dated 5 March 2024. Their decision was appealed with their permission to the UT but the UT (Judge Elizabeth Cooke) agreed at the joint invitation of the parties to dismiss the appeal and grant permission to appeal to this Court without herself engaging with the substance of the argument, thereby in effect creating a leapfrog appeal to this Court from the decision of the FTT. Formally therefore we have before us an appeal from the UT, but there is no reasoned decision of the UT and in effect we are hearing an appeal from the detailed decision of the FTT.
4. This is the second of two appeals to this Court concerning the operation of Part 5 of the BSA, the other being *Adriatic Land 5 Ltd v The Long Leaseholders at Hippersley Point* (“**the Adriatic appeal**”). The detailed issues in the *Adriatic* appeal are rather different, but there is an inevitable overlap in some respects, and by Order dated 14 October 2024 Lewison LJ directed that the *Adriatic* appeal and this appeal should be heard sequentially by the same constitution. We therefore heard this appeal directly after the *Adriatic* appeal. They do however raise different issues, and we have written separate judgments for each appeal.

5. In this appeal there are two grounds of appeal. By section 124 of the BSA the FTT may make an RCO if it considers it just and equitable to do so. By Ground 1 the Appellants contend that the FTT erred in concluding that it was just and equitable to make the RCOs. By Ground 2 they contend that the FTT erred in concluding that an RCO can be made in respect of costs incurred before the relevant part of the BSA came into force on 28 June 2022.
6. Those appearing before us were as follows:
  - (1) The Appellants (SVDP and Get Living) were represented by Mr Jonathan Selby KC and Ms Cecily Crampin.
  - (2) Triathlon was represented by Mr Alexander Nissen KC and Mr Paul Letman.
  - (3) EVML, as explained below, although the intended beneficiary of the RCOs, was not an applicant for them before the FTT. It was joined as a respondent to enable it to participate, but until a late stage took no active part in the proceedings; it was not represented at the hearing before the FTT, although it did make written submissions through counsel supporting Triathlon’s applications. Before us it appeared by Mr Timothy Polli KC, and has aligned itself with Triathlon in resisting the appeal.
  - (4) The Secretary of State for Housing, Communities and Local Government (“**the Secretary of State**”), who was permitted to intervene by Order of Lewison LJ dated 10 September 2024, was represented by Mr Michael Walsh KC, Ms Camilla Chorfi and Mr Richard Miller.
7. We have had wide-ranging and well-argued submissions from counsel for all parties. For the reasons that follow I prefer those for the Respondents and would dismiss the appeal on both grounds.

*The Building Safety Act 2022*

8. It is convenient next to refer to the BSA. We have given an account of the background to the Act and the relevant provisions of Part 5 in our judgments in *Adriatic*, which we are handing down at the same time as our judgments in the present appeal. I will not repeat it all here, but I can summarise it as follows. The BSA was Parliament’s main legislative response to the Grenfell Tower tragedy. Much of the Act was passed to implement the recommendations of the review into building regulations and fire safety led by Dame Judith Hackitt, and Parts 2 to 4 duly 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.
9. Part 5 contains a variety of provisions, including a group of sections headed “Remediation of certain defects”, consisting originally of sections 116 to 125 (although section 125 has subsequently been repealed). In *Adriatic* I referred to these sections together with schedule 8 (which contains much of the detail and is given effect to by section 122) as “the remediation provisions”. The BSA was passed on 28 April 2022 and by section 170(3)(a) the remediation provisions all came into force two months later, that is on 28 June 2022. Unlike Parts 2 to 4 which are forward-looking and set up new regulatory provisions for the future, the remediation provisions were designed

to deal with a one-off problem, referred to as the building safety crisis, which saw many leaseholders of flats in high-rise blocks facing unprecedentedly high, and often unaffordable, service charge bills to pay for the costs of existing fire safety and structural safety defects in their blocks. As explained in more detail in *Adriatic*, a central purpose of the remediation provisions was to provide a substantial measure of protection against such service charges for leaseholders. These protections are found in schedule 8 and in most cases are confined to those with “qualifying leases” – that is where the lessee occupied the flat as their only or principal home, or owned at most 2 other properties in the UK, on the qualifying date of 14 February 2022: see sections 119 and 119A.

10. Paragraph 2 of schedule 8 however contains a more wide-ranging protection, the effect of which is to relieve any lessee from having to pay via their service charges for the costs of remedying fire safety defects if the original developer – or an associated company – is their landlord, or is a superior landlord. It provides as follows:

*“No service charge payable for defect for which landlord or associate responsible*

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- (1) This paragraph applies in relation to a lease of any premises in a relevant building.
- (2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—
  - (a) is responsible for the relevant defect, or
  - (b) is associated with a person responsible for a relevant defect.
- (3) For the purposes of this paragraph a person is “responsible for” a relevant 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.

- (4) In this paragraph—

“developer” means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;

“initial defect” means a defect which is a relevant defect by virtue of section 120(3)(a);

“relevant landlord” means the landlord under the lease at the

qualifying time or any superior landlord at that time.”

11. 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). There is no dispute that the blocks in the present case are relevant buildings.
12. There is also no dispute that the fire safety defects in the present case are relevant defects, and that the proposed works are relevant measures. “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 section 120(5) and section 120(3) respectively, “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 (that is, 28 June 2022): see section 120(3). And “relevant measure” includes a measure taken to remedy a relevant defect: see paragraph 1 of schedule 8.

13. It is common ground that the effect of paragraph 2 of schedule 8 in the present case is that Triathlon is not liable for service charges related to the remedying of the fire safety defects. This is because SVDP is the developer (as defined in paragraph 2(4)) and the freehold is held by two property holding companies called Stratford Village Property Holdings 1 Ltd and Stratford Village Property Holdings 2 Ltd (“**SVPH 1**” and “**SVPH 2**”). SVPH 1 and SVPH 2 are therefore together a superior landlord and they are associated with SVDP.
14. Paragraphs 3 to 9 of schedule 8 to the BSA provide protection against service charges for lessees under qualifying leases, the effect being either that no service charge is payable in the circumstances variously referred to, or that the lessee’s liability is capped at a certain amount (the amount of the cap depending on whether the flat is in Greater London or not, and the value of the lease on 14 February 2022). We have given a more detailed account in our judgments in *Adriatic* to which reference can be made if necessary.
15. Section 123 empowers the Secretary of State to provide by regulations for the FTT to make “remediation orders” requiring relevant landlords to remedy defects.

16. Section 124 empowers the FTT to make RCOs. This is the provision with which we are directly concerned in this appeal. As enacted it provided as follows:

**“124 Remediation contribution orders**

- (1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.
- (2) “Remediation contribution order”, in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to the relevant building.
- (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).
- (4) An order may—
  - (a) require the making of payments of a specified amount, or payments of a reasonable amount in respect of the remediation of specified relevant defects (or in respect of specified things done or to be done for the purpose of remedying relevant defects);
  - (b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.
- (5) In this section—

“associated” : see section 121;

“developer”, in relation to a relevant building, means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;

“interested person”, in relation to a relevant building, means—

  - (a) the Secretary of State,
  - (b) the regulator (as defined by section 2),

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

“partnership” has the meaning given by section 121;

“relevant building” : see section 117;

“relevant defect” : see section 120;

“specified” means specified in the order.

- (6) The Secretary of State may by regulations provide that this section applies, with or without modifications, in relation to a building that would, but for section 117(3), be a relevant building.”

The section has since been amended, but we are concerned with it in its original form.

- 17. Section 121 of the BSA explains when a partnership or body corporate is “associated” with another person for the purposes of sections 122 to 124 and schedule 8. It is not disputed that Get Living is associated with (at least) SVPH 1 and SVPH 2 (the landlords of the blocks), and hence is within the scope of section 124(3).
- 18. Other provisions of the BSA can be briefly noted:
  - (1) 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.
  - (2) Section 135 extended the limitation period for claims under section 1 or 2A of the DPA 1972 or section 38 of the BA 1984. The practical effect was to extend the limitation period for historic claims under section 1 of the DPA 1972 from 6 years to 30 years, thus enabling claims to be brought for buildings completed from 1992 onwards.
  - (3) Section 149 introduced a new cause of action allowing claims to be made where cladding products that were defective when manufactured, misleadingly sold or in breach of regulations have contributed to a building being unfit for habitation.
- 19. There are also regulations made under the BSA. In particular paragraph 12 of schedule 8 empowers the Secretary of State to make regulations for the recovery from a relevant

landlord of any amount not recoverable under a lease as a result of the leaseholder protections in schedule 8. Pursuant to this power regulations 3, 4 and 5 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 SI 2022/589, made in July 2022, (“**the 2022 Regulations**”) 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.

20. 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.”

21. 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”.

22. 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 to 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 scheme of the remediation provisions*

23. Before coming to the facts, it is worth standing back from the detail and considering the legislative scheme of these provisions. In my judgment in *Adriatic* I attempted to identify a number of features that can be discerned from the remediation provisions taken as a whole (see paragraphs [164] to [175]). As there set out in more detail, they can be summarised as follows:

- (1) If the person responsible for the defect retains an interest in the building (as at the relevant date, 14 February 2022), they will be likely to have to bear the costs

of remedying it (paragraph 2 of schedule 8, and regulation 3 of the 2022 Regulations).

- (2) If the lessee has more than a very small portfolio of properties, they get no further protection (this is the effect of confining the other protections to those with qualifying leases); conversely if the landlord is part of a well-resourced corporate group they meet the “contribution condition” and cannot pass on costs to protected lessees at all (paragraph 3 of schedule 8). In other words those who are more likely to be able to afford to pay are required to do so.
  - (3) Next there are certain categories of costs (cladding remediation under paragraph 8 of schedule 8, and legal and other professional costs under paragraph 9 of schedule 8) which protected lessees do not have to contribute towards at all.
  - (4) In other cases remediation costs can in principle be passed on to protected lessees, but subject to a cap on their liability (or a complete exemption from liability) depending on the value of their flats (paragraphs 4 to 6 of schedule 8).
  - (5) The inevitable corollary of relieving lessees of their contractual service charge liabilities is that (unless Government was proposing, which it was not, that the taxpayer would pick up all the costs) costs will be incurred by whoever is doing the work (whether landlord or management company) that would otherwise have been met by the lessees through their service charges 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 RCOs where it is just and equitable to do so, and regulations 3, 4 and 5 of the 2022 Regulations.
  - (6) 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).
24. As I said in *Adriatic*, 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.
25. It is convenient to mention here that after the hearing but before judgment could be finalised the Supreme Court handed down judgment in another case concerning the BSA, *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21 (“*URS*”). We gave the parties an opportunity to file further written submissions on any implications of the decision for the present appeal. *URS* concerned a different aspect of the BSA, namely section 135, but the judgments do contain some helpful statements as to the Act generally, which I will refer to below as appropriate.

*The facts – background and corporate structure*

26. The detailed facts are set out by the FTT with great clarity in their decision. For present purposes I can summarise them more shortly. The appeal concerns five blocks in East Village at Stratford in East London. The Village was originally constructed to provide accommodation for 17,000 athletes and officials participating in the Olympic Games in London in 2012, but it was always intended that after the Games were over the athletes' village would be converted to provide housing, and East Village is now a large permanent residential estate providing nearly 3,000 new homes, most contained in 66 blocks of between 8 and 12 storeys.
27. The five blocks with which we are concerned, referred to by the FTT as Blocks A to E, therefore form only a small part of the estate. They are all in a part of the Village referred to during its development as Plot N26. Each contains a mix of three-storey "town houses" or maisonettes and retail units on the lower levels, and flats or apartments on the upper levels. It was always intended that East Village would include both affordable housing and market housing and from the start it was an important design principle that units occupied under different tenures should not be identifiable by their appearance, nor concentrated in particular areas, but distributed through the Village, so the blocks contain a mix of different tenures. As elsewhere on the estate ownership is therefore split between Get Living which specialises in the private rental market and owns (through subsidiaries) the private rented housing, and Triathlon which owns the social and affordable housing. In practice this means that Triathlon has long leasehold interests in each of the five blocks, while Get Living has such interests in Blocks C to E.
28. After the right to host the 2012 Games had been awarded to London, the Olympic Delivery Authority ("**the ODA**"), a public body, was established in March 2006.
29. Triathlon is a limited liability partnership of three housing providers, two of them subsidiaries of much larger registered social housing providers and the third a property development and investment company which was part of a consortium selected by the ODA in March 2007 as its private sector development and funding partner for the development of East Village. Triathlon came into existence with the intention of purchasing the affordable housing at East Village when the buildings became available after the 2012 Games.
30. In 2009 the ODA set up (and thereafter owned) SVDP, a limited partnership consisting of three corporate partners (one general and two limited), for the sole purpose of funding and developing East Village for legacy use after its occupation by the 2012 competitors.
31. The development of Plot N26 took place pursuant to a Framework Agreement concluded in June 2009 between SVDP as Developer, SVPH 1 and SVPH 2 as Landlord, and Triathlon as Tenant. This, supplemented by separate Development Agreements for each Plot, provided for the construction of the affordable housing at East Village and the grant of leases to Triathlon of the affordable housing in each block on completion of post-Games retrofitting works.
32. SVDP did not carry out the development itself. It entrusted the management of the project to Lend Lease Development Ltd which in turn commissioned Galliford Try

Construction Ltd as its design and build contractor in respect of Plot N26. It is however common ground that SVDP is the “developer” of East Village within the meaning of section 124(5) of the BSA (see paragraph 16 above). The contract between Lend Lease and Galliford Try was entered into in December 2009, and the athletes’ accommodation was opened in March 2012.

33. Meanwhile the ODA was also taking steps for the disposal of East Village after the Games were over. From September 2010 it conducted a bidding process under which the successful bidder would acquire the East Village, subject to Triathlon’s interests in the affordable housing, and so be able to sell or let the other housing (nearly 1,500 units) on the open market. In the event the successful bidder was a joint venture between the Qatari sovereign wealth fund and a BVI investment fund. The ODA was prepared to sell either the land itself or SVDP (which was the beneficial owner of the land) but in the event the purchasers decided to acquire SVDP, and contracted to do so (through a specially incorporated company called QDD Athletes Village UK Ltd (“QDDAV”)) in August 2011.
34. In September 2012 after the Games were over the retrofitting of the athletes’ accommodation began. This work was to the interior of the buildings only and did not change the facades.
35. The sale of SVDP to QDDAV was completed on 6 August 2014. There have since then been various changes in both the corporate structure, and the identity of the investors who are interested, but the details do not matter. The current owner of SVDP is (and has been since 2018) Get Living, whose wholly-owned indirect subsidiaries include QDDAV, the three corporate partners in SVDP, and the two property holding companies SVPH 1 and SVPH 2, who hold the freehold on trust for SVDP.

#### *EVML*

36. I should also briefly refer to the position of EVML. EVML was established in 2009 by agreement between SVDP and Triathlon. Its role is to manage the estate. The current position is that most of the voting rights in EVML are held by either Triathlon (some 39%) or Get Living (some 58%), with the balance (some 3%) held by private individuals. Triathlon and Get Living appoint two directors each, and a fifth is appointed by SVDP.
37. EVML is contractually responsible for remedying defects in the blocks. But, as found by the FTT, from the commencement of the BSA (and before that when its provisions became known) the interests of its two major shareholders diverged, SVDP being the developer against whom both EVML and Triathlon had rights under the Act, and it was, the FTT said, hardly surprising that this made taking decisions at board level a slow and difficult process. Until very late in the day that made it impossible for EVML to initiate or take part in the proceedings, but eventually the board agreed that the two Triathlon directors alone should take advice and make decisions in connection with the proceedings, and EVML, as already referred to, is now supportive of the RCOs.

#### *Property structure*

38. So far as the property interests in the five blocks are concerned the position is as follows:

- (1) The freehold is vested in SVPH 1 and SVPH 2 as trustees for SVDP.
- (2) Below the freehold is a headlease granted to EVML in November 2016 for a term of 1000 years (of Plot N26 among other plots). This was inserted above the leases next mentioned.
- (3) Below the headlease are long (999 year) leases granted to Triathlon and a company called QDD EV N26 Ltd respectively.
- (4) Triathlon has 7 such leases (one for each of Blocks A to D, and three for Block E). They demise the interior of the social and shared ownership units in the blocks, amounting to 129 homes in all. Each lease requires payment of a service charge to EVML in return for services, including the repair and maintenance of the structure and exterior. Triathlon has granted shared ownership leases or assured tenancies of the 129 units let to it.
- (5) In Blocks A and B, all the units are in fact comprised in Triathlon's leases. But in Blocks C, D and E, there are other units, amounting to 77 in all, which are not. These (and the retail units) are the subject of 999 year leases to EV N26 Ltd (formerly named QDD EV N26 Ltd), and in turn sub-leased for 125 years to a Get Living subsidiary, Get Living London EV N26 Ltd. The leases provide for service charges to be payable to EVML. Get Living London EV N26 Ltd has let these units on assured shorthold tenancies at market rents.

#### *The defects*

39. The Grenfell Tower tragedy took place on 14 June 2017. It prompted EVML to review the cladding materials used at East Village. Initial investigations revealed that some blocks, but not those at Plot N26, used the aluminium composite material (“ACM”) cladding responsible for the spread of fire at Grenfell Tower. But publication of Advice Note 14 in December 2018 by the relevant Government Department (then called the Ministry of Housing, Communities and Local Government), which was addressed to the owners of high-rise residential buildings with external wall systems not incorporating ACM, led to further investigations.
40. The position with Plot N26 was not clearly identified until November 2020, but serious fire safety defects were ultimately discovered in each of the five blocks both as regards design and construction of the non-ACM cladding adopted for the facades. It is not necessary to go into any detail as there is no dispute that the defects are “relevant defects” for the purposes of the remediation provisions: see paragraph 12 above. In response to the discoveries a waking watch was implemented in November 2020 which remained in place until additional alarm and heat detection systems were installed as temporary measures.
41. Applications were made by EVML to the Building Safety Fund (“**the Fund**”). The Fund is one of three central government schemes to provide assistance to building owners to meet the cost of remedying fire risks. In Greater London it is administered by the Greater London Authority (“**the GLA**”). In October 2021 the GLA approved the blocks at Plot N26 as eligible for funding, and in September 2022 the Fund agreed in principle to fund the majority of the works at East Village; a Pre-tender Support

Agreement was entered into between the GLA and EVML in October 2022.

42. It took some time for EVML's board to agree on what works were required but a contract for remediation works at the five blocks, which involves removing and replacing the exterior cladding ("**the Major Works**"), was ultimately entered into in December 2022 by EVML with Errigal Facades Ltd ("**Errigal**") and work started in April 2023; the FTT said that full remediation was expected to be complete by August 2025. We were provided with a note of the updated position by EVML which indicated that as at 18 March 2025 works on three of the blocks had completed, and works on the other two were due to complete on 2 April 2025, ahead of schedule.
43. In February 2023 it was confirmed that the Fund would cover the costs of the Major Works and a detailed Grant Funding Agreement was entered into between the Secretary of State, (then called the Secretary of State for Levelling Up, Housing and Communities and referred to in the agreement as "**DLUHC**" – the department is now known as the Ministry of Housing, Communities and Local Government), the GLA and EVML on 1 June 2023 ("**the Grant Funding Agreement**"). It provides for DLUHC to provide funding up to a maximum sum of some £24.5m. At the time of the hearing before the FTT a first tranche of over £7m had been received, and a second of some £10m had been approved for release. The FTT heard some submissions as to suggested concerns that the Fund might not in the event cover the entirety of the cost of the Major Works; but it concluded that there was "no good reason to believe that the remedial works will founder for lack of money, whatever we decide." EVML's Update Note of 18 March 2025 indicated that it had applied to the Fund for an increase in the amounts payable. The application was partially successful and the total amount to be provided was increased to some £27.5m, of which over £26m had been paid to EVML to date.

#### *The applications*

44. It is common ground that none of the costs of the Major Works are recoverable as service charges from Triathlon (this is the effect of paragraph 2 of schedule 8). Triathlon's apportioned share of the expected costs at the time of the hearing before the FTT was over £16m, although the final sum will not be known until the completion of the Errigal contract. Triathlon has not paid anything towards these costs, although, as set out above, its share of the costs is currently being funded by the Fund (although it seems likely there will be some shortfall). The main purpose of Triathlon's applications for RCOs against SVDP and Get Living, which it brought in December 2022, is to require them to pay its share of the costs of the Major Works to EVML.
45. In addition Triathlon has incurred other costs as a result of the discovery of the relevant defects; examples include such matters as the original investigations, the waking watch and installing the temporary fire alarm system. Triathlon also sought RCOs to cover these costs as well; where it had paid the costs (some before and some after the BSA came into force), it sought payment to itself by way of reimbursement; and where it had not paid the costs, it sought an order for payment to EVML. The sums involved are very much less than the costs of the Major Works: details are given below.
46. The FTT heard evidence as to the financial position of SVDP and Get Living. In summary they concluded that SVDP had (at the end of 2021) a net asset value of over £12m, but that was underpinned by fixed assets in the form of illiquid real estate which would take time to sell if that became necessary; its current asset position was negative

and it was only possible for it to prepare its accounts on a going concern basis due to the continued financial support of Get Living. It would be unable to comply with an RCO in any significant sum without the support of Get Living. Get Living on the other hand would be more than able to meet any obligation imposed in these proceedings: its accounts for 2022 showed that the value of the Group's investment property had increased by nearly £300m, and totalled more than £2.6bn.

*The FTT's decision*

47. In their decision of 19 January 2024 the FTT, after an introduction and an account of the relevant provisions of the BSA, first considered a number of issues of principle. One of these was whether an RCO can be made in respect of costs incurred before the commencement of the remediation provisions on 28 June 2022. This question has no relevance to the RCOs for the Major Works as the Errigal contract was entered into in December 2022, but does affect some of the more minor costs previously incurred (and paid) by Triathlon. The FTT concluded that section 124 of the Act does allow RCOs to be made in respect of costs incurred before 28 June 2022 ([73]). This conclusion is challenged by Ground 2 of the appeal.
48. Another issue that was raised was whether a company that was associated with each of the corporate partners in a limited partnership was also associated with the partnership itself. In the present case Get Living was accepted to be associated with each of the corporate partners in SVDP, but there was a dispute as to whether that meant that it was also associated with SVDP.
49. The FTT declined to answer this question because in their view it did not matter. It was accepted that Get Living is an associate of the freeholder (SVPH 1 and SVPH 2) and of each of the landlords in the relevant chain of title. That meant that it came within section 124(3)(d) and so could be specified in an RCO. The question whether it was also an associate of SVDP therefore made no difference to the FTT's jurisdiction; and it was not argued on behalf of Get Living that the capacity in which it might be specified as an associate made any difference in the present case to the Tribunal's determination whether it was just and equitable that an order should be made against it ([124]-[125]). None of that has been challenged before us.
50. After a careful and detailed account of the facts, the FTT then turned to the question whether it was just and equitable to make the RCOs. It was agreed that the qualifying conditions for making RCOs against both SVDP and Get Living were met, but that that was not enough; section 124 conferred a discretionary power that should be exercised having regard to the BSA and all relevant factors ([236]-[237]).
51. They then considered the factors relied on on each side, discounting some of them as not carrying much weight ([245]-[263]). They then set out the factors which seemed to them more important. This conclusion is challenged in Ground 1 of the appeal and it will be necessary to look at some of their reasoning in more detail below, but in essence it was as follows:
  - (1) First, SVDP was the developer. It was the policy of the BSA that primary responsibility for the cost of remediation should fall on the original developer ([265]).

- (2) If it was just and equitable to make an order against SVDP it would also be just and equitable to make one against Get Living; the obvious purpose behind the association provisions was to ensure that where a development has been carried out by a thinly capitalised or insolvent development company a wealthy parent or other associate could not evade responsibility for meeting the costs by hiding behind the separate personality of the development company ([266]).
- (3) There was a risk that there would be a shortfall in the funding of the Major Works by the Fund, but they thought the risk a very modest one. They therefore gave little weight to the risk that the Major Works would not be completed without an order; but gave some weight to the possibility that there might be uncertainty for a time if the Fund refused further help, and that there might even have to be further tribunal proceedings. That would be undesirable ([267]).
- (4) They then considered what was called the “public purse point”, namely why not leave the work to be funded by the Fund, allowing EVML to pursue its remedies against the contractors who built East Village, with SVDP picking up any shortfall? There was every intention that EVML would bring claims against Galliford Try, the main contractor. There was however no knowing how long it would take for a claim to come to trial (liability had already been disputed by Galliford Try) and no guarantee of how much would be recovered ([269]). “The question is”, they said, “who should fund the work in the meantime?” ([274]).
- (5) On this they said ([273]) that:

“The public interest in securing reimbursement of those funds as quickly as possible seems to us to point strongly in favour of making an order.”

And ([270]) that Mr Selby:

“found it difficult to identify a clear and convincing reason why it would be just and equitable to allow the best part of £20m to remain in Get Living’s bank account, earning interest or being put to account for its benefit, rather than being returned to the Building Safety Fund where it could be used to remediate other buildings.”

- (6) They said that Mr Selby’s position cut across two of the principal objectives which section 124 was plainly intended to achieve. First, section 124 and the regulations contained a hierarchy or cascade of liability which did not include the taxpayer, such that public funding was a matter of last resort ([278]). Second, it was plainly the intention of Parliament that an RCO should provide a route to securing funding without the applicant having to become involved in or wait on the outcome of other claims, which might involve complex, multi-handed, expensive and lengthy litigation. If the Fund was left to fund the works while the claims against Galliford Try were resolved, the respondents would effectively achieve the very thing which section 124 was intended to avoid ([279]).
- (7) Finally they considered, and rejected, the argument that it was not just and

equitable for RCOs to be made in respect of costs incurred before the commencement of the remediation provisions on 28 June 2022 ([280]-[283]).

52. They therefore concluded that it was just and equitable to make the RCOs sought by Triathlon ([291]). This decision was given effect to by their Order dated 5 March 2024. This provided for the following payments to be made by SVDP and/or Get Living:
- (1) Reimbursement to Triathlon of a total of £1,158,358.18 paid by Triathlon to EVML.
  - (2) Payment to EVML of £725,019.91 (Triathlon's share of costs of other remedial measures to the blocks).
  - (3) Payment to EVML of £42,418.88 or Triathlon's share of such other reasonable amounts incurred by EVML in servicing and decommissioning the temporary fire alarms.
  - (4) Payment to EVML of £3,631,766.33 (Triathlon's share of the amount paid by EVML to date to Errigal).
  - (5) Payment to EVML of £11,324,264.11 (Triathlon's share of the forecast cost of the remaining Major Works); and Triathlon's share of such further or other reasonable amounts as are incurred by EVML in completing the works.
  - (6) Payment to EVML of £1,075,214.09 (Triathlon's share of the forecast cost of professional fees relating to the Major Works); and Triathlon's share of such further or other reasonable amounts as are incurred by EVML in respect of such fees.
53. The FTT gave permission to appeal to the UT. It was the FTT's suggestion (and the parties agreed) that the UT be jointly invited to dismiss the appeal and grant permission to appeal to this Court without engaging with the substance of the arguments, and, as already referred to, this is what happened. By Order dated 7 May 2024 Judge Elizabeth Cooke in the UT formally dismissed the appeal and granted permission to appeal to this Court.

#### *Grounds of appeal*

54. There are two Grounds of Appeal. Ground 1 is that the FTT erred in concluding that it was just and equitable to make RCOs against SVDP and Get Living for the costs of the Major Works (for which EVML has funding from the Fund). It is said that the FTT erred in 10 separate respects, and had it not done so, it would not have made an RCO for the costs of the current remediation works; or alternatively it would have made an RCO on terms that SVDP and Get Living pay for the remediation works following the outcome of the Galliford Try litigation. I give the details of the 10 sub-Grounds below.
55. Ground 2 is that the FTT were wrong to conclude that an RCO could be made in respect of costs incurred before section 124 of the BSA came into force on 28 June 2022.

#### *Ground 1.1 – an unexpressed presumption*

56. Ground 1.1 is that the FTT wrongly created a presumption (without expressly saying

so) that it is just and equitable to make an RCO against a developer, or indeed any body corporate or partnership falling within the terms of section 124(3) of the BSA, who is able to fund the remediation works.

57. This Ground is based on what the FTT said in two passages, at [265] and [278] of their decision. Having considered a number of matters that were relied on by the parties but which appeared to them “merely to provide the context for our decision or to be matters which do not carry much weight”, they said that they would then deal with “the factors which seem to us to be more important in determining whether it is just and equitable to make an order” (at [264]). They continued:

“265. The first is that SVDP was the developer of East Village. The policy of the 2022 Act is that primary responsibility for the cost of remediation should fall on the original developer, and that others who have a liability to contribute may pass on the costs they incur to the developer. That policy is most apparent from the LPI Regulations which give every landlord who has contributed to the cost of relevant measures the right of recoupment from the responsible landlord (meaning the person who was, or was in a joint venture with, the developer or who undertook or commissioned work relating to the defect – regulation 3(2) and (8), LPI Regulations and paragraph 2(3) of Schedule 8, 2022 Act). SVDP (or to be strictly accurate, SVPH-1 and SVPH-2 which hold the freehold on trust for SVDP) is the responsible landlord in this case and it, and its associates, would therefore be under an obligation to pay costs of remediation which had been met by other landlords if they were served with notices under regulation 3. That is not the route to recovery which is being pursued in these applications, and section 124 requires us additionally to be satisfied that it is just and equitable to make an order against SVDP, but the availability of an alternative, and unanswerable, route to recovery against its trustees is a strong indicator that it is likely to be just and equitable for SVDP to be ordered to pay.”

58. They then addressed Mr Selby’s argument that the purpose of section 124 was to ensure that remediation works that were required were carried out without delay – or as he put it before us, to get the work done – and that in the present case an order was not needed for that purpose as funding was in place from the Fund and the works were being done. They rejected that argument on the basis that there was still a question as to who should fund the works for the time being (the public purse point), and concluded that Mr Selby had no convincing reason why it would be just and equitable to allow Get Living to retain the best part of £20m rather than this sum going to the Fund ([277]), adding: “We say this because Mr Selby KC’s attempts to justify this result cut across two of the principal objectives which section 124 was plainly intended to achieve.”

59. They then continued at [278] as follows:

“278. First, section 124 contains a list of persons against whom a remediation contribution order may be made. Section 124, combined with the LPI Regulations, creates a hierarchy or cascade of liability in relation to a relevant defect. The taxpayer does not appear in section 124 or in this hierarchy, save in so far as a taxpayer funded entity may constitute a body corporate or partnership within the terms of section

124(3) or a landlord within the terms of the LPI Regulations. **Given this position, it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse.** We do not see that this point loses any of its essential force in circumstances where it is said that the public purse will eventually be reimbursed from the fruits of successful litigation against third parties. Even if we were persuaded that the Building Safety Fund could be confident of this result on the facts of the present case, and we are not in a position to be so confident, we do not see why the public purse should act as interim funder and underwriter of the risk of failure, while claims against third parties wend their way to a conclusion. We agree with a point made by Mr Nissen KC in opening, which is that public funding is a matter of last resort, and should not be seen as a primary source of funding where other parties, within the scope of section 124, are available as sources of funding.” (emphasis added).

60. Mr Selby relies on the sentence I have highlighted from [278] and submits that in effect the FTT has created a presumption that an RCO should be made against a developer with means. He accepts that it is of course relevant, as the FTT said in [265], that SVDP was the developer; but he said that it was not determinative. And the FTT had in any event gone further than simply confine what it said in [278] to developers but had referred to “a party falling within section 124(3)”, which was much wider than developers.
61. I do not accept this submission. The FTT were I think making two different points in [265] and [278]. The point they were making in [265] was that the policy of the Act was to place primary responsibility on the developer. I did not understand Mr Selby to dispute that as a general proposition: he accepted that in a simple case where the only parties were lessees, their landlord and a developer, the developer sits at the top of the hierarchy. This policy can be clearly seen from the Act where (i) if a developer retains an interest in the building no service charges are payable by any lessee (paragraph 2 of schedule 8) and (ii) if another landlord is in those circumstances liable for costs which they cannot recover through the service charge, they can pass the costs on to the developer by serving notices under regulation 3 of the 2022 Regulations (see paragraph 20 above). It may be noted that in *URS* the Supreme Court accepted that a central purpose of the Act was to hold those responsible for building safety defects accountable: see at [104] and [106] per Lord Hamblen and Lord Burrows, and at [274] per Lord Leggatt.
62. The point the FTT were making in [278] is a slightly different one. Here they were considering the public purse point, namely whether the works should be funded by Get Living or the Fund pending any recovery from Galliford Try, and the point they were making was that as between public funding and those listed in section 124 as potential contributors to the cost of works, public funding was to be seen as a matter of last resort.
63. Again I think they were justified in making this point. Indeed Mr Selby accepted that he could not quarrel with the proposition that as between those connected to the building and the taxpayer, those who were connected to the building and could afford to pay should do so rather than expect the taxpayer to do so.

64. In those circumstances I do not see what is left of this Ground. In the present case SVDP as developer was “responsible for the relevant defect” within the meaning of paragraph 2 of schedule 8 (and SVPH 1 and SVPH 2 were associated with SVDP) with the result that no service charges were payable to EVML. EVML has no other income; as Mr Polli pointed out, it is a management company with a right to only peppercorn rents and does not otherwise trade. But it is still liable to carry out the works, and these still need to be funded. Since the Act has taken away EVML’s contractual right to look to the service charges for such funding, the Act, as one would expect, puts in place mechanisms to enable the costs to be passed on to others. One of those mechanisms is section 124 under which the costs can in an appropriate case be passed on to the developer or other landlords. It is true that Government has also made available public funding in the shape of the Fund, but there is no reason to think that this was intended to displace the provisions of the Act which regulate which parties with a connection to the building should, if able to, contribute to the cost. In those circumstances I think the FTT were entirely justified in concluding that as between SVDP and Get Living on the one hand and the public purse on the other, it was difficult to see why the public should fund the works in the interim rather than the developer and its associates who continue to own the buildings and who can (in the case of Get Living) well afford to fund the works.
65. I do not think it is necessary to consider whether the FTT were right to say that it was difficult to see how it could “ever” be just and equitable for “a party falling within the terms of section 124(3) and well able to fund the relevant works” to be able to claim that the works should instead be funded by the public purse. In saying that, they were expressing themselves rather more widely than was needed for the present case, and there may indeed be cases where it would not be just and equitable to make an RCO against those within section 124(3), even if the result was to leave the costs to be funded by the public. Those who can be required to contribute by means of an RCO include (by section 124(3)(d)) associates of the developer (or of a landlord), and the effect of section 121(5)(a) is that a body corporate is associated with another body corporate if at any time in the relevant period (the 5 years before the qualifying time of 14 February 2022) a person was a director of both of them. Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public. So the FTT may have gone too far in what they said. But none of that affects their decision in the present case.
66. In those circumstances I would dismiss this Ground of appeal.

*Ground 1.2 – passing on costs to developers*

67. Ground 1.2 is that the FTT wrongly found that the policy of the BSA is that primary responsibility for the cost of remediation works should fall on the original developer, and that others may pass on the costs they incur to the developer, and that such a policy is most apparent from the LPI Regulations.
68. This is another criticism of the FTT’s decision at [265] which I have set out above. The

point that Mr Selby made is that regulation 3 of the 2022 Regulations only applies to allocate costs as between landlords: it enables a landlord who has paid, or is liable to pay, the costs of relevant works, but is precluded by paragraph 2 of schedule 8 from recovering the costs through the service charge, to pass on the costs to “the responsible landlord”. To be the responsible landlord a person must have been either the landlord or any superior landlord at 14 February 2022 and either itself responsible for the relevant defect in question, or associated with a person responsible for that defect; or have since 14 February 2022 become the owner of that landlord’s interest (see paragraph 20 above). Regulation 3 imposes no liability on those who are not (and were not) landlords. In the present case neither SVDP nor Get Living is a landlord and they could not be made liable under regulation 3, nor indeed could Triathlon have applied under regulation 3 as Triathlon have not paid and are not liable to pay the costs (at any rate of the Major Works).

69. All of that is true, but I do not see that it undermines the reasoning of the FTT. The point they were making is that the policy of the Act is that primary responsibility for the costs should fall on the original developer. As I have already said I did not understand Mr Selby to dispute this as a general proposition, and it has now been endorsed by the Supreme Court in *URS*. The FTT referred to regulation 3 of the 2022 Regulations as giving a clear indication of that policy. I think they were justified in doing so. The effect of paragraph 2 of schedule 8 and regulation 3 taken together is that where the original developer (or its associate) retains (or retained as at 14 February 2022) an interest in the building in question, lessees do not have to pay the service charges, and any other landlord who ends up bearing the cost as a result can pass that liability to the landlord-developer or the landlord that is an associate of the developer. That, unlike section 124, is not a discretionary matter: regulation 3(2) provides that where the regulation applies the responsible landlord “is liable to pay” (and where there are two or more persons who are responsible landlords, each “is jointly and severally liable” for the remediation amount). Recovery is triggered by the claiming landlord simply serving a notice specifying the amount (regulation 3(3)). The recipient of a notice may appeal to the FTT but only on very limited grounds, namely that the remediation amount does not represent the cost of the relevant measure, or that the recipient is not a responsible landlord (regulation 3(5) and (6)).
70. That does to my mind provide, as the FTT said, a clear illustration of the policy that costs should fall on the original developer. I do not think that it matters that Triathlon could not itself have invoked regulation 3; the point the FTT made was that EVML (which is a landlord and has incurred costs) could have done so. Nor do I think it matters that regulation 3 only permits claims to be made against other landlords and neither Get Living nor SVDP was itself another landlord. There is no reason to think that the FTT overlooked this point. As they say, strictly speaking SVDP is not a responsible landlord as it is not a landlord at all, but SVPH 1 and SVPH 2, which hold the freehold on trust for SVDP, are responsible landlords. They are the superior landlord and are associated with a person responsible for the defect, namely SVDP. On the face of it the FTT were right to say that regulation 3 appears to give an alternative, and unanswerable, claim against SVDP’s trustees (that is by EVML rather than Triathlon). We were told that EVML has now served such notices but they are under challenge, and although we were not given the details of the challenge, I do not mean to prejudge anything that may be raised in that respect; but whatever the particular issues on the facts I see no reason to doubt that the FTT were right to say that in

principle EVML could bring such a claim.

71. On that basis I also agree with the FTT that the fact that the costs could in principle be claimed from SVDP's trustees (and hence, by being enforced against the assets held on trust for SVDP, effectively against SVDP itself) was a factor of considerable weight in deciding whether it would be just and equitable to make an RCO against SVDP.
72. Nor does it matter for these purposes that Get Living could not itself have been made liable under regulation 3. The reasoning of the FTT was (i) it is *prima facie* just and equitable to make an RCO against SVDP as developer (at [265]) and (ii) if that is so, it is also just and equitable to make an RCO against Get Living (at [266]). They explained their reasoning for the latter conclusion as follows:

"266. ...The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted."

73. That reasoning, as can be seen, has nothing to do with the scope of regulation 3; and the fact that Get Living could not itself have been pursued under regulation 3 does not affect the cogency of the FTT's analysis.
74. I would therefore dismiss this Ground of appeal.

#### *Ground 1.3 – Triathlon's motivation*

75. Ground 1.3 is that the FTT erred in finding that it was not necessary to consider the motive or the identity of the applicant for an RCO or the basis of the applicant's eligibility.
76. This is aimed at two passages from the FTT's decision, at [246] and [271], as follows:

"246. We do not think it is relevant to the exercise of our discretion to draw conclusions about Triathlon's motivation in bringing these applications. Triathlon directors who gave evidence stressed the importance to them of ensuring the safety of the leaseholders and complying with Triathlon's responsibility to the Homes and Community Agency to maintain standards of building safety. The respondents suggested that the real motivation was to ensure that Triathlon was not called on to meet any of the cost of remediation itself. It was not suggested that that was an improper motive, nor could it have been, and no doubt it is part of Triathlon's thinking. In the absence of any submission that Triathlon was acting out of malice towards the respondents or some other motivation which might be said to taint its

case, we do not need to make any findings about why it seeks these orders. Parliament has made them available and Triathlon is entitled to take advantage of them.”

And:

“271. The first point Mr Selby KC made was that the application would have been stronger if it had been made by the Secretary of State or the GLA, and was weakened by the fact that Triathlon’s only real interest was in protecting itself from having to pay for remediation, rather than protecting the public purse. That was clear from the form of the order it sought, covering only its share of the costs of remediation. We have already said that we do not think the motivation of an applicant will usually be of much significance and nor do we think it matters much who the applicant is. Any eligible applicant coming within section 124(5) will have an interest in the building or an interest or responsibility for building safety and we do not see why the basis of their eligibility should be significant.”

77. Mr Selby said that the *motive* of the applicant was a relevant factor. The Act provided that an application under section 124 could be made by an “interested person” which itself suggested that the applicant’s interest in the order was a relevant consideration; in exercising the statutory discretion the FTT had to balance the interests of the parties; the FTT should not make an order without understanding why it was being asked for; and to avoid an infringement of the respondent’s rights under Article 1 of the First Protocol to the European Convention on Human Rights it was necessary to identify the aims sought to be achieved.
78. But I consider that the FTT were right that it was not necessary for them to resolve any issues as to Triathlon’s motivation. In general parties who have legal rights or remedies are entitled to pursue them without having to explain why they have decided to do so, and a litigant’s subjective reasons for litigating (save in the unusual case where a litigant is acting out of malice or the like) are usually irrelevant to the merits of its claim. What may be relevant is whether an applicant has a legitimate interest in pursuing an application, but here I do not think there is any difficulty. There is no dispute that Triathlon is an interested party as defined; it is the owner of long leasehold interests in the blocks; it is the landlord of a large number of occupying tenants and naturally concerned for the safety of its residents; and it undoubtedly has an interest in the defects being remedied efficiently and effectively. In those circumstances it does not seem very surprising that it should also have an interest in how the works were to be funded.
79. What makes the application somewhat unusual is that the obvious applicant for RCOs would normally have been EVML. Mr Selby accepted that if EVML had itself applied, it would have been very difficult to query its motive for doing so. But, as already explained, EVML found it difficult to make decisions due to the divergent interests of its shareholders and directors; and in those circumstances it is understandable that Triathlon might think it appropriate to take the initiative. As Mr Nissen put it, the reasons for Triathlon doing so were as plain as a pikestaff: the disagreements at board level of EVML had led to delays in doing the works due to significant disagreements about the scope of the works to be done and the like, and Triathlon had an interest in doing what it could to ensure the smooth completion of the works. It could legitimately

form the view that securing funding from Get Living (and hence reducing EVML's dependence on funding from the Fund) would assist in that objective.

80. As to the *identity* of the applicant, again I think the FTT were right. Triathlon undoubtedly had standing to apply for an RCO. An RCO is an order that the respondent make payments to a specified person for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (see section 124(2)), and here Triathlon of course sought payment by SVDP to EVML for that purpose. The question for the FTT was whether that order should be made; and that depended on whether it was just and equitable to do so. The fact that it was Triathlon, rather than EVML, or the Secretary of State, who sought the order did not change the nature of the order sought; and I do not think it changed the answer to the question whether it was just and equitable to make such an order. Mr Selby said that the RCO was not needed as the works were being done; they were being funded; the FTT concluded that “with the support of the Fund there is no good reason to believe that the remedial works will founder for lack of money, whatever we decide” (at [215]); and further concluded that there was only a very modest risk of a funding shortfall (at [268]). In those circumstances Mr Selby said that the RCO was not needed to fulfil any of the statutory objectives which he identified as being (i) to ensure that remedial works were carried out; (ii) to protect leaseholders from excessive service charges; and (iii) to ensure the safety of residents.
81. Those submissions address the substantive question whether it was just and equitable to make an RCO in those circumstances at all. But for present purposes the significance of the submission is that it illustrates that none of those matters is affected by the fact that the applicant for the RCO was Triathlon. Exactly the same considerations would apply whether the application had been brought by EVML or by Triathlon. The substantive question was whether Get Living should be ordered to make payments to EVML; I agree with the FTT that in the circumstances of the present case, the answer to that question does not depend on who the applicant was, or the basis on which Triathlon was eligible to apply.
82. I would therefore dismiss this Ground of appeal.

*Grounds 1.4 and 1.10 – the public purse*

83. Ground 1.4 is that the FTT erred in finding that the public purse would be the underwriter of the risk of failure if not reimbursed from the fruits of litigation against third parties, and wrongly found that if the Fund was left to fund the works while the claims against Galliford Try are resolved, an applicant for an RCO would have to become involved in, or wait upon, other claims.
84. Ground 1.10 is that the FTT erred in concluding that public funding is a matter of last resort. Mr Selby argued both Grounds together.
85. Ground 1.4 is based on what the FTT said in their decision at [278]-[279], and Ground 1.10 on [278]. I have set out [278] at paragraph 59 above. The FTT continued at [279]:

“279. Second, as we have already noted, it was plainly the intention of Parliament that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the

outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation. If the Building Safety Fund was left to fund the works while the claims against Galliford Try are resolved, the respondents would effectively achieve the very thing which, as it seems to us, section 124 is intended to avoid.”

86. In oral argument Mr Selby advanced a number of reasons why it was wrong to use an RCO in effect to reimburse the public purse. He said that at [270] and [277] the FTT had posed the question whether there was any reason why it would be just and equitable to allow the best part of £20m to remain in Get Living’s bank account rather than be returned to the Fund where it could be used to remediate other buildings. That, he suggested, was the wrong question; what the FTT should have asked themselves is why it would be just and equitable to require Get Living to pay the best part of £20m, something that required a compelling reason. He said that it was wrong to characterise the Fund as a last resort – the provisions of the Act and the establishment of the Fund were both part of the legislative and non-legislative measures to deal with the building safety crisis; and he submitted that RCOs should only be made if the funding agreement was not working adequately.
87. I do not accept these submissions. They are in effect a repeat of the point made to the FTT that no RCOs were needed as the works were being adequately funded and were being carried out. But this is I think to take too narrow a view of the statutory purposes of the Act. I accept that one of those purposes is to ensure that works that are required are actually done. But another purpose is to deal with the “who pays” question, and as set out above, the Act provides a complex set of answers to this question with a number of facets. The starting point is the protection for leaseholders. One of these (and the most far-reaching) is that provided by paragraph 2 of schedule 8 which applies to all leaseholders (not just qualifying leaseholders) and exempts them from service charges for relevant costs where the developer or its associates retain an interest in the building. As I have sought to explain, that necessarily requires the Act to make provision as to how the costs which would otherwise have fallen on the leaseholders should be borne. It does this through a number of mechanisms including section 124. But the Act does not itself contemplate that taxpayer funding in the shape of the Fund (and other taxpayer-funded initiatives) will provide the solution to the problem. Instead it provides for costs to be allocated between those who have relevant connections to the building. As the FTT said, one discernible principle is that a developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs.
88. Given this, I think the FTT were right to say that the Fund is to be characterised as a last resort. It does not take its place in the hierarchy of those whom the Act contemplates as potential funders of the costs which the leaseholders are relieved from meeting: it stands outside the Act (and in fact pre-dates it). If the mechanisms in the Act can be operated, then I think the FTT were right to consider that they should be, despite the fact that funding was being provided through the Fund. In practical terms that means that if the FTT concluded, as it did, that it was *prima facie* just and equitable for SVDP as developer and Get Living as an associate to pay what would otherwise have been Triathlon’s share of the costs, then it was not a reason not to make an RCO that the works were being funded by the Fund. That way of looking at it explains why at [270] and [277] the FTT posed the question in terms of whether there was any clear

and convincing reason why the best part of £20m should remain in Get Living's bank account rather than be repaid to the Fund: by that stage of their analysis they had already said at [266] that they were "provisionally minded" that it was just and equitable to make an RCO against SVDP because it was the developer, and hence also against Get Living. So the question was naturally posed as to whether the fact that the Fund was funding the works constituted a good reason not to give effect to their provisional conclusion. It does not betray any failure to ask the right overall question.

89. Seen in that light, none of the other points made by Mr Selby seem to me sufficient to displace the FTT's conclusion that there was no good reason not to make the RCO, and that it should therefore be made. The fact that it was not needed to fund the work as the funding by the Fund was working perfectly well is no answer if the position is, as the FTT (rightly in my view) concluded that it was, that the policy of the Act was that primary responsibility should fall on a developer in the position of SVDP (and hence on Get Living). Why should the public continue to fund remediation works when the developer and associated companies are available and able to pay? That is the question considered in detail by the FTT at [269]-[279], and they expressed their overall conclusion at [276] as follows:

"276. None of these points [ie those advanced by Mr Selby] seem to us to provide a good reason why the respondents should not now be the subject of a remediation contribution order, or a justification as to why the works should be funded at public expense."

I consider that to be a conclusion that was undoubtedly open to them, and that cannot be faulted.

90. There remain three specific points raised by Mr Selby. One is that it was wrong for the FTT at [278] to refer to the Fund as being the "underwriter of the risk of failure". Mr Selby said that the risk of failure of EVML's claims against Galliford Try could have been catered for by either making no order with liberty to apply for an RCO in the future, or by making RCOs requiring SVDP and Get Living to pay any shortfall following the conclusion of the claim against Galliford Try. It is not clear to what extent these possibilities were advanced below, but in any event I think this criticism is misplaced. The FTT when referring to the Fund as the underwriter of risk of failure must have had in mind the case where no RCO was made at all. But, more significantly, even if that risk could have been mitigated as suggested by Mr Selby, it does not answer the main point made by the FTT in this passage which is that they did not see "why the public purse should act as interim funder ..., while claims against third parties wend their way to a conclusion". Neither of his suggested mechanisms addresses this question.
91. Second, Mr Selby took issue with the FTT's statement at [279] that if the Fund were left to fund the works pending the litigation against Galliford Try it would achieve the very thing that section 124 was intended to avoid. Mr Selby said that this was wrong because in the present case the works were being funded, and carried out, and so there was no need for EVML to await the outcome of the Galliford Try litigation before funding was provided. I think this misunderstands the point the FTT were making. This was that section 124 contemplated that RCOs could be made at an early stage without the applicant having to wait on the outcome of other claims. In effect Mr Selby's point therefore collapses into the same point that I have already addressed,

namely that RCOs are not needed when the necessary works are being funded by the Fund.

92. Third, Mr Selby said that on the facts of this case the development of East Village was a public project, developed by SVDP which was originally owned by the ODA; when SVDP was sold the capital value went to the public in the shape of the ODA. So it was right for the public to share in the costs by providing the forward funding. This point also arises under Ground 1.8, and it is more convenient to consider it there.
93. I would therefore dismiss these Grounds of Appeal.

*Ground 1.5 – pursuing other claims*

94. Ground 1.5 is that the FTT erred in holding that there was nothing unfair in Triathlon taking advantage of its ability to apply for an RCO instead of pursuing other claims or potential claims available to it.
95. This is a reference to the FTT’s decision at [261]-[262] where they said:

“261. ...The ability to make a claim for a remediation contribution order under section 124 is a new and independent remedy, which is essentially non-fault based. The remedy has been created by Parliament as an alternative to other fault-based claims which a party may be entitled to make in relation to relevant defects. It seems clear to us that Parliament did not intend that the availability of other claims or potential claims should either disqualify an applicant from making a claim for a remediation contribution order or delay the making of that claim. It also seems clear to us that Parliament intended that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation. By the same token, and concentrating on the question of what is just and equitable, we can see nothing unfair in making remediation contribution orders on the applications, without requiring Triathlon to hazard the pursuit of other claims which it may have.

262. The same reasoning applies to the argument that Triathlon should follow the contractual route constituted by the network of agreements relating to the sale and development of East Village and, in particular, to the argument that Triathlon should respect the agreement constituted by clause 7 of the Members Agreement. The 2022 Act, and its creation of the independent remedy of a remediation contribution order postdates all of this. The same applies to the new legislative restrictions which now operate on EVML’s ability to fund the remedial works by the service charge. Parties cannot contract out of this new statutory regime. In all these circumstances we see nothing unfair in Triathlon taking advantage of the ability which it has been given to act independently of the network of contractual provisions relied upon by the respondents, or in our making remediation contribution orders on the

applications.”

96. This is a short point. Mr Selby said that the FTT were wrong to say that Triathlon should not have been required to pursue other claims first, in circumstances where the works were being funded and were under way. Before the Act, the remedies available to leaseholders would have been to claim against SVDP; SVDP could then bring in Galliford Try, and Galliford Try could bring in any others responsible such as architects and contractors. The availability of an RCO under the Act cuts through that process. That is understandable where an RCO is needed to get the funding in place to get the work done. But if the work is already being funded and underway, an RCO is not necessary, and the mischief is that neither SVDP nor Get Living can join Galliford Try into the proceedings before the FTT.
97. I do not think this Ground really raises any separate point from those already considered. It is true that the works are already being funded and under way, but that funding is at public expense and the effective question is who should provide interim funding while claims against third parties are pursued. For the reasons already given, I think the FTT were entitled to conclude that the policy of the Act was that the costs of remediation should primarily fall on developers; that this was not intended to await the outcome of other claims but to be available from the outset; and that there was no good reason why interim funding should be at public expense if there were a developer against whom it would otherwise be just and equitable to make an RCO. That conclusion necessarily involves the funding being provided by SVDP and Get Living while claims against third parties are outstanding, but such funding has to be provided either by the public purse or by them at a stage when the third party claims are unresolved, and as already discussed the FTT were entitled to conclude that the interim funding should be provided by Get Living rather than the Fund.
98. In those circumstances I do not think that this Ground really raises any separate issue, and I would dismiss it.

*Ground 1.6 – the context of the applications to the Fund*

99. Ground 1.6 is that the FTT failed to take into account that the applications to the Fund had been made at Triathlon’s request, that the scope of remedial works that were being undertaken was the only scope that met the requirements of the Fund, and that the parties were working on the basis that the remedial works would be funded through the Fund.
100. Mr Selby relied on the following facts (all set out in the FTT’s decision). First, the application to the Fund by EVML was made at Triathlon’s request ([191]). Second there was initially disagreement between Get Living and Triathlon as to the appropriate remediation scheme. A number of schemes were considered but only the most comprehensive option would be eligible for funding from the Fund. Get Living wished to investigate less expensive options, not least because under UK domestic regulations introduced to replace EU state aid rules the support available from the Fund for Get Living was capped; Triathlon was consistently opposed to any scheme less than complete remediation. By June 2022 Get Living had however agreed to comprehensive remediation of all the blocks, among other things because a change to the state aid rules meant that Get Living could benefit equally from the Fund ([194]-[198]). The parties then worked together to secure the funding from the Fund, which led to the Fund

approving pre-tender support in August 2022, and confirming in February 2023 that it would cover the costs of the Major Works ([201]-[206]).

101. Mr Selby said that in these circumstances it was something of a “kick in the teeth” for Triathlon to have applied for RCOs against SVDP and Get Living. The FTT had given no consideration to these matters when considering whether to make the orders. It was wrong not to do so: when the issue was whether the public purse should be the forward funder of the works, it must be relevant that it was the applicant Triathlon that had caused the public funding to be applied for in the first place.

102. We were shown the transcript from the hearing below which shows that although Mr Selby did make this point, he did so very briefly and quite lightly, simply saying that:

“a reason against the public purse argument is that the parties were always working on the basis that the remedial works would be funded through the BSF. And that culpable contractors, such as Galliford Try, would be pursued. And that is clear from the lengthy discussion in cross-examination with Mr Lipton of events between 2021 and 2023.”

103. It is true that the FTT does not in its decision deal with this submission separately, but it is not incumbent on a tribunal to examine in its decision every point made by counsel, and I am not surprised that the FTT did not think it necessary in the circumstances to say anything about this argument. The fact that all parties were ultimately in agreement that EVML should apply to the Fund, and that this was successfully done with the co-operation of both Get Living and Triathlon, does not by itself tell one anything much about whether, when an application for an RCO is made, the works should continue to be funded at public expense rather than by the developer (SVDP) and its parent (Get Living) against whom an RCO would otherwise be just and equitable. It is not as if it is suggested that Triathlon ever promised not to apply for an RCO, or had estopped itself from doing so.

104. I think the real question is whether there is anything inconsistent in Triathlon on the one hand pressing for EVML to obtain public funding, and on the other then seeking an order that SVDP and Get Living cover what would have been Triathlon’s share of the costs.

105. EVML, as already referred to, had no other income to cover the cost of the works and once its right to look to the service charges had been taken away by the BSA, it made obvious sense to secure funding if possible as its directors could not properly place the contracts without being comfortable that they would be funded. In those circumstances I do not think that Triathlon (or more precisely the Triathlon directors on the board of EVML) by applying for public funding were precluding themselves from later pressing for Get Living to pay Triathlon’s share of costs and seeking RCOs to that effect. Once that had been done the question for the FTT was whether there was any need for RCOs given that the works were under way and being funded, or as they put it at [269]:

“269. If the funding of the Major Works is subject to only a small shadow of doubt, and if they will properly remedy the defects (as we are sure they will) what reason is there for making an order at this stage? Why not leave the work to be funded by the Building Safety Fund and

allow EVML to pursue its contractual remedies against the contractors who built East Village, with SVDP then picking up any shortfall? In short, why shouldn't the costs of remediation be borne for the time being by the public?"

That (the public purse point) was a point that they undoubtedly did consider fully, and I do not think that they can be criticised for not taking into account as part of that consideration the fact that Triathlon and Get Living had co-operated in securing the public funding in the first place. That could not really help to answer the public purse point; it merely provided the setting for the question to arise.

106. I would therefore dismiss this Ground of appeal.

*Ground 1.7 – No expectation by the Fund*

107. Ground 1.7 is that the FTT failed to take into account that the funding from the Fund was provided irrespective of the position under the BSA, such that the public authorities do not expect SVDP and Get Living to provide the forward funding.

108. It is based on what the FTT said at [273] as follows:

“273. Next Mr Selby KC referred to the fact that funds had been secured from the Building Safety Fund after the commencement of the Act and confirmed and disbursed after these applications had been commenced. There was no evidence to suggest that the Fund expected Get Living to forward fund the work or that its continuing support was dependent on the outcome of these applications. Mr Selby went further and suggested that the Grant Funding Agreement prohibited EVML from pursuing claims against Get Living, as an associate of a leaseholder (an optimistic interpretation of the Agreement where Get Living is also an associate of the developer). The Fund was also meeting the remediation costs of 33 other buildings at East Village. Those points seem to us at best to be neutral, but did serve also to highlight the scale of the public resources being committed to remediation. The public interest in securing reimbursement of those funds as quickly as possible seems to us to point strongly in favour of making an order. ”

(The argument that the Grant Funding Agreement in fact prohibits EVML from pursuing claims against Get Living is the subject of Ground 1.9, which I consider below.)

109. Mr Selby said that it was not the role of the FTT to second-guess the public interest in circumstances where public bodies (in particular DLUHC and the GLA) have already made a funding decision in the public interest and there is not (and could not be) any public law challenge to that decision. He also suggested that the public interest is not as clear-cut as the FTT suggests in [273]. There is for example also a national housing shortage, and it is a political decision as to how hard developers and investors are pushed to rectify fire safety defects in circumstances where they are also needed to invest capital for new housing. In those circumstances the willingness of DLUHC and the GLA to grant funding on the terms they did should not have been treated as a neutral factor but as a factor in favour of refusing the application.

110. I do not accept this submission. I think the FTT were entitled to regard this factor as a neutral one. The funding provided by the Fund is not an out-and-out grant: the Grant Funding Agreement, which we were told is in a standard form, by clause 5.4.1 requires the applicant (here EVML) to use all reasonable endeavours to pursue claims as follows:

“Save where there has been an assignment under Clause 5.4.4, the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it in respect of the Unsafe Non-ACM Cladding on any Building (including, without limitation, any claims against insurers, any relevant contractors and/or manufacturers and/or warranty providers responsible for the manufacture and/ or installation of the Unsafe Non-ACM Cladding and/or with any liability in relation to the Building) (**"Non-ACM Remedies"**).”

By clause 5.4.3 the Applicant is required promptly to pay over any net monies recovered in the next 12 years from such claims to DLUHC or the GLA (so far as attributable to the matters funded by the Fund). In reply Mr Selby accepted that the obligation under clause 5.4 could include applying for an RCO in an appropriate case.

111. That illustrates that there is, as one would expect, a public interest in the Fund being reimbursed if and when claims against others are successfully made. In other words it is only intended as temporary funding pending recovery from those who can be made legally liable. Although there is what may appear to be a generous 12 year period, this is explicable by the fact that such litigation may be long and complex; it does not affect the fact that the Applicant is under an obligation to pursue claims, to notify DLUHC within 10 working days of receiving any monies, and to pay them over promptly.
112. Against that background I do not think one can infer from the fact that the Fund provided funding to EVML that the public bodies concerned had no interest in RCOs being made where appropriate. On the contrary, I think the FTT were entitled, indeed plainly right, to take the view that there was a public interest in securing reimbursement of the funds as quickly as possible. And they recorded at [270] that Mr Selby “recognised the attraction of the proposition that the public should not have to pay for work when there was a well resourced commercial entity which could be made liable under the Act” and “did not suggest that protecting the public purse by securing the earliest possible reimbursement of remediation costs was irrelevant.”
113. As to the suggestion that pressing developers and investors too hard might discourage investment in the provision of new housing, that seems to me quite speculative. I accept that it is a political question, and had Government (or Parliament) been persuaded that there was a significant risk of that, it could have made some express provision to that effect. But there is no suggestion that this formed any part of Government thinking or found expression in the Act, and in the absence of that, I think the FTT were fully justified in concluding that the public interest in the Fund being reimbursed was a strong reason in favour of making the order.
114. I would dismiss this Ground of appeal.

*Ground 1.8 – the changing identity of the beneficial owners of SVDP and Get Living*

115. Ground 1.8 is that the FTT wrongly gave no weight to the changing identity of the ultimate beneficial owners of SVDP and Get Living, in particular that the East Village development had been a public project from which the public, through the ODA, had benefited.
116. This is based on what the FTT said at [251], but it is helpful to set out the whole passage from [251]-[254] as follows:

“251. We give no weight to the changing identity of the ultimate beneficial owners of SVDP and Get Living. Mr Selby KC submitted that the SVDP of today is not the SVDP that designed and built the Blocks. That SVDP was owned by the ODA; today’s SVDP is owned by QDDAV and its various investors. He argued that since the Act ignores the distinctions between corporate entities in its search for pockets close enough to the original developer and deep enough to pay for remediation, it was also relevant to take account of the changes which have occurred in beneficial ownership. We do not agree, and we consider that it is unnecessary to go higher up the corporate chain than Get Living when considering what is just and equitable in his case.

252. Mr Selby is right that the Act erodes and elides corporate identity and deprives it of some of its main advantages, but it does so for specific purposes and within specific limits. It does not require or permit the normal consequences of incorporation to be ignored for different purposes. When QDD opted to acquire SVDP it could instead have taken a transfer of the land and buildings, leaving the liabilities of the developer behind, but it chose not to do so for its own reasons, knowing that it was acquiring not only the assets of the partnership but also its liabilities, including latent and consequential liabilities. The same is true of each of the investors who has subsequently bought in to the corporate structure above SVDP. Each willingly assumed the risks associated with their investment. In our judgment it is not open to any of them to ask that the timing and circumstances in which they made their investment in those assets be taken into account in determining whether it is just and equitable for the companies in which they invested to be the subject of contribution orders.

253. The same applies to the fact that Get Living was inserted in the corporate structure only as late as 2018; when it acquired East Village it acquired both its assets and its liabilities. Additionally, as Mr Millett KC put it, Get Living is the latest holding parent in a group which has been involved as owner of East Village since 2014 and as prospective purchaser since 2011.

254. As for the fact that SVDP was originally in public ownership, through the ODA, that is also irrelevant for the same reasons. In any event, QDDAV had rights against the ODA which it has released for valuable consideration.”

117. Mr Selby reiterated a number of these points before us. He said that the reality was that the developer in this case was the ODA through its then subsidiary SVDP, and that Get Living, which only acquired SVDP subsequently, was in no sense a developer and had no connection with the development. Indeed the FTT said (at [172]) that they were satisfied that when QDDAV acquired SVDP “there was no reason for QDDAV not to proceed at that time on the assumption that the Blocks had been constructed competently and in accordance with current building standards and were safe”.
118. I think there are a number of points run together here which it is helpful to keep distinct. The first is the changing identity of the ultimate beneficial owners of SVDP and Get Living, which is addressed by the FTT at [251]-[252]. This as I understand it is a reference to the fact that the investors who are now the beneficial owners of Get Living (and hence of QDDAV and SVDP) are not the same as those who initially bought SVDP from the ODA. That, as the FTT says at [252] does not seem to me to be relevant: if you invest in a company, you take the risk of unforeseen liabilities attaching to that company.
119. The second, which I think is a separate point, is that Get Living itself had no involvement with the development. It had no association with SVDP at the time of the development. Mr Selby said that it is not therefore a development company that used a thinly capitalised SPV to build a development, sold off the completed blocks, and then walked away; it is not the sort of associate that is the paradigm case for an RCO. The answer given by the FTT was that the original purchasers had the choice between acquiring the land and acquiring SVDP. They chose for their own reasons to acquire SVDP through QDDAV rather than the land. Having done so, they took the risk of liabilities attaching to SVDP. One of those risks, although unknown at the time, was that SVDP might be made liable to contribute to the costs of remedying defects in the development; and another risk, which I accept was quite unforeseeable, was that there would develop such a serious building safety crisis that Parliament thought it right to enact very far-reaching legislation under which the well-resourced parent of a poorly-resourced developer could also be made to contribute without being at fault in any way. That was another risk in acquiring SVDP; and the FTT explained at [266] (set out at paragraph 72 above) why in the circumstances they thought it appropriate to make RCOs not only against SVDP as developer but also against Get Living as its parent. That passage is not directly challenged but in any event seems to me to be cogent.
120. The third point is that SVDP was originally owned by the ODA which was a public body. This was relied on by Mr Selby both under this Ground and under Ground 1.4 (the public purse point). The answer that the FTT gave to it is in [254], namely that the purchasers chose to acquire SVDP through QDDAV and the fact that it was formerly in public ownership does not affect the current position. As the FTT point out, QDDAV did in fact have the benefit of warranties from the ODA, but they were released some time ago in a separate transaction, no doubt for what seemed then to be sound commercial reasons.
121. I consider that the FTT were entitled to come to the conclusions that they did. I do not think it can be said that their consideration of these points was wrong, or outside the generous ambit of the discretion entrusted to them. I would dismiss this Ground of appeal accordingly.

*Ground 1.9 – terms of Grant Funding Agreement*

122. Ground 1.9 is that the FTT failed to take into account that the terms of the Grant Funding Agreement expressly prohibit a claim against Get Living.

123. This point turns on the construction of the Grant Funding Agreement. It was dealt with very shortly by the FTT at [273] (set out at paragraph 108 above) where they described the interpretation contended for as optimistic.

124. Clause 4.3.1(d) of the Grant Funding Agreement provides as follows:

“The Applicant undertakes and warrants to DLUHC and the GLA that:

...

- (d) it shall not claim the cost of any Qualifying Expenditure funded by the Funding ... from any Leaseholder, and shall recompense Leaseholders for any expense they have incurred in paying for Works reimbursed by the Funding (including repaying any deductions from a sinking fund) irrespective of whether that Leaseholder is a Protected Leaseholder with such recompense paid directly to the bank account of the relevant Leaseholder or such other appropriate payment method of the Leaseholder's choosing promptly following the first payment of Funding to the Applicant under this Agreement and by no later than the date of second payment of Funding under this Agreement. The Leaseholders may enforce the terms of this clause 4.3.1 (d) against the Applicant in the event that the Applicant breaches the terms of this clause 4.3.1 (d)”

125. Clause 1.1 contains a definition of “Leaseholder” as follows:

“(a) a person (other than the Applicant) that is a party to a Lease Document;

(b) any person that controls any person (other than the Applicant) that is a party to a Lease Document;

(c) any sub-lessees in respect of any Lease Document,

and “control” means the power to direct the management and policies of an entity, whether through the ownership of voting capital, by contract or otherwise”

and a definition of “Lease Documents” as meaning:

“a lease of a Residential Unit or a Commercial Unit and a reference to a Lease Document is a reference to any of the lease documents”.

126. Mr Selby’s argument is very simple. Get Living subsidiaries are parties to leases in the blocks (see paragraph 38(5) above). Get Living controls these subsidiaries. It is therefore a Leaseholder as defined. That means that the effect of clause 4.3.1(d) is that

EVML has agreed not to claim any costs from Get Living. That must be relevant to the question whether an RCO should be made requiring Get Living to pay such costs to EVML.

127. Mr Nissen said that Triathlon was not a party to the Grant Funding Agreement and not bound by it and Triathlon's application for RCOs was therefore not a breach of the agreement. That is no doubt true, but I think there is force in the point that if EVML has agreed not to bring such a claim in its own name, that is a potentially relevant factor when considering whether it is just and equitable to make an RCO in favour of EVML at the instance of Triathlon.
128. It fell to Mr Polli to advance submissions as to why EVML was not in fact precluded from bringing such a claim. He had three arguments:
- (1) The inclusion in the definition of Leaseholder of those who controlled a party to a lease could be seen to be an error that could be corrected as a matter of construction (that is, on the *Chartbrook* principle: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101).
  - (2) Clause 4.3.1(d) is to be understood as only preventing EVML from pursuing claims against leaseholders in their capacity as parties to the lease in question.
  - (3) There is a conflict between clause 5.4.1 which requires EVML to use all reasonable endeavours to pursue claims to recover monies which can be used to reimburse the Fund and clause 4.3.1(d) which appears to prevent such claims being pursued. That conflict should be resolved in favour of permitting such claims to be brought.
129. I do not think the first argument (that the inclusion of controlling parties in the definition of Leaseholder was a mistake and can be omitted as a matter of construction) is right. It is true that there is "not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed" (*Chartbrook* at [25] per Lord Hoffmann). But it must be "clear that something has gone wrong with the language", and it requires a "strong case" to persuade the Court of this, as "we do not easily accept that people have made linguistic mistakes, particularly in formal documents" (*Chartbrook* at [14], [15] and [25] per Lord Hoffmann). What Mr Polli seeks is not just a rearrangement or correction of infelicitous language but the wholesale removal of one limb of the definition. I do not think it can be said to be clear that this was included by mistake: that is both *prima facie* unlikely, and would I think require a careful examination of every instance where "Leaseholder" was used in the Grant Funding Agreement, an exercise that has not been done.
130. To take one example, clause 13 imposes obligations of confidentiality on the parties. Clause 13.1.3 provides a number of exceptions, including at (e):

"where to do so is deemed necessary by the Applicant (acting reasonably) in order to keep Leaseholders in the building informed as to the progress of any Works..."

If the definition of Leaseholder were construed as omitting the reference to controlling parties, this might prevent EVML from communicating information to them. It is not

obvious that this would be what the parties intended.

131. Nor am I persuaded by Mr Polli's third argument (that there is a conflict between clause 5.4.1 and clause 4.3.1(d) and that it should be resolved in favour of the latter). As Mr Selby said, the obligation on EVML in clause 5.4.1 (set out at paragraph 110 above) is to use "all reasonable endeavours" to pursue claims. But this cannot sensibly be read as requiring EVML to pursue a claim which the parties have agreed it should not pursue.
132. That leaves the second argument (that clause 4.3.1(d) only applies to claims against leaseholders in their capacity as parties to the lease). I think this argument is well-founded. It is true that as a matter of language the clause simply refers to EVML not claiming "the cost ... from any Leaseholder". But as has been established by a series of well-known cases which it is not necessary to cite, the construction of a contract is not simply a literalist exercise of parsing the language, but an iterative process in which the context and background of the contract, the apparent purpose of its provisions and the practical implications of rival constructions can all be taken into account; and where there are rival constructions, the Court can prefer the construction which is more consistent with business common sense.
133. The evident purpose of clause 4.3.1(d) is to prevent the Applicant from claiming costs which are covered by the Fund from leaseholders (and indeed to reimburse those who have already contributed). That makes sense if it is interpreted as conferring protection on leaseholders in their capacity as lessees, who might otherwise be liable to contribute to the costs through their service charges. But it makes no commercial sense if EVML has a claim against someone in a different capacity (such as a developer) and is precluded from pursuing it simply because such a person also happens to be a Leaseholder as defined. It would mean for example that if a developer thought that it might be the target of an RCO, it could prevent any such action being taken by buying a flat in the block in question. The same would apply to others such as contractors, or the suppliers of cladding materials. It is impossible to see what rational purpose could be served by such an interpretation, and it would cut across the policy of the BSA which it cannot be supposed Government intended.
134. In those circumstances I accept Mr Polli's second argument. Clause 4.3.1(d) prevents EVML from pursuing leaseholders in their capacity as leaseholders. But it does not in my judgement prevent EVML from pursuing those such as Get Living in other capacities such as here as the associate of the freeholder, even if they happen to satisfy the definition of Leaseholder. So construed it provides no obstacle to the grant of RCOs in favour of EVML.
135. I would therefore dismiss this Ground of appeal.
136. I have now considered each of the various Grounds relied on in support of Ground 1. For the reasons I have given I would dismiss the appeal against the decision of the FTT that it was just and equitable to grant RCOs against SVDP and Get Living.

*Ground 2 – retrospectivity*

137. Ground 2 is that the FTT were wrong to find that an RCO could be made in respect of costs incurred before section 124 of the BSA came into force on 28 June 2022.

138. This issue relates to some £1.1m of Triathlon’s claims that relate to costs that were incurred before that date. Mr Selby’s contention is that section 124 does not have retrospective effect and that such costs are irrecoverable because they were incurred before section 124 came into force.
139. The FTT dealt with this at [70]-[79]. They gave a number of reasons for concluding that section 124 enables an RCO to be made in respect of costs incurred before 28 June 2022. First, the language of section 124(2), which simply refers to making an order “for the purpose of meeting costs incurred or to be incurred in remedying relevant defects”, is unlimited. The language, they said, appeared to them to be clear and explicit, and the absence of any temporal limitation or transitional provision was telling [73].
140. Second, they found confirmation in paragraph 1012 of the Explanatory Notes [74].
141. Third, they did not regard this construction as either improbable or unfair. On the contrary, it was consistent with the purpose and structure of Part 5 of the Act that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time [75]. The Act [75]:
- “provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair. We agree with Triathlon’s submission that the Act and the LPI Regulations disclose a hierarchy of liability, with the original developer and its associates at the top. An interpretation of the Act which resulted in some leaseholders bearing the cost of remediation, and some developers, landlords and their associates avoiding responsibility, would not give effect to the obvious purpose of the Act to protect leaseholders to the fullest extent possible.”
142. Moreover, such an interpretation would create serious inconsistencies in the operation of the legislation between the functioning of section 124 (and section 123) on the one hand and schedule 8 on the other, and would discriminate between individual leaseholders in materially identical circumstances [75]-[76]. They assumed (as we have now decided in the *Adriatic* appeal) that schedule 8 protects only against the obligation to pay service charges and does not assist leaseholders who have already contributed to the cost of relevant measures before the commencement of the Act; those leaseholders must therefore rely on section 124 for a remedy. If section 124 did not apply to costs already incurred leaseholders who had already paid would have no remedy no matter how much they had already paid [77]. They continued [78]:
- “78. It appears to us to be inconceivable that Parliament can have intended that the individual leaseholders of flats in a building which had not yet been remediated by the time the leaseholder protections in Schedule 8 came into force on 22 June 2022 were to enjoy those protections, but that the leaseholders of an identical building on the same estate which had already been remediated at their expense were to be left to bear the full costs themselves and prevented from seeking a

contribution order under section 124. Similarly, it cannot have been intended that a leaseholder who paid a service charge demanded to meet the cost of remedial works before 22 June 2022 would be left with no remedy, whereas their neighbour in the same building who had refused or been unable to pay would have full Schedule 8 protection. The sums involved in remediation are too great, and the consequences for individuals too extreme, for such a haphazard pattern of protection to have been Parliament's intention."

143. There was no dispute between the parties as to the legal principles applicable to the question whether a statutory provision is to be interpreted as having retrospective effect. They are considered in our judgments in *Adriatic*: see per Newey LJ at paragraphs [53] to [59] and my own judgment at paragraphs [134] to [139]. It is not necessary to repeat everything there said. The FTT summarised the position as follows:

"61. Legislation is said to be retrospective if it alters the legal consequences of things that happened before the legislation came into force. It is common ground that, as a matter of legal policy, changes in the law should not take effect retrospectively. Nevertheless, Parliament clearly has power to enact legislation which has retrospective effect, but it is presumed not to intend to do so unless that intention is clear. How clearly Parliament's intention must appear depends on the degree of unfairness which would result from giving the legislation retrospective effect."

They cited in support the speech of Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 524, and the statement, approved by Lord Mustill, of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724, to the effect that "the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended." Mr Selby did not take issue with any of that.

144. I think it helpful to start with the judgment of the Supreme Court in *URS*. The particular issue with which the Court was concerned was the effect of section 135 of the Act which extends the limitation period for bringing claims under the DPA, but they unsurprisingly approached that question by a consideration of the general purposes of the Act, and specifically of Part 5.
145. The leading judgment is that of Lords Hamblen and Burrows JSC (with whom Lords Lloyd-Jones, Briggs, Sales and Richards JSC agreed), with a concurring judgment by Lord Leggatt JSC. In the joint judgment of Lords Hamblen and Burrows they consider the background to the Act at [78]-[83], and at [84] say of the Act that it:

"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."

They then at [85] say that the Act is both forward and backward-looking, and summarise the forward-looking provisions in Parts 2 to 4. Then at [86] they turn to Part 5, and say as follows:

“86. The backward-looking provisions are set out in Part 5, which includes section 135. Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects. In summary, the main changes are:

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

(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.

87. All four sets of provisions have retrospective effect. As the Secretary of State explained at paras 24-25 of her written submissions:

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

146. This is picked up at [102] where they refer to “the importance of retrospectivity to Part 5” and add:

“As outlined above, this is reflected not only in section 135 but in all the main changes to the law made by Part 5.”

147. At [104] they refer to a central purpose and policy of the Act being “to hold those responsible for building safety defects accountable”.

148. So far as Lord Leggatt’s judgment is concerned, Mr Selby drew our attention in particular to what he said at [273] about the presumption against retrospectivity:

“273. ...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”.”

That must however be read with the next paragraph where he says this:

“274. The presumption against retrospective operation of a statute is, nonetheless, only a presumption. Sometimes the unfairness to potential defendants of reviving expired rights and corresponding liabilities may be considered by the legislature to be a necessary price of achieving an important policy goal. This was obviously the view taken in enacting the BSA. A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs. To achieve that goal, Parliament has decided to enable claims to be brought against property developers, contractors and others responsible for the construction of unsafe residential buildings even when the construction work was completed many years ago. That is only made possible by greatly extending the limitation period for bringing such claims, including where the limitation period had already expired before the BSA came into force.”

149. These passages are self-evidently strongly in favour of section 124 being given a retrospective interpretation. The joint judgment says so in terms. Indeed the Secretary of State submitted that this was a necessary part of the majority’s reasoning and dispositive of Ground 2 of this appeal. I am rather doubtful that this is technically part of the *ratio* of the decision, as the relevant issue in *URS* concerned the extent of the retrospective operation of section 135 and I do not see that what they said about section 124 was a necessary step in their reasoning. But even if not technically *ratio*, it is clearly a carefully considered statement of the position not a casual aside, and one that I consider we ought to be guided by unless convinced that it was wrong.
150. But I am very far from being so convinced. I accept that of the points relied on by the FTT, the language of section 124 by itself does not take one very far (as the import of the words “incurred or to be incurred” is that one can apply for an RCO both to cover costs already paid and to cover costs not yet paid and that makes sense whether or not the section has any retrospective effect); and the FTT’s reliance on Explanatory Notes which were added after the passage of the Bill through Parliament is of limited assistance for the reasons explained by Newey LJ in *Adriatic*. But the remaining points made by the FTT seem to me very persuasive, and to have received significant support from the analysis of the Supreme Court in *URS*.

151. It is necessary to interpret section 124 in such a way as to give effect to the purposes of Part 5 of the Act. These purposes include the protection of leaseholders from financial risk (*URS* at [84]), or to ensure that risks from historical defects are remedied without the leaseholders having to bear the potentially very large costs (*URS* at [274] per Lord Leggatt). One of the statutory mechanisms to give effect to this purpose is the protection for leaseholders in schedule 8, but, as we have decided in *Adriatic*, this only provides protection from being required to pay; it does not enable payments that have been made to be recovered. It seems to me that the FTT is right that it is very difficult to believe that Parliament intended that those leaseholders who had *not* paid should receive this protection but those leaseholders – perhaps as the FTT says in the same block – who *had* paid should be left without any remedy at all, except the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court. It is far more consonant with the purposes of the Act to interpret section 124 as providing the statutory mechanism for leaseholders who have paid to seek to pass on the costs they have already incurred – whether before or after the Act came into force. In *URS* at [115]-[116] the majority accepted a submission for the Secretary of State that there was no good policy reason why Parliament would have decided to “penalise” those developers who had been pro-active in investigating, identifying and remedying defects, and had thereby acted responsibly. Similarly there is no good policy reason why Parliament would have decided to “penalise” leaseholders whose landlords (perhaps at the leaseholders’ own instigation) had acted responsibly and got on with repairs; *a fortiori* there is no good reason why Parliament should have prejudiced leaseholders who had themselves (possibly at great sacrifice) discharged their service charge debts as opposed to those who had not.
152. Moreover in *URS* at [117] the majority gave an example of a developer who carried out remedial works which straddled the commencement date, and referred to the incoherence of a split regime for the application of section 135(3). In a similar way one can envisage a leaseholder who has started paying a large service charge by instalments which straddle the commencement date. To some extent this will indeed produce a split regime with schedule 8 providing protection against future instalments but not affecting those already paid; but it would be more coherent to interpret section 124 as the FTT did as applying to the past instalments than to interpret the Act as leaving leaseholders who had paid without statutory remedy.
153. Mr Selby said that such an interpretation would mean that section 124 was in principle capable of applying to the payment of service charges that had long since been regarded as settled – for example on replacement of fire doors some 25 years ago – and that this was unfair. I agree that that might in certain circumstances be regarded as unfair. But section 124 does of course contain its own safety-valve against unfairness because the FTT can only make an RCO if it is just and equitable to do so. It does not seem to me to be a sufficient reason to interpret section 124 as unable to be used for costs such as those incurred by Triathlon in the present case.
154. There is another consideration which persuades me that the FTT’s decision is right. The Act must of course be interpreted in such a way as to make it work as a whole. Our decision in *Adriatic* means that a leaseholder can be protected against service charges even if the person doing the work (landlord or management company) has already incurred the cost before the commencement of Part 5. Take a case like the present

where the obligation to do the work falls on a management company with no income other than the service charges. If such a management company had incurred costs before the Act but not yet claimed, or received, reimbursement through the service charges, the effect of schedule 8 may be to leave it with a significant shortfall. It may be that the only realistic target for it to pass on such costs to would be an associated company of the developer. Such a target is, as the present case illustrates, within the scope of section 124. But if section 124 cannot be used to pass on costs incurred before the commencement of the Act, such a management company may be left without any obvious remedy. Again it seems difficult to believe that this would be in line with Parliament's intention.

155. In those circumstances I consider that the FTT reached the right conclusion, and would dismiss this Ground of appeal.

*Conclusion*

156. For the reasons I have given I would dismiss the appeal.

**Lord Justice Holgate:**

157. I agree that the appeal should be dismissed for the reasons given by Nugee LJ.

**Lord Justice Newey:**

158. I also agree that the appeal should be dismissed.
159. So far as Ground 1 is concerned, I have nothing to add to Nugee LJ's comprehensive analysis.
160. With respect to Ground 2, section 124 of the BSA empowers the FTT to make an RCO "for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects)". Having regard to the definition of the term given in section 120(2), a "relevant defect" may have arisen as a result of work done (or not done) many years before the BSA was enacted and, as the FTT pointed out in paragraph 73 of its decision, section 124 does not expressly impose any other temporal limitation. Nothing said in section 124, therefore, prevents the provision from having retrospective effect.
161. Even so, as Nugee LJ has observed in paragraph 150 above, "the language of section 124 by itself does not take one very far". In circumstances where there is a presumption against retrospectivity, the fact that section 124 is silent on the subject might be said to favour SVDP and Get Living rather than the FTT's construction.
162. There are, however, other reasons for concluding that section 124 has retrospective effect. In the first place, that interpretation is consistent with the evident purposes of Part 5 of the BSA. As Lords Hamblen and Burrows noted in *URS*, at paragraph 84, these include "protect[ing] leaseholders from ... financial risk" and "ensur[ing] that those responsible [for historic building safety defects] are held to account". Both aims are furthered by construing section 124 in such a way that RCOs can be made in favour of leaseholders, and against developers and persons associated with them, in respect of costs pre-dating the BSA.

163. More specifically, denying section 124 retrospective effect would result in RCOs being unavailable in circumstances where Parliament could be expected to have intended that such relief should be available and inconsistencies could arise were it not to be. Nugee LJ has pointed out in paragraph 151 above that it is difficult to believe that Parliament intended that leaseholders who had already paid service charges should be “left without any remedy at all, except the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court” while leaseholders who had not paid were protected by schedule 8. I have explained in my judgment in *Adriatic* that, in my view, schedule 8 does not apply in relation to costs incurred before schedule 8 came into force. Were that correct, the need for a leaseholder to be able to seek an RCO in respect of outstanding service charges would be all the greater. Further, there is good reason to think that Parliament would have wished landlords and management companies who are prevented from recovering service charges by schedule 8 to be able to apply for RCOs against developers and their associates. So interpreting section 124 allows costs to be passed on to those responsible for the defects. An allied point is that, as Nugee LJ has mentioned in paragraph 154 above, a management company facing a shortfall as a result of schedule 8 could find itself without any remedy were it unable to resort to section 124. The same could be true of landlords.
164. In *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747, Patten LJ, giving the judgment of the Court, observed at paragraph 56 that “legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability on past conduct”. Unlike schedule 8, section 124 of the BSA falls into the latter category. It allows a fresh liability, by way of an RCO, to be imposed on the strength of defects arising from works undertaken, and (as I see it) costs incurred, before the BSA was enacted.
165. Another, and important, difference from schedule 8 is that, under section 124(1) of the BSA, an RCO cannot be made unless the FTT “considers it just and equitable to do so”. That seems to me very significant to the assessment of the fairness of treating section 124 as having retrospective effect (as to which, see in particular *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, at 525) and, more generally, to the likelihood of Parliament having intended retrospectivity. Nothing comparable is to be found in schedule 8.
166. Finally, as Nugee LJ has commented in paragraph 149 above, passages in *URS* plainly support a retrospective interpretation of section 124 of the BSA.
167. In all the circumstances, I agree that section 124 of the BSA allows RCOs to be made in relation to costs pre-dating its coming into force and, hence, that Ground 2 fails.