**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case reference** | **:** | **LON/00BB/BSD/2024/0601**<br>**LON/00BB/BSA/2025/0002**<br>**LON/00BB/BSA/2025/0003** |
| **Property** | **:** | **Land at the East Village, Stratford, London E20, comprising the four buildings known as Mellor House (Block A), Chroma Mansions (Block B), Seasons House (Block C) and Patina Mansions (Block D) at Plot 26 (North and South)** |
| **Appellants** | **:** | **(1) STRATFORD VILLAGE PROPERTY HOLDINGS 1 LIMITED**<br>**(2) STRATFORD VILLAGE PROPERTY HOLDINGS 2 LIMITED** |
| **Representative** | **:** | **Jones Day** |
| **Respondent** | **:** | **East Village Management Limited** |
| **Representative** | **:** | **Bevan Brittan LLP** |
| **Type of application** | **:** | **Appeal under Regulation 3 of the Building Safety (Leaseholder Protections) (Information Etc.) (England) Regulations 2022/859** |
| **Tribunal** | **:** | **Judge S McGrath**<br>**Judge A Sheftel** |
| **Date** | **:** | ~~**16th January 2026**~~<br>**29th January 2026** |

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**DECISION**

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## Introduction

1. In this matter we are considering two appeals against notices served under regulation 3 of the Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2022/859 (as amended) ("the Regulations"). The Regulations were made under the Building Safety Act 2022 ("the BSA"). Regulation 3 makes provision for the recovery of the costs of the remediation of unsafe buildings by landlords with the responsibility for carrying out the remedial works from landlords responsible for the construction or conversion of relevant buildings, or from their associates.

2. The regulation 3 notices in this case were served by East Village Management Limited (EVML) on Stratford Village Property Holdings 1 Limited and Stratford Village Property Holdings 2 Limited (in this decision referred to together as SVPH). At the hearing the SVPH companies were represented by Cecily Crampin of counsel and EVML by Timothy Polli KC.

3. Although some provisions of the BSA have already been considered by the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 (*BDWTrading Ltd*) and by the Court of Appeal in *Triathlon Homes LLP v Stratford Village Development Partnership* [2025] EWCA Civ 846 (*Triathlon)* and *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 (*Adriatic*), this is the first case where the Regulations have been directly in issue. *Triathlon* concerns Remediation Contribution Orders (RCOs) under section 124 of the BSA. In RCO cases, the Tribunal may order a landlord and/or associate to pay remediation amounts if it considers it "just and equitable" to do so. In regulation 3 cases, there is no equivalent or similar test to "just and equitable." If the conditions prescribed in regulation 3 are made out, then the Tribunal must make an order for the payment of the relevant costs of remediation.

4. We think it is important to cite the context and purpose of the BSA. It is a key part of the Government's response to problems in the building industry that were brought to light as a result of the Grenfell Tower Fire in 2017. The provisions of the BSA are far reaching and, in some respects, radical. In *BDW Trading Ltd*, Lord Hamblen described the origin of the BSA as follows:

> "1. On 14 June 2017 a fire broke out at Grenfell Tower in London leading to the tragic death of 72 residents of the 24-storey tower block. It later transpired that the main reason why the fire engulfed Grenfell Tower so quickly was the use of unsafe cladding around the outside of the building, which did not comply with relevant building Regulations.
>
> 2. Investigations carried out following the fire led to the discovery that a number of high-rise residential buildings across the country were subject to serious safety

defects. Aside from unsafe cladding, other issues were identified, including other fire safety concerns, such as lack of compartmentation and flammable balconies, and serious structural defects that gave rise to risks of buildings (or parts of buildings) collapsing.

3. The Government encouraged developers to investigate medium or high-rise developments for which they were responsible and to carry out any necessary remedial work for safety defects discovered. In 2022 this encouragement was reinforced by legal responsibilities imposed on developers and contractors under the BSA."

**Background**

5. SVPH have been the joint registered legal proprietors of the freehold estate in the land and buildings known as East Village, in Stratford, since 2009. The buildings at the East Village were constructed as part of the Athletes' Village for the London 2012 Olympic Games and, following the Games, were converted into residential flats. Within each tall building there are flats, almost all of which are arranged over one storey, and some dwellings referred to as "townhouses". The townhouses are typically arranged over two or three storeys and have front doors opening directly onto the street. Some buildings have commercial units on the ground floor.

6. SVPH hold their legal estate on trust for Stratford Village Development Partnership ('SVDP'). SVDP (which was then owned and controlled by the Olympic Delivery Authority) acted as the developer of the former Athletes' Village and then the East Village. SVPH is therefore an associate of SVDP, the developer.

7. The East Village is divided into various "Plots", each identified by the letter 'N' and then a number. Premises in each of the plots are demised either to Triathlon Homes LLP ('Triathlon'), which owns and deals with social and affordable housing, or to wholly owned and controlled subsidiaries of Get Living PLC, which specialises in the private rental market and owns (through subsidiaries) the private rented housing.

8. EVML is owned jointly by Get Living and Triathlon and was established in 2009. EVML manages the estate of 11 Plots across the East Village, comprising about 63 relevant buildings and 2,500 residential flats. It is contractually responsible for remedying defects in the blocks. It is the head landlord and Estate Management Company for the properties and is the Principal Accountable Person in respect of all the buildings for which it is responsible.

9. All of the relevant buildings suffer from multiple fire safety defects, both to the external walls and also the balconies and to the internal compartmentation. Some buildings have already had some remediation works carried out. The buildings on Plot N26 have had their external walls remediated by Errigal Facades (the N26

Works). The N26 works were partly funded by the Building Safety Fund pursuant to a Grant Funding Agreement dated 1st June 2023.

10. In *Triathlon Homes* the Remediation Contribution Order under section 124 of the BSA was made against SVDP for Triathlon's share of those external works. The first appeal notice in this case seeks to recover the majority of the costs of those works that do not fall within the RCO, which is the majority of the Get Living share of those costs.

11. In March 2025 EVML applied for further Remediation Contribution Orders against SVDP, Get Living, SVPH and other companies in relation to the costs of external and internal remediation of the remaining blocks in the East Village. That case is likely to be heard later this year. No figure has yet been given for the total costs sought but reference has been made to the remediation costs being approximately £400 million.

## The Notices and Grounds of Appeal

12. EVML had originally served three regulation 3 notices on SVPH, all of which were appealed. However, by agreement between the parties and with the consent of the FTT, the third notice and the associated appeal were withdrawn. There are therefore two appeals against two notices:

<u>The N26 Notice</u>

13. The first notice (the N26 Notice), dated 14th October 2024, is for £10,270,544.94. It relates to 4 blocks (A, B, C, and D of plots N26). This sum is said to represent 40.46% of the costs of remediation of the 4 blocks calculated by reference to the number of units held by Get Living companies. The remainder of the costs were the subject of the Remediation Contribution Orders made in the *Triathlon Homes* case mentioned above.

14. An appeal dated 11th November 2024 was lodged against the N26 notice on three grounds, as follows:
    (a) Ground 1: the remediation amount does not represent the cost of the relevant measure
    (b) Ground 2: the Notice includes amounts which fail the "but for" requirement
    (c) Ground 3: the Notice is defective

    Two further grounds were added in SVPH's statement of case dated 27 June 2025. They are as follows:
    (d) Ground 4: at the date the N26 Notice was given, not all of the costs included were costs EVML had paid or was liable to pay to the contractor Errigal, and
    (e) Ground 5: Regulation 3 does not have retrospective effect and thus does not include costs which EVML was liable to pay or paid prior to the Regulations coming into force on 21st July 2022.

The OPEX Notice

15. The second notice (the OPEX Notice), dated 20th December 2024, is for £2,305,026.15. It relates to all of the plots demised by the Headlease, for the costs of a remediation team set up by EVML, which are the "operating costs for the Remediation Team that EVML has paid or is liable to pay in order to deliver the remediation of the defects across the Estate."

16. An appeal dated 17th January 2025 was lodged against the OPEX notice as follows:
    (a) Ground 1: the "expects to pay" costs do not fall within regulation 3(1) which states that regulation 3 applies where "a landlord (L) has paid or is liable to pay the costs of a relevant measure relating to a relevant defect…"
    (b) Ground 2: the remediation amount does not represent the cost of the relevant measure.

    A further ground was added (subject to the Tribunal's permission to amend if required) in SVPH's statement of case dated 27 June 2025, as follows:
    (c) Ground 3: the second notice includes amounts which fail the "but for" requirement in regulation 3(1).

17. As will be clear, Grounds 4 and 5 of the appeal against the N26 Notice and Ground 3 of the appeal against the OPEX Notice were added by inclusion in the Appellants' statement of case. A formal application for permission to amend the grounds of appeal was not received by the Tribunal until shortly before the hearing. Although there was some resistance to the application from Mr Polli, the Tribunal allows the inclusion of the additional grounds. Firstly, they were originally raised following receipt of information that had not been available at the dates of the original appeals and secondly the Respondent had had ample notice in order to meet the grounds and had prepared its case on that basis.

**The Issues**

18. By the time of the hearing, the issues had been narrowed. SVPH only pursued Grounds 2, 4 and 5 (not 3) in respect of the N26 Notice. Ground 1 was pursued only to the extent it arises in the context of grounds 2, 4 and 5. For the OPEX Notice, SVPH only pursued Ground 3. A joint list of issues was provided as follows:

(a) The N26 Issues
    (i) The Strike Out Issue: Whether, as EVML says, Ground 4 of the appeal against the First Notice should be struck out?
    (ii) The 'But For' Issue (Ground 2): whether EVML is entitled to recover costs that are funded by the Building Safety Fund pursuant to the Grant Funding Agreement (GFA), even though EVML would not, by reasons of the GFA, have

been able to recover those costs pursuant to the service charge under any lease.

(iii) The Contingent Costs Issue (Ground 4): whether EVML is entitled to recover costs (the costs that were to be paid to Errigal in due course for the N26 Major Works) that it was under a future or contingent liability to pay as at the date of service of the N26 Notice.

(iv) The Retrospectivity Issue (Ground 5): whether EVML is entitled to recover by a regulation 3 notice, costs that were paid prior to the commencement of regulation 3 on 21st July 2022.

(b) The OPEX Issues

(i) The Strike Out Issue: whether, as EVML contends, Ground 3 of the Appeal against the OPEX Notice should be struck out and not proceeded with any further.

(ii) The 'But For' Issue (Ground 3): whether EVML is entitled to recover costs that are funded by the BSF pursuant to the GFA, even though EVML would not, by reason of the terms of the GFA, have been able to recover those costs pursuant to the service charge under any lease.

**Part 5 of the BSA**

19. Part 5 of the BSA was considered in detail by the Court of Appeal in both *Triathlon Homes and Adriatic*. We respectfully adopt the description of the main provisions of Part 5 given by Lord Justice Nugee in *Triathlon Homes* (which, as already noted, concerned Plot N26 on the East Village):

> "8..... 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 unprecedently 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 defects for which landlord or associate was responsible
>
> (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."

20. In this case the parties agree that as a result of paragraph 2 of schedule 8 to the BSA, EVML is precluded from recovering costs as service charges from leaseholders. It was also agreed that SVPH is associated with the developer of the East Village (Stratford Village Development Partnership "SDVP"), which was responsible for the building safety defects.

21. Lord Justice Nugee described the Regulations as follows:

> "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."

22. As to the impact of the leaseholder protections in Schedule 8, Lord Justice Nugee stated:

> "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."

23. For the sake of completeness, it is important to note the provisions of section 124 of the BSA in relation to Remediation Contribution Orders (RCOs). This provides:

> (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.

In particular, and in contrast to regulation 3, a Tribunal must be satisfied that it is "just and equitable" to make an RCO before it may do so.

**The Strike Out Issue**

24. We start with a consideration of the strike out issue. This concerns the extent of the Tribunal's jurisdiction under regulation 3. In order to understand the arguments it is essential to consider regulation 3 in some detail. Regulation 3(1) is as follows:

> "(1) This Regulation applies where, in relation to a lease of premises in a relevant building, a landlord (L) has paid or is liable to pay the cost of a

relevant measure relating to a relevant defect ("the remediation amount") which, but for paragraph 2 of Schedule to the Act, would have been payable as a service charge by a tenant under the lease."

If the conditions of paragraph (1) are not met, then the remainder of regulation 3 will not apply. Since by paragraph 3(2), where paragraph (1) applies "the responsible landlord is liable to pay L, the remediation amount…." one of the questions we must resolve is whether the Tribunal has jurisdiction to determine whether paragraph (1) applies or not?

25. Paragraph 3(3) sets out how L is able to recover the remediation amount from a responsible landlord (or landlords). Very simply, L must give at least one responsible landlord a notice which contains the information set out in paragraph 3(3B). That information is:
    (a) the remediation amount that L has paid or the remediation amount that L expects to pay;
    (b) the time limit for appealing to the Frist -tier Tribunal and for applying for an extension of that time limit; and
    (c) the possible grounds of appeal.

    Another question we are asked to resolve is whether the Tribunal has jurisdiction to determine whether a paragraph (3) notice is a valid notice?

26. How an appeal is to be made against a paragraph (1) notice is set out in paragraphs 3(5) and 3(5A)-(5C). Paragraph 3(5) states:
    "(5) A person who is notified by L of a requirement to pay all or part of the remediation amount referred to in paragraph (2) may appeal to the First-tier Tribunal within 30 days of the notification, specifying the grounds of appeal".

    Paragraphs 3(5A)-5C) set out how to seek a 30-day extension to the time limit from the Tribunal.

27. There are two statutory grounds of appeal. These are set out in paragraph 3(6) and are:
    (a) that the remediation amount does not represent the cost of the relevant measure; or
    (b) that the person sent the notice is not a responsible landlord.

28. Paragraphs (6A) and (6B) explain the consequences of an appeal succeeding or failing and provide:

    "(6A) Where an appeal made on the grounds specified in paragraph (6)(a) –
    (a) is unsuccessful, subject to the outcome of an appeal on another ground under this Regulation the person who was notified by L is required to pay the remediation amount set out in the notice unless that person's liability has

been discharged by payment of the remediation amount by another recipient of the notice;

(b) is successful, subject to the outcome of an appeal on another ground under this Regulation the First-tier Tribunal must substitute the remediation amount it rules is the correct one for the remediation amount in the notice.

(6B) Where an appeal made on the grounds specified in paragraph (6)(b)

(a) is unsuccessful, subject to the outcome of an appeal on another ground under this Regulation the person who was notified by L is required to pay the remediation amount set out in the notice unless that person's liability has been discharged by payment of the remediation amount by another recipient of the notice;

(b) is successful, the person who was notified by L is not required to pay the remediation amount set out in the notice."

29. Paragraphs 3(8) and 3(10) are also relevant:

"(8) In this Regulation "the responsible landlord" means—

(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.

.....

(10) An amount payable to L under this Regulation is recoverable by L as a civil debt."

30. In this case, the Appellants ask the Tribunal to decide a number of issues which the Respondent says do not fall within the limited scope of paragraph 3(6) and therefore, fall outside the jurisdiction of the Tribunal. As a consequence, the Respondent seeks to strike out a number of the grounds of appeal.

31. Mr Polli's analysis of the Regulations is not controversial. He says that liability on a responsible landlord to pay arises only if the conditions in regulation 3(1) are satisfied. Those conditions are that L has paid or is liable for the cost of a relevant measure in respect of a relevant defect (being the remediation amount) and that "but for" paragraph 2 of Schedule 8, the remediation amount would have been payable by way of a service charge.

32. If the conditions are satisfied the trigger for the recovery of the remediation amount is proper service of a valid paragraph (2) notice. If no valid notice is served then the right to recover the remediation amount does not arise and the remainder of

Regulation 3 is not engaged, and accordingly, the right to appeal under paragraph (6) will not arise.

33. Mr Polli submitted that issues pertaining to the satisfaction of regulation 3 conditions to the validity of a regulation 3 notice ("a regulation 3 notice") are for the court and not for the Tribunal. He contends that the lack of formal requirements for a paragraph (2) notice to be valid limits the scope to argue that a notice fails. He also says that regulation 3 does not expressly provide for an application to be made to the Tribunal for a decision on validity. That omission, he argues, would be surprising if it was intended that the Tribunal should have jurisdiction. He points out that enforcement would be by the Court against the person said to be the responsible landlord.

34. In consequence, Mr Polli submitted that a recipient of a regulation 3 notice who brings an appeal to the Tribunal against that notice must necessarily be taken to accept that the conditions in paragraph (1) are satisfied and that the notice is valid. Although he accepted that the Tribunal undoubtedly has jurisdiction to resolve any question that must be resolved in order to determine a challenge pursuant to regulation 3(6), including issues as to the extent of its jurisdiction, it cannot (he says) be appropriate for a Tribunal to encourage a party to bring an appeal solely in order to argue that the paragraph (1) conditions were not satisfied or that there was no valid notice.

35. On behalf of the Appellants Ms Crampin asserts that the Tribunal does have jurisdiction to decide issues both under Regulation 3(1) and 3(2) and she rejects the suggestion that in lodging appeals, the Appellants are estopped from denying that a notice is valid, or is bound to accept that the Tribunal has jurisdiction and hence that Regulation 3(1) applies. She submitted that the Tribunal is required to consider jurisdiction under rule 9(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 which provides that the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal does not have jurisdiction in relation to the proceedings or case or that part of them.

36. For the following reasons we consider that the Tribunal is the correct forum to determine whether the conditions in Regulation 3(1) are met and whether a notice under Regulation 3(2) is valid.
    (a) As Mr Polli acknowledges, the Tribunal must be able to resolve questions which are required to determine a challenge under Regulation 3(6). In our view this includes being satisfied that the Regulations are applicable and that a notice is valid and validly served.
    (b) Later in this decision we consider some of the policy considerations underlying the Regulations. In our view, it is intended that the Regulations should be a straightforward remedy for landlords who have incurred or who will incur

remediation costs. The position advocated by Mr Polli would introduce a complexity which would undermine that policy.

(c) Furthermore, there seems to be no justification for Mr Polli's approach. Part 5 of the BSA confers jurisdiction on the Tribunal to decide the majority of disputes between the parties. Splitting-off jurisdictional questions under regulation 3 to the courts is out of kilter with the structure of the BSA.

(d) Paragraph 10 of regulation 3 provides that an amount payable to L under this Regulation is recoverable by L as a civil debt. An amount will only be payable if the conditions of paragraphs (1) and (2) are met. There is no indication that those issues will fall for separate determination or that the Tribunal's jurisdiction lacks finality. This is not a case where the Tribunal's jurisdiction is merely declaratory.

(e) The period to appeal a notice is short and the prescribed contents of a paragraph (2) notice are sparse. We do not agree that by lodging an appeal, a landlord would be estopped from contesting jurisdiction. Although the statutory grounds for appeal do not include considerations of applicability or validity, in our view it is implicit that the Tribunal must be satisfied of those issues before proceeding to a determination. In the context of this legislation it would be odd if a recipient of a notice had to put in a protective appeal and immediately ask that it be stayed so that validity can be determined by the county court. In any event, the delay that would be caused would probably be against the Respondent's interest in receiving payment quickly.

**The "But for" Issue**

37. Having satisfied ourselves that we can decide issues of jurisdiction we turn to the first, which is the "but for" issue. On behalf of the Appellants, it is said that the condition in regulation 3(1) that the costs of "a relevant measure…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" is not met in this case. This is because, it is said, the terms of the BSF funding agreement for the N26 external works itself prevents the Respondent from recovering those costs from any leaseholder. Therefore the "but for" test is not met in this case where service charge costs were not recoverable in any event.

38. Ms Crampin approached this in two ways. Firstly, she said that the "but for" ground of appeal is a regulation 3(6)(a) ground of appeal because the costs, in these circumstances, cannot be the "cost of a relevant measure." Alternatively, she said that the "but for" argument meant that the N26 Notice was invalid and that its service did not permit recovery of the sums in issue by EVML from SVPH. Accordingly she contended that SVPH is not liable to EVML under regulation 3(2).

39. It is not disputed that a proportion of the costs sought under the N26 and OPEX Notices were funded by the Building Safety Fund or that the Grant Funding Agreement (GFA) prohibits the recovery of grant funded costs from lessees. The

relevant term of the GFA is at clause 4.3.1(d), which states that EVML "shall not claim the cost of any Qualifying Expenditure funded by the Funding…from any Leaseholder…" It is agreed that the clause is operative in respect of those N26 costs and OPEX costs.

40. Ms Crampin said that to construe regulation 3 it is necessary to identify the power under which was made. This is paragraph 12 of schedule 8 to the BSA, which provides:

> "12. The Secretary of State may by Regulation make provision for and in connection with recovery, from a prescribed relevant landlord, of any amount that is not recoverable under a lease as a result of this schedule."

41. In her submission the power in paragraph 12 is not to give the remediating landlord a right to payment from the responsible landlord even though by reason of the terms of the GFA, the remediating landlord cannot charge a service charge for the costs of the relevant measure in any event. Instead, she contended, the power in paragraph 12 is strictly to provide for a replacement where the application of schedule 8 was the only and the only operative reason the landlord was out of money for remediation.

42. In support of her argument, Ms Crampin referred to observations by Lord Justice Nugee in *Triathlon* at paragraph 23(5) where he said "the inevitable corollary of relieving lessees of their contractual service charge liabilities is that ….costs will be incurred by whoever is doing the work…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 include….Regulations 3, 4 and 5 of the 2022 Regulations."

43. She said that "bearing the cost" means bearing the cost "without funding" and that the Regulations apply precisely where the service charge source has been removed. In her submission the "but for" in regulation 3(1) is strict, it must be paragraph 2 of schedule 8 and paragraph 2 alone which prevents the service charge being payable if regulation 3(1) is to apply. Otherwise, she said that a construction of the "but for" test that included costs which are not recoverable from a leaseholder because of a reason other than the application of paragraph 2 would make the Regulation *ultra vires* because it would exceed the powers in schedule 8, paragraph 12.

44. Secondly, Ms Crampin said that if it were correct that the "but for" test should be considered by reference to the terms of the leases alone, then it would mean that even if the remediating landlord had funds for the works from another source (in particular one in which the money was expressly provided in place of the service charge as with the GFA) then regulation 3(1) would still permit recovery from the responsible landlord. In her submission that would not be to "transfer the cost of

remediating the relevant defects in question to the responsible landlord", instead it would be to give the remediating landlord a second source of payment, for no reason.

45. Thirdly, she said that a construction of the "but for" test, which is limited only to looking at the terms of the lease, would mean that the service charge limitations under the Landlord and Tenant Act 1985 would not apply to what could be recovered under regulation 3, so that a remediating landlord could recover more than it could have under the service charge. In that case, she contended, the "but for" test would again have a meaning beyond the power in schedule 8, paragraph 12.

46. In her submission, the requirements of sections 18 to 30 of the 1985 Act, including questions of reasonableness, consultation and limitation under section 20B cannot be considered to have been excluded by regulation 3. Instead, she contended that those matters would need to be resolved or determined in order to establish that the service charge was payable and that any amount not payable, despite being expended, would be excluded from the "but for" calculation. Otherwise, she argued the consequence would be that a relevant landlord would have a strict, no fault, liability for costs of relevant measures even at an unreasonably incurred "gold-plated" level chosen by the remediating landlord.

47. Ms Crampin also pointed out that strict liability under regulation 3 would be imposed not only on landlords who were developers but also on associate landlords who may have had no financial benefit from the development. The imposition of such a strict liability would be, in her submission, contrary to the requirement to construe regulation 3 in a way compatible with convention rights under section 3 of the Human Rights Act 1998, where by section 3(1) "so far as it is possible to do so…subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights."

48. The particular Convention Right relied upon is contained in Article 1 of Protocol 1 which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

49. Ms Crampin contended that the effect of regulation 3, where it applies, is to deprive the relevant landlord of its money because a valid regulation 3 notice makes the relevant landlord liable to pay money to the remediating landlord, a liability which it had not had before. Even if this could be justified by reference to the public interest

in protecting lessees from service charges for the cost of existing fire safety and structural safety defects, it would not justify imposing a strict liability in respect of costs for which the remediating landlord had no right, or did not need because it has the money from another source. That is so in particular, she said, where a Remediation Contribution Order could be sought, with the just and equitable test allowing the Tribunal to balance the interests of the remediating landlord and the paying party. Seeking a RCO should be the route where a landlord wants costs beyond the service charge.

50. We do not accept Ms Crampin's submissions. In our view, the "but for" condition has been met in this case. The only relevant consideration is whether or not a service charge would have been payable by a tenant under a lease. We do not consider that the condition can be treated as not being fulfilled where BSF funding has been made available to a remediating landlord. We also do not consider that the requirements imposed by sections 18 to 30 of the Landlord and Tenant Act 1985 which may (hypothetically) have reduced the amount of service charge that would have been payable are relevant.

51. In reaching this conclusion we start with the policy of the BSA. On behalf of the Respondent, Mr Polli drew our attention to *URS* where the Supreme Court accepted the Secretary of State's submission that:

> "83. It has become clear that the unprecedented level of remediation works required cannot be met by residential leaseholders alone. Leaseholders living in high-rise flats purchased their properties in good faith and could never have foreseen the nature or scale of the costs in question. In a large number of cases where building safety defects have been identified, leaseholders have been unable to afford the costs of remediation, which in many cases stretch into the tens, or even hundreds, of thousands of pounds (and in certain cases exceed the amount paid for the property). Nor can these costs be met by the taxpayer alone (although the Government has provided substantial grant funding, in particular to remedy buildings with unsafe cladding).";
>
> and
>
> "The Government has consistently taken the view that, where building developers and other contractors are responsible for building safety defects, it is fair that they should cover the costs of remediation, and that holding wrongdoers to account will speed up the remediation process and reduce the risks posed by unsafe residential buildings to their residents."

As a result, the Court concluded that

> "84. The BSA is part of the Government's response to the need to identify and remediate historic building safety defects as quickly as possible, to protect

leaseholders from physical and financial risk and to ensure that those responsible are held to account."

52. Mr Polli submitted that this made it clear that the BSA and the Regulations together are part of the intervention by which the Government sought not only to protect leaseholders from the costs of remedial works, but also to ensure that those responsible for them (or their associates) bear the financial burden. In our view, this is correct. Additionally, it is our view that a further policy driver is identified in the remarks, namely the desire to speed up the remediation process and reduce the physical risks to residents living in dangerous buildings.

53. Schedule 8 is primarily concerned with making provision to protect leaseholders from paying service charges. The provisions are nuanced and in the main apply to "qualifying leaseholders" with varying degrees of liability imposed on different categories of landlord. However, so far as paragraph 2 of schedule 8 is concerned, all lessees are relieved from having to pay service charges under a lease for the costs of remedying fire safety defects if the original developer (or an associated company) is their landlord or is a superior landlord. No qualification is included in the statutory language and there is no policy indication that any mitigation was intended.

54. In our view the existence of the BSF funding agreement does not displace the applicability of regulation 3 to the recovery of the remediation amount in this case.

55. There are clear differences between Remediation Contribution Orders under section 24 of the BSA and regulation 3 payments. However, the underlying policy is sufficiently similar to justify our having regard to some of the dicta of the Court of Appeal in the *Triathlon* case. First are the observations on the consequences of schedule 8. At paragraph 23(5) Lord Justice Nugee said that:

> "(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."

Then at paragraph 69 in commentating on the decision of the FTT in that case:

> "69. ..... 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."

56. In our view the strength of the policy identified goes some way to addressing Ms Crampin's suggestion that "bearing the cost" means "bearing the cost without funding." The approach of the Court of Appeal to regulation 3 is more straightforward. Very simply, it is the developer or an associate of the developer who should pay. The limited nature of the prescribed grounds of appeal reinforce this conclusion.

57. If we are correct, and the BSF funding does not displace paragraph 3 and fall foul of the "but for" test, then in consequence we accept there will be a danger of double recovery. However, funding from the BSF is not final or once and for all and includes obligations to repay money to the BSF where sums have been provided from another source. The Secretary of State has already taken RCO proceedings in the FTT in respect of a number of BSF awards and this remains an option. Furthermore, the terms of the GFA include the following provisions:

"4.5.1 The GLA may reduce the Maximum Sum by such amount as it determines appropriate –

(a) In the event that the Applicant receives and/or accepts an offer of any other funding and/or finance which relates to any part of the Qualifying Expenditure which the Funding is financing, which shall include without limitation:

(i) any other public sector finance; or

(ii) any amount recovered pursuant to any litigation and/or claim relating to the installation ….

……
4.5.2 In the event that the Applicant receives and/or accepts an offer of any other funding and/or finance which relates to the Project (which shall include without limitation the types of funding/finance referred to in clause 4.5.1(a)(i)…, the Applicant shall advise the GLA as soon as reasonably practicable.

Hence, other funding is anticipated by the GLA and notification and, implicitly, recovery are catered for.

58. That the BSA funding is not final was also recognised in *Triathlon* at paragraphs 110 and 111 as follows:

> " 110 …… 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."

59. Similar considerations concerning the nature of the BSF funding apply in regulation 3 cases. As already observed, the clear policy of paragraph 2 of schedule 8 and of regulation 3 is to ensure that leaseholders are protected from paying service charges and that the burden of meeting remediation costs is diverted to the developer or associate. In our view, the process under regulation 3 is intended to be straightforward. These are public policy issues and we do not accept Ms Crampin's submission that the availability of BSF funding in this case means that an order under regulation 3 would offend against the Human Rights Act or Article 1 of Protocol 1 to the Human Rights Convention. Furthermore, we do not accept that the omission of a "just and equitable" test offends Convention rights.

60. For completeness we also need to address the question of the particular service charge deficit that would be recoverable under regulation 3. Ms Crampin submitted that the "but for" test would not be met unless a landlord (L) could demonstrate that they had complied with the provisions of sections 18 to 30 of the 1985 Act, otherwise L could claim costs which would not ordinarily be considered to have been reasonable or that might have offended any of the other statutory leaseholder protections. Mr Polli submitted that we simply had to be satisfied that there was a relevant requirement to pay service charges within a lease and that we need not go any further. We agree with Mr Polli.

61. Paragraph 10 of schedule 8 explains what is meant by "no service charge is payable" For the purposes of paragraph 2 (among others). The provisions are technical. Sub-paragraph (2) states:

> "(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing –
>
> (a) no costs incurred or to be incurred in respect of that thing….
>
> (i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge payable under the lease, or
>
> (ii) are to be met from a relevant reserve fund;
>
> (b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly…

By sub-paragraph (3) "the relevant provisions" means sections 18 to 30 of the Landlord and Tenant Act 1985 (service charges) and section 42 of the Landlord and Tenant Act 1987 (service charge contributions to be held on trust).

62. Since paragraph 10 provides that schedule 8 service charges are not "relevant costs", then they are not subject to the section 18-30 regime. Paragraph 2 applies where service charges fall within the definition of section 18 of the 1985 Act but otherwise any restrictions such as the limitation of service charges by (for example) section 19, section 20 or section 20B are removed. In our view, the amounts recoverable under regulation 3 must mirror the paragraph 2 of schedule 8 provisions and therefore sections 18 to 30 are also irrelevant (save that the service charge must fall within section 18) to the application of the "but for" test.

63. During the hearing, the question was also raised: if the mechanics of a lease such as the service of notices for payment were not complied with, whether this would displace the "but for" presumption? In our view it would not. A failure to comply with internal notice provisions has a suspensory effect rather than rendering a service charge not payable. The same applies to the suspensory provisions of sections 47 and 48 of the Landlord and Tenant Act 1987. The "but for" test cannot be read to include the words "for the time being" or "from time to time."

64. Furthermore we accept Mr Polli's submission that Parliament cannot have intended that a detailed exploration of the contractual or statutory payability of a service charge need be conducted as a pre-condition of liability under regulation 3.

65. Accordingly, the Tribunal considers that regulation 3(1) applies in this case.

## Future/contingent costs

66. The second substantive area of dispute concerned future and contingent costs: specifically, whether EVML is entitled to recover the costs that were to be paid to Errigal in due course for the works to block N26 that it was under a future or contingent liability to pay as at the date of service of the N26 Notice (Ground 4 of the appeal).

67. The sum in issue between the parties under this head is £3,924,232.39 The explanation for such costs was set out in a letter from EVML's solicitors, Bevan Brittan, dated 20 January 2025, following the issuing of the present appeals. That letter identifies which of the total costs of the N26 external works were paid before 31 July 2024, and which EVML expected to pay. It should be noted that the final account, agreed with Errigal, had led to a reduction as against what had been included in the N26 Notice, hence the reduction between the sum of £3,927,780.19

referred to in EVML's statement of case (as the EV Companies' share of £9,707,593.20 included in the N26 Notice), and the sum of £3,924,232.39 now in issue. In other words, the "*expects to pay*" sum in the N26 Notice was greater than for which EVML was liable at the final account.

As noted in Mr Polli's skeleton argument, the issue regarding future and contingent costs requires the tribunal to consider what sort of liability is required of the remediating landlord by regulation 3(1) and, therefore, what sort of liability is imposed upon the responsible landlord by the service of a regulation 3 notice as a consequence of regulation 3(2).

68. The starting point is the wording of regulation 3(1), which applies where the remediating landlord:

> "*has paid or is liable to pay the cost of a relevant measure relating to a relevant defect*" (emphasis added).

Similar wording appears within regulation 3(2):

> "*Where this regulation applies the responsible landlord is liable to pay the remediation amount …*" (emphasis added).

69. On SVPH's case, the phrase "*is liable to pay*" in regulation 3(1) (and also regulation 3(2)), requires the remediating landlord to be legally liable to pay the costs in question as at the date it gives a regulation 3 notice. An estimate of costs is not enough. Nor is a contract under which the remediating landlord is not yet liable, because there is a condition precedent to liability as yet not fulfilled (for example if a contractor has not yet done works, or payment to the contractor is contingent on certification, or where the cost is a salary, where the date for payment is in the future). In all such cases, the obligation on the remediating landlord to pay might never arise because the condition precedent might not be fulfilled or might not be fulfilled for the whole cost.

70. It should be noted, however, that the language is not consistent throughout regulation 3. Regulation 3(3B)(a), which sets out information the notice under regulation 3(3) must contain, requires inclusion of "*the remediation amount that L has paid or the remediation amount that L expects to pay*" (emphasis added). That is different from the phrase "liable to pay" in regulations 3(1) and (2) above.

71. In EVML's submission, the phrase "expects to pay" is plainly wide enough to contemplate a present liability that has not yet crystalised. This was relied on in support of the submission that all that is required of the liability to which regulations 3(1) and (2) refer is that it must be one that can be said to give rise to an 'expectation' that a payment will probably have to be made – the use of the language of expectation is not naturally compatible with a liability that is overdue.

72. In contrast, Ms Crampin stressed that it is regulation 3(1) which defines when regulation 3 applies, and thus when valid notice can be given. As such, "*expects to pay*" must be read as meaning "*liable to pay*", in accordance with the phrase in

regulation 3(1). In other words, the landlord "*expects to pay*" the sums it is "*liable to pay*" but has not paid.

73. Other parts of regulation 3 were also referred to by SVPH in support of the argument that it does not extend to future or contingent liabilities.

    (1) Where the statutory appeal process is followed, and is unsuccessful, the responsible landlord is "*required to pay the remediation amount set out in the notice*" (regulation 3(6A)(a) and regulation 3(3)(6B)(a) respectively to the two statutory grounds of appeal). However, regulation 3 does not state that the responsible landlord is required to pay the remediation amount set out in the notice *"<u>if and when L is required to pay it</u>*". Indeed, regulation 3(6A)(a) and 3(3)(6B)(a), in using the words "*required to pay*", are emphasising a current liability, not a contingent liability, thus supporting the contention that the phrase "*liable to pay*", wherever it is used in regulation 3, is not a contingent liability.

    (2) A cost which is only what EVML expects to pay without yet any liability "*does not represent the cost of a relevant measure*" within the meaning of Regulation 3(6)(a). The wording is "*<u>the</u> cost*" (emphasis added), not "the expected cost" or "an estimate of the cost".

    (3) The word "*represent*" in Regulation 3(6)(a) is certain, as is the phrase "*the correct one*" in Regulation 3(6A)(b): i.e. on a successful appeal on a Regulation 3(6)(a) ground the "*Tribunal must substitute the remediation amount it rules is the correct one for the remediation amount in the notice*". Neither sit easily with the notion of a future or contingent liability.

74. Mr Polli referred to several authorities in which it was said that it has been recognised that a future or contingent liability has some sort of present existence as a liability properly so called – although he readily accepted that the examples given arose in different contexts and that the Regulations must be construed on their own terms. So, for example: (i) they feature (by reason of statute and the applicable insolvency rules) in the administration of insolvencies (see, by way of example, *In re Lehman Bros International (Europe) (No 4)* [2015] EWCA Civ 485); (ii) the existence of an un-crystalised future or contingent liability is recognised as a reason why redemption of a security might be refused (see by way of example, *Rudd & Son* (1986) 2 BCC 98955); or, (iii) in a landlord and tenant context, in *Burr v OM Property Management Ltd* [2013] 1 WLR 3071 Lord Dyson MR commented that, "*as a matter of ordinary language, there is an obvious difference between a liability to pay and the incurring of costs.*" He accepted that a liability did not become a cost incurred until that liability had crystallised.

75. EVML contended that although a future or contingent liability might not have crystalised or become immediately payable as at the date of a Regulation 3 Notice, some sort of nascent liability already exists in the present. That *something* is a liability that exists *now* either to pay a sum in the future, or to pay a sum in the future depending on how circumstances unfold. A future or contingent liability is therefore a liability properly so called.

76. Further, having regard to the wider policy of the BSA and the Regulations, Mr Polli stressed that it is entirely consistent with their aims and objectives that a regulation 3 notice should be able to include future and contingent costs. The question, he identified, is whether regulation 3 should operate on a 'just in time' basis, or in arrears. In EVML's submission, it should be the former: the purpose of regulation 3 was for a landlord, who might be thinly capitalised in the way that EVML is, to have quick and ready access to funds so that remediation works are not unnecessarily held up.

77. Ms Crampin also emphasised practical considerations associated with a conclusion that would allow future or contingent costs to be included within a regulation 3 notice. However, in contrast to Mr Polli, she contended that the approach advocated by EVML leads to numerous difficulties and potentially unfairness.

78. By regulation 3(10), "*an amount payable to L under this regulation is recoverable by L as a civil debt*". A right of recovery arises as soon as the remediating landlord has given notice under regulation 3(3), subject to any appeal. In other words, the remediating landlord can issue a complaint in the Magistrates' Court for a civil order for recovery under section 58(1) of the Magistrates' Courts Act 1980. The order which the Court can make under section 58(1) is "*for the payment of any money recoverable summarily as a civil debt*" (emphasis added). Moreover, by section 96 of the 1980 Act, the remediating landlord could then by complaint seek an order that the Magistrates' Court commit the responsible landlord to prison. The key point, however, is that the 1980 Act is not directed at contingent sums, but at sums which the debtor could be in default of payment.

79. Pausing there, it should be noted that the language of regulation 3(10), dealing with enforcement – i.e. "*… an amount payable…*", is again different to that used earlier in regulation 3 as noted above. In EVML's submission, the use of the words "*an amount payable*" in this provision is of significance:

    (1) It is said that it may be inferred that the reference to "an amount payable" conveys (or, at least, contemplates) a different meaning to the earlier references to an amount for which the remediating or the responsible landlord is "liable" or "required to pay";

    (2) Consequently, the fear of EVML being able to enforce the immediate payment of a debt for which EVML is only subject to a future or contingent liability – cannot arise: if it is only a future or contingent liability, it is not yet 'payable'.

80. This is part of EVML's wider submission as to the status of a future or contingent liability on the recipient of a regulation 3 Notice. Mr Polli accepted that to the extent that the remediating landlord is faced with a future or contingent liability, such liability would be mirrored with regard to the responsible landlord. In other words, the responsible landlord's liability would also be future or contingent, notwithstanding the receipt of a regulation 3 Notice, until it crystallised for the remediating landlord.

81. There are several difficulties with such analysis. First, as noted above, where the statutory appeal process is followed, and is unsuccessful, the responsible landlord is "*required to pay the remediation amount set out in the notice*" (regulation 3(6A)(a) and regulation 3(3)(6B)(a) respectively). In other words, the requirement to pay is immediate. Secondly, it is difficult to see how the responsible landlord would know when its contingent liability had become immediate. There is no process for the remediating landlord to update the notice it serves. Moreover, having regard to the limited information required in a notice by regulation 3(3B), there is no certainty that a notice would contain details of what the contingency is or when it would become payable. There is no mechanism in the Regulations which would accommodate the responsible landlord's liability to pay only arising when any contingency on the remediating landlord's liability has been met. The responsible landlord is simply required to pay the cost in the notice given under regulation 3(3). The Tribunal has no jurisdiction to make an order that the responsible landlord pay only when the remediating landlord is required to pay. The Tribunal's powers on an appeal such as in the present case are as contained in regulation 3(6A). Those powers differ from the Tribunal's power in respect of RCOs under section 124(4)(aa) and (b) of the BSA which allow the Tribunal to make an order that the specified payer (aa) "*is liable for the reasonable costs of specified things done or to be done*" and/or requiring "*a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event*".

82. Moreover, on SVPH's case, if "*liable to pay*" in regulation 3(1) could include a contingent liability on the remediating landlord, then the responsible landlord could be required to pay a sum which the remediating landlord itself would never have to pay (where the condition precedent never arises). The responsible landlord would be at risk of recovery in the Magistrates' Court, and, in principle, of imprisonment for default of payment under section 96 of the 1980 Act. Similarly, it was argued that construing regulation 3 so that it allowed for payment of a cost only estimated by the remediating landlord, or for which the remediating landlord had only a contingent liability, would not be compatible with a responsible landlord's Article 1 Protocol 1 right to the peaceful enjoyment of its possessions because it would not strike a fair balance between the demands of the general interest and the protection of the responsible landlord's rights. There is no mechanism under the Regulations to recover a payment where it transpires that the total amount due was less and we do not accept that it is an answer to the possibility of bringing an unjust enrichment claim, which would be both costly and uncertain.

83. Returning to the principal question of interpreting the words "paid or is liable to pay in regulations 3(1) (and 3(2)), we agree with the submission that these are, in essence the 'operative' parts of the regulation: regulation 3(1) sets out when it applies. In our view, the phrase "liable to pay' most easily sits with the concept of a liability which has already arisen – not one that is future or contingent.

84. In construing these words, it is correct that we must have regard to the Regulations as a whole and also the wider policy of their enabling Act, the BSA. We agree with Mr

Polli that the purpose is not merely the protection of leaseholders and, consequently, filling the gap which would otherwise have been provided by service charges, but also consideration of the 'who pays?' question. In this regard, we acknowledge the thrust of the BSA that it is generally the developer that will sit at the top of the hierarchy of liability. The same is also true of Regulations 4 and 5 (indeed Regulation 5 can be applied to 'any landlord').

85. As to Mr Polli's point that the Regulations should operate on a 'just in time' basis so as not to delay remedial works, while we agree that avoiding delay in remediation of defective buildings must be a clear policy objective of the BSA, it is difficult to see that there would be much delay in requiring a liability to crystallise before a notice under the Regulations may be served. This is particularly so in light of EVML's acceptance that the liability of a responsible landlord would mirror that of a remediating landlord, such that a contingent liability for the remediating landlord would remain a contingent liability of the responsible landlord unless and until such liability crystallised. In other words, even on EVML's case, the responsible landlord is not asked to pay until the liability crystalises.

86. We therefore agree with SVPH that the wider policy of the BSA is not frustrated by limiting sums recoverable under regulation 3 to extant liabilities. As new liabilities arise, further notices can be served. Furthermore, regulation 3 is not the only way in which a remediating landlord can obtain payment from a responsible landlord. Section 124 applications for a Remediation Contribution Order are available, with the tribunal's jurisdiction more flexible, allowing for payment before liability has arisen for the remediating landlord and for repayment to the paying party if the costs of remediation are reduced.

**The Retrospectivity Issue**

87. The question here is whether regulation 3 can apply to remediating landlord costs paid prior to the coming into force of the Regulations.

88. In Ms Crampin's submission the starting point is the presumption against retrospective effect and that, unless the contrary intention appears, the statute is presumed not to be intended to have retrospective effect. She also submitted that since regulation 3 is contained in a statutory instrument, there is a second issue, which is whether the scope of the enabling power in paragraph 12 of schedule 8 could have given the Secretary of State power to make regulations with retrospective effect.

89. She does accept for the purposes of this FTT matter that amounts not recoverable as service charges under Part 5 of the BSA can include amounts paid by a landlord prior to the coming into force of the BSA on 28th June 2022. That is the result of the Court of Appeal's decision in *Adriatic*. Permission to appeal the point has been given by the Supreme Court and Ms Crampin reserved SVPH's position on any appeal against the FTT decision in this case.

90. In summary, Ms Crampin contends that there is nothing in regulation 3 which positively indicates that it is to have retrospective effect and she suggests that, just as in *Triathlon*, "the language …does not take one very far."

91. She submitted that regulation 3 differs from section 124 since the onus is on the responsible landlord to challenge liability once a regulation notice has been served. That is unlike section 124, which puts the onus on the applicant remediating landlord. She said that the older the costs are, the more difficulty that task becomes.

92. She said that as the law currently stands, a section 124 order can be made in relation to costs incurred before that section came into force on the basis that the just and equitable test was a "safety-valve" against unfairness and that the retrospectivity of section 124 was needed to make the BSA scheme work as a whole. In her contention, none of that reasoning applies to regulation 3.

93. The Tribunal does not accept those submissions. Unless the Supreme Court takes a different view from the majority of the Court of Appeal in *Adriatic*, we consider that costs incurred prior to the commencement of the Regulations fall within regulation 3. In reaching this conclusion, we acknowledge that regulation 3 does not include a "just and equitable" test but consider that the scheme of the BSA must incorporate retrospectivity in order to operate as a whole. There can be no justification for treating regulation 3 differently than other costs within schedule 8 and, in particular, we are mindful that in *URS*, the Supreme Court clearly accepted the Secretary of State's submission that:

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

**Conclusion**

94. In conclusion, we determine that:

(a) The FTT has the power to determine its jurisdiction to decide appeals under regulation 3 of the Building Safety (Leaseholder Protections)(Information etc.) England Regulations 2022. The determination of its jurisdiction includes deciding whether the conditions in regulation 3 have been established and whether a notice under paragraph 3 is valid;

(b) The "but for" condition in paragraph 3(1) means that but for paragraph 2 of schedule 8 to the Building Safety Act, a lessee would have been liable under their lease to pay the remediation cost. The fact that Building Safety Funding has been

granted is not relevant. The possibility that the amount of service charge might otherwise be restricted by contract or law is not relevant.

(c) The responsible landlord's liability under regulation 3 is restricted to costs for which the remediating landlord is immediately liable and does not extend to future estimated or contingent costs.

(d) Regulation 3 costs can include costs paid by the remediating landlord prior to the coming into force of the Regulations on 21st July 2022.

95. Accordingly, save for Ground 4 of the N26 Notice appeal, the Appeals fail.

**Judge Siobhan McGrath** **Judge Andrew Sheftel**

~~**16th January 2026**~~

**29th January 2026**

**RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **London.RAP@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide

whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.