Easter Term
[2025] UKSC 21
On appeal from [2023] EWCA Civ 772

JUDGMENT

URS Corporation Ltd (Appellant) *v* BDW Trading Ltd (Respondent)

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
21 May 2025

Heard on 2, 3, 4 and 5 December 2024

Appellant
Laurence Rabinowitz KC
Fiona Parkin KC
Patrick Harty
James Goudkamp
James Ruddell
(Instructed by CMS Cameron McKenna Nabarro Olswang LLP (London))

Respondent
Mark Howard KC
Simon Hargreaves KC
David Sheard
Tom Pascoe
Thomas Saunders
(Instructed by Osborne Clarke LLP (London))

Intervener – Secretary of State for Housing, Communities and Local Government (written submissions only)
Sir James Eadie KC
Michael Walsh KC
Jason Pobjoy KC
Camilla Chorfi
Will Perry
(Instructed by Government Legal Department)

LORD HAMBLEN AND LORD BURROWS (with whom Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Richards agree):

1. Introduction

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 Building Safety Act 2022 (the "BSA").

4. The respondent ("BDW") is a major developer. Its brand names include well-known developers such as Barratt Homes and David Wilson Homes. The appellant ("URS") provides consultant engineering services. A number of BDW's medium or high-rise flat developments were based on URS's structural designs.

5. During its post-Grenfell investigations, in late 2019, BDW discovered design defects in two sets of multiple high-rise residential building developments (known as "Capital East" and "Freemens Meadow", together "the Developments").

6. BDW was the developer of the Developments. URS was appointed by BDW to provide structural design services in connection with the Developments. Initially, BDW was the freehold owner of Freemens Meadow and, on the assumed facts, had a proprietary interest in Capital East at the time it was constructed. In each case, long leases of flats were sold to residential purchasers, any interest which BDW had in the structure and common parts was ultimately transferred to third-party management companies, and all of BDW's remaining proprietary interests were sold for full value.

7. Amongst other facts that were assumed at first instance, and are not in dispute for the purposes of this appeal, the Developments had various defects as a result of URS's failure to exercise reasonable skill and care in the provision of its design services; and that failure was a breach of URS's common law duty of care in tort, which was concurrent with, and arising out of, the obligations assumed by URS under its contracts with BDW. Furthermore, the existence of certain of the defects presented a health and safety risk.

8. In 2020 and 2021, BDW carried out repairs/remedial works (we shall throughout use those terms interchangeably) to the Developments, although no claim against BDW arising out of the defects had been intimated by any third-party owner or occupier of the Developments. Nevertheless, BDW says that it considered that the defects, if left unremedied, presented a danger to occupants and risked serious damage to BDW's reputation in the market. The losses claimed by BDW from URS relate to the costs of executing those remedial works, together with associated costs.

9. At the time that those repair costs were incurred, BDW no longer had any proprietary interest in the Developments and any action brought by third parties to enforce obligations owed to them by BDW (whether under the Defective Premises Act 1972 (the "DPA") or in contract for breach of collateral warranties) in relation to defects would have been time barred under the Limitation Act 1980.

10. In March 2020 BDW issued proceedings against URS in the tort of negligence. It was made clear, by BDW's Reply to URS's Defence, that BDW was making no claim for breach of contract.

11. On 4 June 2021 O'Farrell J ordered the trial of preliminary issues, on assumed facts, as to whether the scope of URS's duties extended to the alleged losses and whether the alleged losses were recoverable in principle as a matter of law in the tort of negligence. URS also applied to strike out the claim against it.

12. The preliminary issue trial was heard by Fraser J on 5, 6 and 7 October 2021. On 22 October 2021 judgment was handed down ([2021] EWHC 2796 (TCC)) determining that: (i) the scope of URS's duty extended to the losses claimed by BDW, save in relation to those which concerned *"*reputational damage*"*; (ii) BDW's alleged losses were all recoverable in principle, save for the claims for *"*reputational damage*"*; (iii) the losses were in the contemplation of the parties at the time of entering into the appointments and were not too remote; and (iv) issues of legal causation (ie whether BDW's actions had broken the chain of causation so that BDW had caused its own losses) and whether BDW had failed to mitigate its loss were fact dependent and could only be determined at trial. Consequential orders were made in relation to the strike out application.

13. Section 135 of the BSA (which inserted section 4B into the Limitation Act 1980) came into force on 28 June 2022 and retrospectively extended the limitation period for accrued claims under section 1 of the DPA from six years to 30 years. On the same day BDW issued an application to amend its case in reliance on section 135 of the BSA.

14. The amendments sought: (i) to delete the previously pleaded admissions that at the time that the defects were discovered and the repairs undertaken any liability which BDW had to any third party was time-barred, and to introduce instead the allegation that, by reason of section 135 of the BSA, BDW's liability to such third parties under the DPA was not time-barred at the time of the repairs; (ii) to bring a new claim against URS under the DPA on the basis that such a claim would not now be time barred; and (iii) to bring a new claim against URS for contribution under the Civil Liability (Contribution) Act 1978 ("the Contribution Act") on the basis that both parties were under in-time liabilities for the same damage under the DPA at the time that BDW undertook the relevant repairs. The amendments were opposed by URS but permission to make them was granted by Adrian Williamson KC sitting as a deputy High Court judge: [2022] EWHC 2966 (TCC) HT-2020-000084 (14 December 2022).

15. The decisions of Fraser J and Adrian Williamson KC were appealed. The appeals were heard together by the Court of Appeal (King, Asplin and Coulson LJJ) on 25, 26 and 27 April 2023. By a judgment handed down on 3 July 2023 (Coulson LJ giving the leading judgment), the Court of Appeal dismissed the appeals: [2023] EWCA Civ 772.

16. The Supreme Court granted permission to appeal on 5 December 2023 on four grounds, which give rise to the following issues:

> Ground 1: In relation to BDW's claim in the tort of negligence against URS, has BDW suffered actionable and recoverable damage or is the damage outside the scope of the duty of care and/or too remote because it was voluntarily incurred (disregarding the possible impact of section 135 of the BSA)? If the answer to that question is that the damage is outside the scope of the duty of care or is too remote, did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the Developments?
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> Ground 2: Does section 135 of the BSA apply in the present circumstances and, if so, what is its effect?
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> Ground 3: Did URS owe a duty to BDW under section 1(1)(a) of the DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?

Ground 4: Is BDW entitled to bring a claim against URS pursuant to section 1 of the Contribution Act notwithstanding that there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

17. These grounds of appeal raise some important legal issues. These include: whether voluntarily incurred losses are irrecoverable as a matter of law (Ground 1); whether the retrospective extension, by section 135 of the BSA, of the limitation period for claims under section 1 of the DPA has relevance to a claim in the tort of negligence or for contribution under the Contribution Act (Ground 2); whether developers are owed duties under section 1 of the DPA (Ground 3); and the circumstances in which a cause of action accrues under the Contribution Act (Ground 4).

2. The judgment of the Court of Appeal

18. Coulson LJ's leading judgment extended beyond the issues with which this appeal is concerned. Moreover, some of the submissions being put forward on behalf of URS in this appeal were not formulated in the same way in the lower courts. Nevertheless, it is helpful to summarise Coulson LJ's reasoning on the four grounds that are before us. In doing so, we will refer to Grounds 1, 2, 3 and 4 as they now stand (which do not correspond to the grounds, or the numbering of the grounds, with which the Court of Appeal was dealing).

19. Ground 1 is what Coulson LJ referred to as the substantive appeal. It is the ground based on BDW's claim against URS in the tort of negligence. Grounds 2-4 were what Coulson LJ referred to as the amendment appeal. These grounds were consequential on the coming into force, subsequent to Fraser J's judgment, of the BSA, which extended the limitation period for claims under the DPA. As a result, BDW had sought permission to amend its pleadings (see paras 13-14 above).

20. Looking first at Ground 1, dealing with BDW's negligence claim against URS, the Court of Appeal upheld Fraser J's decision on the preliminary issue and that the negligence claim should not be struck out. URS principally argued that the losses claimed by BDW fell outside the scope of the duty of care owed. But it is noteworthy that URS did so without any reference to the argument of "voluntariness", going to scope of duty (or, as has now been added, remoteness), that URS principally relied on in the appeal to this court.

21. Coulson LJ held (see especially para 33 of his judgment) that the losses claimed by BDW were within the scope of URS's duty of care. URS had to comply with the standard duty imposed on a design professional and the risk of harm, in breach of that duty, was that the design of the buildings would contain structural defects which would

have to be subsequently remedied. He went on to explain that, on the assumed facts, the design was not only defective but dangerous requiring multi-million pound remedial works and that, in the circumstances, "it is impossible to conclude that the losses were somehow outside the scope of URS's duty" (para 33).

22. Coulson LJ went on to deal in detail (at paras 68-142) with URS's submission that BDW's cause of action in the tort of negligence did not accrue until after it had divested itself of its proprietary interest in the Developments and that, for that reason, the claim must fail. URS challenged the approach to the accrual of the cause of action laid down in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 ("*Pirelli*") in a situation, as here, where the cause of action was for pure economic loss not physical damage. While Coulson LJ indicated that it would not have made any difference even if the cause of action had accrued after BDW had sold the Developments, he decided that BDW did have an accrued cause of action at the latest by the date of practical completion (which was before it sold the Developments). In this respect, he applied Dyson J's decision in *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] PNLR 20 ("*New Islington*").

23. Turning to Grounds 2-4, the Court of Appeal upheld Adrian Williamson KC's decision that the amendments could be made and that those matters should go to trial as being reasonably arguable.

24. As regards Ground 2, it was reasoned by Coulson LJ (at paras 160-171) that accrued claims by BDW against URS under section 1 of the DPA were subject to the extended 30-year limitation period under the BSA even in respect of ongoing litigation. The explicit retrospectivity of that extension under section 135(3) of the BSA did not clash with URS's rights under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

25. In respect of Ground 3, Coulson LJ decided (at paras 173-193) that BDW had an arguable claim against URS under the DPA. This was because BDW as a developer was owed a duty by URS under section 1(1)(a) of the DPA; and the damages sought by BDW were in principle recoverable under section 1(1) of the DPA.

26. Finally, on Ground 4, Coulson LJ held (at paras 194-220) that BDW had an arguable claim for contribution under the Contribution Act against URS. This was because, first, the right to make a claim for contribution accrued at the time when a liability to a third party in respect of the same damage arose and it was not necessary for the third party to make a claim or obtain a judgment or settlement from the party seeking contribution. Secondly, that conclusion was not altered by section 10 of the Limitation Act 1980. And thirdly, as a result of section 135 of the BSA, BDW was liable to the

relevant third parties at the time at which remedial works were carried out, and so any claim in contribution was not precluded by section 1(2) of the Contribution Act.

3. Ground 1: In relation to BDW's claim in the tort of negligence against URS, has BDW suffered actionable and recoverable damage or is the damage outside the scope of the duty of care and/or too remote because it was voluntarily incurred (disregarding the possible impact of section 135 of the BSA)? If the answer to that question is that the damage is outside the scope of the duty of care or is too remote, did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the Developments?

(1) Pure economic loss, scope of duty and remoteness

27. It is important to explain at the outset that BDW's claim in the tort of negligence concerns pure economic loss. In order for the claimant to establish the cause of action in the tort of negligence, the relevant "damage" is not physical damage to the building but is rather the pure economic loss of having a defective building which has a lower value than it should have had and/or requires repair: see *Murphy v Brentwood District Council* [1991] 1 AC 398 ("*Murphy v Brentwood*") (overruling *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns v Merton*")). In general, there is no duty of care owed in the tort of negligence not to cause another person pure economic loss: see, eg, *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6; [2025] AC 406, para 20; and the recent decision of the High Court of Australia in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* [2024] HCA 25; (2024) 98 ALJR 956. But there are exceptions. The main exception is where there is an assumption of responsibility by the defendant to the claimant: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. As both parties accepted, that exception applies in this case. There was an assumption of responsibility by URS to BDW, undertaken through the contract for professional services between them, that URS would take reasonable care in providing structural designs to BDW such that buildings constructed on the basis of those designs would not be defective thereby causing BDW pure economic loss.

28. On the assumed facts, it is also not in dispute that URS was in breach of that duty of care owed to BDW in respect of those structural designs (ie the designs had been negligently produced by URS); and that BDW incurred repair costs in respect of the Developments that were factually caused by that breach of duty (applying the standard "but for" test for factual causation).

29. URS therefore accepts that, had BDW carried out repairs to the Developments before selling them (ie at a time when it still had a proprietary interest in them), the cost

of repairs incurred by BDW would have been pure economic loss that was recoverable by BDW in the tort of negligence. But URS submitted that, because the repairs were carried out by BDW on the Developments that no longer belonged to it and without any enforceable legal obligation to do so (because, it is argued, BDW had a limitation defence to any claim against it by homeowners whether under the DPA or for breach of a contractual collateral warranty), the loss suffered was outside the scope of the duty of care and/or was too remote. More specifically, URS argued that there is what it labels a "voluntariness principle" that provides a bright-line rule of law explaining why the loss in this case was outside the scope of the duty and/or was too remote.

30. Counsel for URS neatly encapsulated its submissions in its written case on this appeal as follows (at paras 48-49):

> "[T]he losses claimed in this case are the costs related to remedial works undertaken: (i) after BDW had ceased to have any proprietary interest in the developments; and (ii) in the absence of any enforceable obligation to undertake such repairs. Losses of that type are not recoverable as they:
>
> (1) Fell outside the scope of the duty assumed by URS, not being of a type and not representing the fruition of a risk that it was URS's duty to guard against; and
>
> (2) Were not within URS's contemplation as a serious possibility at the time the contract was made and for which URS assumed responsibility and therefore were too remote."

31. Before examining the cases relied on by URS for the voluntariness principle, it is helpful to consider the standard application to the assumed facts of the law on scope of duty and remoteness on the initial premise that there is no such voluntariness principle.

32. Looking first at scope of duty (or what has sometimes been referred to as the "*SAAMCO* principle" following the leading case of *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191), it was explained in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2022] AC 783 and *Meadows v Khan* [2021] UKSC 21; [2022] AC 852 that, as a limiting principle separate from remoteness, the scope of duty enquiry essentially depends on the purpose of the duty. Focussing on that, it is clear that the purpose of URS's duty of care was to guard BDW against the very type of loss – the repair costs to the Developments – that BDW has incurred. Therefore, absent the application of a voluntariness principle, the loss here was within the scope of URS's duty of care (as the Court of Appeal decided: see para 21 above).

33. As regards remoteness, in a tort of negligence claim resting on a contractual assumption of responsibility, it is now clear that the appropriate remoteness test is what has sometimes been referred to as the "contract test": see *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch 529. Originating in *Hadley v Baxendale* (1854) 9 Exch 341, and clarified in cases such as *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 and *Brown v KMR Services Ltd* [1995] 4 All ER 598, this is a stricter test than what is sometimes called the "tort test" laid down in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388. Applying that stricter remoteness test, the question to be asked is whether the type of loss suffered was reasonably contemplated by the defendant at the time of the assumption of responsibility (ie here at the time the contract was made) as a serious possibility. Applying that remoteness test to the assumed facts, it must have been reasonably contemplated by URS as a serious possibility at the time of the assumption of responsibility that BDW would suffer the type of loss – the repair costs – that BDW has incurred. Therefore, absent the application of a voluntariness principle, the loss here was not too remote (as Fraser J decided, see para 12 above: remoteness, as distinct from scope of duty, was not focussed on in the Court of Appeal).

(2) A voluntariness principle?

34. The question therefore becomes, is there a voluntariness principle and, if so, on the assumed facts, would it alter the decisions that one would otherwise reach on scope of duty and remoteness?

35. It is helpful first to consider a hypothetical example. A passer-by, who enjoys DIY, notices that solar panels on a newly-built but empty house have become loose and potentially dangerous. He phones the builders and the owner to inform them of the danger but they fail to act. The passer-by returns a week later and carries out the necessary repairs having bought the necessary materials to do so. He then demands payment of the cost of the repair from the builders. It is accepted that the solar panels were not properly affixed because of the negligence of the builders. If the passer-by were to bring a claim against the builders in the tort of negligence for the pure economic loss (ie the repair cost incurred), it is clear that there would be no such liability. That is most obviously because, as there was no assumption of responsibility by the builders to the passer-by, there would be no duty of care owed to the passer-by by the builders not to cause pure economic loss. It may be that the passer-by's voluntariness would be another reason for there being no liability but the important point is that there would be no need to rely on any principle of voluntariness to explain that result. We also put to one side the separate question as to whether the passer-by might conceivably have a claim in the law of unjust enrichment against the owner (or perhaps the builders) for necessitous intervention: see, eg, *Goff and Jones, The Law of Unjust Enrichment,* 10th ed (2022), Chapter 18; Graham Virgo, *The Principles of the Law of Restitution,* 4th ed (2024), Chapter 12.

36. However, on the assumed facts, in contrast to that hypothetical example, it is not in dispute that, based on the assumption of responsibility, there was a breach of the duty of care owed by URS to BDW not to cause BDW pure economic loss. The question at issue is whether, despite there being a duty of care owed and breached, there is a voluntariness principle that applies, through the concepts of scope of duty or remoteness, to rule out recovery for the cost of repair incurred by BDW.

(3) The four cases relied on by URS

37. In support of there being such a voluntariness principle, URS relied on four cases.

38. In *Admiralty Comrs v SS Amerika* [1917] AC 38 ("*SS Amerika*"), one of His Majesty's submarines was negligently run into and sunk by the defendants' steamship. All but one of the submarine crew were drowned. The claimant Commissioners included within the loss for which they were seeking damages, assessed by the Admiralty Registrar, the capitalised amount of the pensions that they had paid out to the dependants of the deceased men.

39. The House of Lords, sitting as a panel of three, denied that claim for two reasons. First, it was for a loss to the claimants consequent on another's death. Applying the long-standing rule of the common law, laid down in *Baker v Bolton* (1808) 1 Camp 493, there could be no recovery for losses caused by the death of another person. Secondly, in any event, the loss was too remote. The payments were compassionate payments which the Admiralty was not legally bound to pay. In the words of Lord Parker at p 42:

> "[T]he items of damage which the appellants desire to be allowed are too remote. … No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased."

40. Lord Sumner expressed the position as follows at pp 60-61:

> "In the present case the sums claimed were paid to widows and other dependants of the drowned men under Admiralty Regulations … which expressly declare that these are compassionate payments, and granted of grace and not of right, both in kind and in degree. True that in such cases they are always made, and most properly made, but none the less the money claimed was lost to the Exchequer directly because the

> Crown through its officers was pleased to pay it. The collision was the causa sine qua non; the consequent drowning of the men was the occasion of the bounty; but the causa causans of the payment was the voluntary act of the Crown. Had the present action been brought upon a contract it might well be the case that these payments would have been within the contemplation of the contracting parties, but they are not the natural consequences of the tort which is sued for."

41. There are two points to note about this decision at this stage.

(i) The Commissioners were essentially recovering damages for physical damage to their property (ie the loss of the submarine). The payments to the dependants of the deceased men were not consequent, or at least not directly consequent, on that physical damage. On the contrary, they flowed from the death of the crew. A principal reason why one cannot recover in the tort of negligence for loss consequent on another person's death is that that constitutes pure economic loss and there is, in general, no duty of care owed not to cause pure economic loss. Fatal Accidents Act legislation was first introduced in 1846 (popularly known as Lord Campbell's Act) to depart from *Baker v Bolton* but, even applying the present Fatal Accidents Act 1976, the Commissioners would have no statutory cause of action because it is only dependants of the deceased who have such a claim.

(ii) Although Lord Parker said that the loss was too remote, when his Lordship came to discuss the voluntary nature of the payment, he relied on language that is most obviously relevant to the concepts of mitigation or legal causation. Similarly, Lord Sumner used the language of legal causation as well as remoteness.

42. In *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia)* [1989] AC 643, Esso's oil tanker was damaged in an accident caused by a defect in the tugs that were towing her into an oil terminal in Scotland. Oil escaped from the damaged tanker and polluted the coastline. In a negligence action against the tugs' shipbuilders, Esso recovered damages for the damage to its tanker and for the loss of its oil. In addition, they claimed damages for the sums they had paid out in respect of the oil pollution to the Shetland Islands Council (representing, in particular, crofters) under the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution ("TOVALOP"). The House of Lords held that those sums were irrecoverable because they constituted pure economic loss; and pure economic loss cannot (normally) be recovered in the tort of negligence.

43. Lord Jauncey (with whom Lords Keith, Brandon, and Templeman agreed) said the following at pp 677-678:

> "Esso chose to enter into and remain a party to TOVALOP for what were no doubt sound policy and commercial reasons but under no compulsitor of law so to do. They agreed voluntarily to indemnify persons affected by oil spillage. They were under no general duty in law to the crofters and as far as they were concerned the payments which they received were entirely gratuitous. … TOVALOP is and remains a gratuitous contract of indemnity notwithstanding that the event which gave rise to the payments thereunder was damage to the *Bernicia.* Esso cannot pray in aid the latter event to convert their claim to repayment of sums paid under that indemnity into a claim for economic loss resulting directly from the damage."

44. Lord Goff (with whom Lord Templeman agreed) made pellucidly clear that the loss comprising the sums paid out under the TOVALOP was irrecoverable pure economic loss because it did not truly flow from the physical damage to Esso's ship. He said at pp 664-665:

> "Esso cannot claim the sums paid by it under TOVALOP as financial loss attributable to the physical damage to the ship caused by Hall Russell's alleged negligence. The damage to the ship did no more than trigger off the event which led to the pollution in respect of which Esso became bound under the terms of TOVALOP to make the payments which are the subject matter of its claim. In truth, Esso's claim to damages falls under two separate heads—(1) damages in respect of the physical damage to the tanker, and any financial loss (eg loss of use) flowing from such physical damage; and (2) damages in respect of the sums paid out by Esso under TOVALOP. But … damages of the type claimed under the second head are irrecoverable in negligence, as has been established for over 100 years, ever since the decision of your Lordships' House in *Simpson & Co v Thomson* (1877) 3 App Cas 279."

45. Therefore, as in *SS Amerika,* the relevant loss in question was pure economic loss. This was because it was not consequent on, or at least not directly consequent on, the damage to the tanker. *Simpson & Co v Thomson*, referred to by Lord Goff, was a House of Lords (Scotland) decision denying recovery for negligently caused pure economic loss. While it is true that the sums paid out under the TOVALOP were voluntary, their classification as pure economic loss appears to have been crucial in explaining why they were irrecoverable in the tort of negligence.

46. In *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173 ("*Anglian Water*") the claimant, Anglian Water Services Ltd ("Anglian"), had engaged Crawshaw Robbins & Co Ltd ("Crawshaw Robbins") to carry out the work of replacing old water main pipes with modern ones. In doing so, Crawshaw Robbins's sub-contractor negligently drilled through an existing water main, a gas main and an electricity cable. The consequence was that 20,000 people in Corby were affected, to varying degrees, by loss of gas supplies. Anglian made payments, inter alia, to those householders whose gas supplies had been affected (without there being any physical damage to their gas appliances) and to local authorities who had provided emergency services. In an action for breach of contract and in the tort of negligence against Crawshaw Robbins, Anglian claimed damages for the payments it had made to the householders and to the local authorities. It was held by Stanley Burnton J at paras 80, 113, 156, 158 and 174, that, whether in contract or tort, Anglian could not recover from Crawshaw Robbins for those payments to third parties because, however commendable Anglian's actions had been in making those payments, they were voluntarily paid (ie Anglian had no legal liability to the householders or the local authorities).

47. In further explaining why there was no recovery for the voluntary payments, Stanley Burnton J made two points. First, in respect of the tort of negligence claim he relied (at para 113) on *The Esso Bernicia.* However, as has been explained, in respect of the tort of negligence, the loss in *The Esso Bernicia* was irrecoverable pure economic loss. Yet in *Anglian Water*, where there was a contract between the claimant and defendant that gave rise to an assumption of responsibility, the fact that the loss was pure economic loss would not have rendered it irrecoverable.

48. Secondly, as regards the contract claim, the judge said the following at para 80:

> "In my judgment, Anglian is not entitled to recover as damages for breach of contract sums voluntarily paid to third parties. Such payments are not normally within the contemplation of the parties… . There is no evidence in this case that when the Contract was entered into the risk of liability for such damages was accepted by Crawshaw Robbins."

49. This is most naturally interpreted as saying that the payments were here too remote. But it is important to note that the judge was not saying that that will always be so just because the payments were voluntary. Rather by his reference to what is "normally" contemplated by the parties and there being "no evidence in this case" he was indicating that the determination of the remoteness question was fact-specific.

50. Finally, we were referred to *Hambro Life Assurance plc v White Young & Partners* (1987) 38 BLR 16 ("*Hambro*"). The claimant, as an investment, had acquired industrial

warehouse units which were subject to existing 25-year leases. The claimant discovered serious structural damage in the units and, although having no legal duty to do so under the leases, the claimant carried out repairs to the units. It then brought proceedings in the tort of negligence against, amongst others, the defendant local authority (Salisbury DC) who had approved the plans and whose building inspectors had inspected the premises. It was an agreed fact that the defendant had been negligent. However, on a preliminary issue the Court of Appeal, upholding the trial judge, held that no duty of care was owed in tort by the defendant to the claimant.

51. Two reasons for the decision were given. One was that there was no duty of care owed to the claimant under *Anns v Merton* (which, at the time, bound the Court of Appeal) because the claimant was merely the owner and had never occupied the premises so that it was under no risk to health or safety. A second reason was that the claimant had no legal liability to carry out the repairs but had done so "from enlightened self-interest in the preservation of their investment" (p 24). In respect of at least some of the units the damage was such that the lessees had a legal repairing obligation but the trial judge had found that the claimant, as lessor, had acted reasonably in carrying out the repairs and not enforcing that repairing liability of the lessees.

52. Again, this is a case where the loss in question was pure economic loss. Viewed in the light of the subsequent overruling of *Anns v Merton* by *Murphy v Brentwood*, the most straightforward explanation for the decision is that there was no duty of care owed to the claimant by the defendant local authority in respect of what was, on a correct analysis, pure economic loss. In any event, even applying the old law laid down in *Anns v Merton,* the decision shows that no duty of care was owed by the local authority to the claimant because it was not an occupier. The voluntariness of the repair was not essential to the decision and, in any event, the voluntariness was not expressly explained as being an aspect of remoteness or scope of duty.

53. Drawing together the threads of these four cases, we do not consider that they establish a principle of voluntariness that operates as a bright line rule of law rendering loss too remote or outside the scope of the duty of care in the tort of negligence. In the two House of Lords cases the payments that were voluntarily paid to third parties constituted pure economic loss, rather than loss (directly) consequent on damage to the claimants' property, and there was no duty of care owed for that reason. Similarly, in *Hambro* there was no duty of care owed because, on the correct analysis that is now to be applied after *Murphy v Brentwood*, the repair costs were pure economic loss. In so far as other reasoning (ie other than the loss being pure economic loss) was relied on, legal causation and mitigation featured as prominently in the speeches in *SS Amerika* as remoteness (as we discuss further at paras 55-61 below). Certainly, those cases do not establish that the voluntariness of the payments meant that, as a rule of law, the loss was outside the scope of the duty of care or too remote.

54. That leaves *Anglian Water* where there were concurrent contractual and tortious claims so that, although not adverted to by Stanley Burnton J, a duty of care in the tort of negligence was owed (by reason of the assumption of responsibility) as regards the pure economic loss comprising the voluntary payments made to third parties. But while seeing the issue through the lens of remoteness, Stanley Burnton J indicated that whether the loss, comprising the voluntary payments, was or was not too remote was fact-specific. He was not saying that there was a rule of law denying recovery just because the payments were voluntary.

(4) Legal causation and mitigation

55. The more obvious role for any principle of voluntariness is in considering whether the chain of causation from breach of duty to loss has been broken by the claimant's own voluntary conduct or whether, subsequent to the cause of action, the claimant has failed in its so-called "duty" to mitigate its loss. In other words, there is a strong argument that voluntariness most naturally falls to be considered within the concepts of legal causation or mitigation rather than scope of duty and remoteness.

56. This is borne out by some of the language used by Lord Parker and Lord Sumner in their speeches in *SS Amerika*: see paras 39-40 above. It is also supported by the only textbook treatment that we have found that links together the first three of the above cases: in Andrew Tettenborn and David Wilby, *The Law of Damages,* 2nd ed (2010) at para 7.52 those three cases are considered as an aspect of legal causation. *SS Amerika* is discussed under the heading of "Damages increased by claimant's act" in *Clerk and Lindsell on Torts,* 24th ed (2023) at para 26.11 and the footnote at the start of that paragraph says that: "In this situation, the courts are just as likely to use the language of causation as they are mitigation." See also Tettenborn and Wilby's discussion, at para 3.50 and footnote 3, of the failure of claims for "voluntary" payments in settlement of bad claims which, they write, rests "[p]resumably on the basis that a voluntary payment of a bad claim breaks any chain of causation between the wrong and the payment" (and see, in support of this, for example, *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia (The Krapan J)* [1999] 1 Lloyd's Rep 688). Personal injury cases on "voluntary" rescue, such as *Haynes v Harwood* [1935] 1 KB 146, also focus on legal causation.

57. In addition, there are other cases where voluntariness appears to have been considered primarily as an aspect of mitigation so that expenses (or other additional losses) were held to be recoverable provided reasonably (even if voluntarily) incurred: see, for example, *Holden Ltd v Bostock & Co Ltd* (1902) 18 TLR 317; and *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 (both contract cases).

58. In the former case, the defendants had sold sugar to the claimants for brewing beer. The sugar contained arsenic. In an attempt to prevent any loss of business, the claimants

issued notices advertising that they had changed their brewing materials. In an action against the defendants for breach of contract, the claimants were awarded, inter alia, the £50 cost of the notices because that was a reasonable step to take to minimise any possible loss of business.

59. In the latter case, the defendants contracted to print banknotes for the claimant Portuguese bank. In breach of contract, they delivered a large number of the banknotes to a criminal, who circulated them in Portugal. On discovering this, the bank withdrew the issue of notes. It then undertook to exchange all the "bad" notes for good notes. In defending an action for breach of contract against them, the defendants argued that, while they were liable for the cost of printing the new notes, they were not liable for the bank's additional loss in choosing to exchange the bad notes for good notes (not least where the bank could not properly distinguish good notes from bad). The House of Lords, by a 3-2 majority, held that the defendants were liable for that additional loss. While the defendants argued that that loss was irrecoverable because it was voluntarily incurred, the majority held that it was recoverable because it was not too remote and was reasonably incurred so as to maintain the bank's commercial reputation and public confidence in the bank. The minority did not disagree with the majority's analysis of the law but differed as to whether, on the facts, the bank really did suffer a loss in exchanging good notes for bad. None of their Lordships accepted that, just because the loss might be said to have been voluntarily incurred, it was irrecoverable. In a passage that has often been cited in respect of the law on mitigation, Lord Macmillan in the majority said the following at p 506:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

60. The problem for URS as regards mitigation is that reasonableness is indisputably of central importance. The enquiry in respect of mitigation is whether the claimant could have avoided its loss by taking reasonable action or whether expenses (or other additional losses) incurred, increasing its loss, were reasonably incurred. That is clearly a fact-

specific enquiry that would have to await trial. The reasonableness of the claimant's conduct may also be of importance in determining legal causation and, even if not, it would appear that a fact-specific enquiry would be needed in order to decide whether the "chain of causation" between breach of duty and loss has been broken. In respect of neither concept can it be said that voluntariness constitutes a rule of law to the effect that there has been no legal causation or there has been a failure to mitigate.

61. Fraser J (at paras 9 and 123) specifically laid down that matters of legal causation and mitigation would need to go to trial (see para 12 above). That ruling was not appealed. In line with this, URS has put those concepts to one side and has focussed, instead, on scope of duty and remoteness. But as we have said (see para 53 above), the case law does not support the submission that there is a bright line rule of law that voluntarily incurred loss is outside the scope of the duty of care or too remote.

(5) Features of the present case on the assumed facts

62. In any event (and disregarding the effect of section 135 of the BSA), it is strongly arguable that three features of the assumed facts indicate that BDW was not, in a true sense, acting voluntarily in paying for the repairs to be carried out. These three features, taken together, also serve to distinguish this case from the four cases relied on by URS (examined in paras 37-54 above) albeit that the third feature was present in one or more of those cases.

63. First, if BDW did nothing to effect the repairs, there was a risk that the defects in the Developments would cause personal injury to, or the death of, homeowners for which BDW might be legally liable under the DPA or in contract (for breach of collateral warranties). Such claims would not be time-barred because, by reason of sections 11 and 12 of the Limitation Act 1980, the three-year limitation period for personal injury and death (whatever the cause of action) runs from discovery or discoverability of the injury or death (as an alternative to running from accrual of the cause of action). In any event, section 33 of the Limitation Act 1980 confers a discretion on a court to disapply the primary limitation period so as to allow a claim for personal injury or death to go ahead.

64. Secondly, BDW had a legal liability to the homeowners under the DPA or in contract to incur the cost of repairs. Even though, at the time the repairs were carried out, the claims by the homeowners would have been unenforceable because time-barred (disregarding the possible impact of section 135 of the BSA) it is well-established that, subject to rare exceptions that do not here apply, limitation bars the remedy and does not extinguish the right: see, eg, *Royal Norwegian Government v Constant & Constant and Calcutta Marine Engineering Co Ltd* [1960] 2 Lloyd's Rep 431, 442.

65. Thirdly, there would be potential reputational damage to BDW if BDW did nothing once it knew of the danger to homeowners. It was therefore in BDW's commercial interest to effect the repairs. The fact that it was decided by Fraser J that BDW could not recover damages for "reputational damage" (see para 12 above) is essentially irrelevant in considering whether loss of reputation was a factor in making its actions not truly voluntary. Closely linked to this is that there was a general public interest, which included moral pressure on BDW, in BDW effecting the repairs so as to avoid danger to homeowners.

66. There is therefore a strong case for contending that BDW was, in any event on the assumed facts, not exercising a sufficiently full and free choice so as to be regarded as acting voluntarily in effecting the repairs. In other words, BDW had no realistic alternative. The three features indicate that BDW was not, in any true sense, acting voluntarily. While the third of those features may have been present in one or more of the four cases relied on by BDW, none of those cases shares all three features.

(6) Conclusion on Ground 1

67. Our conclusion, therefore, is that (irrespective of the possible impact of section 135 of the BSA which is to be considered under Ground 2) the appeal on Ground 1 fails. There is no rule of law which meant that the carrying out of the repairs by BDW rendered the repair costs outside the scope of the duty of care owed or too remote.

(7) A note on underlying policy

68. The remoteness test and its application ultimately reflect the underlying policy of the common law as to where it is appropriate for a line to be drawn protecting the defendant against excessive liability, thereby ensuring that the defendant is not held liable for all loss factually caused by the defendant's breach of duty however far removed in time and space. Similarly, in deciding on the scope of the duty of care, the law's focus on the purpose of the duty reflects the underlying policy of achieving a fair and reasonable allocation of the risk of the loss that has occurred as between the parties.

69. The conclusion we have reached as to the correct legal position is consistent with those underlying policies. On the assumed facts of this case, it is entirely appropriate for the negligent defendant (URS) to be held liable to the claimant (BDW) for the repair costs BDW has incurred because they were the obvious consequence of URS failing to perform its services with the professional skill and care required. It is fair and reasonable that the risk of that loss should be borne by URS and not BDW. Moreover, the policy of the law favours incentivising a claimant in BDW's position to carry out the repairs so as to ensure that any danger to homeowners is removed.

(8) Accrual of the cause of action: the Pirelli issue

70. Did BDW in any event already have an accrued cause of action in the tort of negligence at the time it sold the Developments (this is the issue raised in the second sentence of Ground 1)? According to Coulson LJ in the Court of Appeal, BDW's cause of action in the tort of negligence had already accrued, at the latest at the date of practical completion (see para 22 above), and could not have been lost by the subsequent sale of the Developments.

71. Given our rejection of URS's submissions on the voluntariness principle, and our consequent dismissal of URS's appeal on Ground 1, this issue falls away. Nevertheless, both parties accepted that, in so far as it was relevant to consider when the cause of action in the tort of negligence accrued, one possible approach that this court might take would be to overrule *Pirelli*. Indeed, that possibility is the reason that a seven-person panel was convened to hear this appeal.

72. Given that whatever we say on *Pirelli* will be obiter dicta, it would be inappropriate for us to consider using the 1966 Practice Statement, [1966] 1 WLR 1234, to overrule that decision. As it turned out, we heard relatively limited submissions on the *Pirelli* issue and we were not asked to consider the full potential consequences of such an overruling.

73. We therefore confine ourselves to making the following three points.

74. First, it is clear that *Pirelli* was decided on the false premise that cracks in a building constitute physical damage rather than pure economic loss for the purposes of the tort of negligence. Where there has been negligent design, building or inspection, cracks appear in a building because the building is, and has been, defective and not because there has been damage to an otherwise non-defective building (analogous to, let us say, the physical damage where a lorry crashes into a building). That the relevant "damage" is pure economic loss, not physical damage, was made clear by the overruling of *Anns v Merton* by *Murphy v Brentwood*.

75. Secondly, that false premise does not necessitate that *Pirelli* was wrong in reasoning that the cause of action in the tort of negligence accrues when the relevant "damage" occurs and not when that damage is discovered or could reasonably have been discovered (which we can refer to as the date of "discoverability"). It is possible to have a concept of latent pure economic loss even though that loss could not at the time of accrual have been reasonably discovered. That that is possible is supported by, for example, the reasoning of Coulson LJ in this case adopting the decision of Dyson J in *New Islington* (see para 22 above). It is also consistent with a number of cases on professional negligence outside the building context where a cause of action in the tort of negligence for pure economic loss has been held to accrue prior to the date of

discoverability: see, eg, *Forster v Outred & Co* [1982] 1 WLR 86; *Law Society v Sephton & Co* [2006] UKHL 22; [2006] 2 AC 543; *Axa Insurance Ltd v Akther & Darby* [2009] EWCA Civ 1166; [2010] 1 WLR 1662; and, although not concerning limitation, but rather the date from which interest should be awarded, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627.

76. Thirdly, and notwithstanding what we have so far said on this issue, in the context of pure economic loss there are strong arguments of principle for accepting that there can only be an actual loss once the pure economic loss has been discovered or could reasonably have been discovered. That this is so is borne out by the reasoning of judges in several of the highest courts in common law jurisdictions, including the Privy Council: see, eg, *Kamloops v Nielsen* [1984] 2 SCR 2, 40 (Canada); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 505 (Australia); *Invercargill City Council v Hamlin* [1996] AC 624 (New Zealand); and the dissenting judgments of Bokhary PJ and Lord Nicholls in *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* [2000] 1 HKLRD 268 (Hong Kong). See also the views of several academics including Stephen Todd, "Latent Defects in Property and the Limitation Act: A Defence of the 'Discoverability' Test" (1983) 10 NZULR 311; Nicholas Mullany, "Limitation of actions – where are we now?" [1993] LMCLQ 34, 43-44. Cf Ewan McKendrick, "*Pirelli* re-examined" (1991) Legal Studies 326. However, in considering whether that would now be an appropriate approach to adopt in this jurisdiction, the Latent Damage Act 1986 (the "LDA") would need to be taken into account. Following the recommendations of the Law Reform Committee, 24th Report, *Latent Damage* (Cmnd 9390) (1984), the legislature intervened to reform the law in the light of what were seen to be the unfair consequences for claimants of the decision in *Pirelli* whereby they might lose their cause of action before they knew, or could reasonably have known, of its existence. By sections 1 and 2 of the LDA, inserting sections 14A and 14B into the Limitation Act 1980, a claimant has six years from accrual of the cause of action or three years from the date of discoverability, whichever expires later, to commence an action in the tort of negligence for damage including pure economic loss (but not personal injury which has long had its own regime). This is subject to a long-stop of 15 years running from the date of the negligent act or omission (ie the breach of duty). If the accrual of the cause of action was to be fixed at the date of discoverability, this might undermine the legislative solution to this problem. In other words, the legislation was based on the assumption that the accrual of the cause of action in the tort of negligence is at a different date from the date of discoverability. The effect of the date of discoverability being the date of accrual would be to give claimants six years from the date of discoverability rather than the three years that was considered sufficient by the legislature in the LDA.

77. It can therefore be seen that the question as to whether to develop the common law on the tort of negligence in the context of defective buildings, so as to move to the cause of action accruing at the date of discoverability, raises difficult issues. Their resolution must await a case where what is said will be ratio decidendi and where, accordingly, this court has the benefit of full submissions on that question.

4. Ground 2: Does section 135 of the BSA apply in the present circumstances and, if so, what is its effect?

(1) Background to the BSA

78. In relation to Ground 2, we were assisted by submissions in writing on behalf of the Secretary of State for Housing, Communities and Local Government. These were particularly helpful in relation to the background to the BSA, the structure of the BSA and the policy and purpose underlying the BSA in general and section 135 in particular. The submissions were strongly supportive of BDW's case.

79. Following the Grenfell Tower fire, the Government commissioned Dame Judith Hackitt to lead an Independent Review of Building Regulations and Fire Safety. In her interim report of 18 December 2017 (Cm 9551), she described how the regulatory system covering high-rise and complex buildings was not fit for purpose. In her final report, "*Building a Safer Future*" (Cm 9607), published on 17 May 2018, she concluded that, in her "personal view", stakeholders were ignorant about regulations and guidance, and indifferent to building safety concerns; that there was a lack of clarity as to roles and responsibilities between stakeholders; and that regulatory oversight and enforcement tools were inadequate. She suggested that these issues:

> "… have helped to create a cultural issue across the sector, which can be described as a 'race to the bottom' caused either through ignorance, indifference, or because the system does not facilitate good practice. There is insufficient focus on delivering the best quality building possible, in order to ensure that residents are safe, and feel safe."

80. She also emphasised the importance of the principle of risk being owned and managed by those who create it and explained how her review concluded that there is a strong case for the full effect of this key principle being applied to the construction industry and for a clear model of risk ownership to be established.

81. A public inquiry into the fire ("the Inquiry") was established and Sir Martin Moore-Bick was subsequently appointed as its Chairman. Phase 1 of the Inquiry focused on the factual narrative of the events of the night of 14 June 2017 and reported on 30 October 2019. Phase 2 of the Inquiry reported on 4 September 2024 and confirmed and elaborated upon many of the concerns about the construction industry which had earlier been identified by Dame Judith Hackitt.

82. It became apparent to the Government that the "race to the bottom" had resulted in building safety defects in many medium and high-rise buildings dating back many years and that widespread remediation works would be required. This raised the question of how such works were to be funded.

83. As was explained in the Secretary of State's written submissions:

> "11. One of the key questions for the Government and stakeholders following the Grenfell Tower fire was how remediation works should be funded. This question has often been described as the '*who pays*' question. The scale of the costs required are significant. For example the Government currently estimates that the full cost of remediation work across England on buildings over 11 metres affected by unsafe cladding is £16.6 billion (within an estimated range of £12.6 to £22.4 billion).
>
> 12. 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).
>
> 13. 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."

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. Other initiatives include encouraging large developers to sign a "Developer Remediation

Contract" and the launch, pursuant to powers under the BSA, of a "Responsible Actors Scheme".

(2) The BSA

85. The BSA is both forward and backward-looking. The forward-looking provisions include Part 2 which sets up a new Building Safety Regulator in England to oversee a new, more stringent regime for higher-risk buildings and to drive improvements in building safety and performance standards in all buildings; Part 3 which amends the Building Act 1984, reforming the process for the design and construction of higher-risk buildings, and provides for the registration of building inspectors and building control approvers with a view to improving standards across the industry; and Part 4 which creates a new regulatory regime for the management of occupied higher-risk residential buildings in England, and places duties on an "Accountable Person" (for example, the freeholder) in relation to building safety risks in their building.

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."

(3) Section 135

88. Section 135 provides:

> "**135 Limitation periods**
>
> (1) After section 4A of the Limitation Act 1980 insert—
>
> '**4B Special time limit for certain actions in respect of damage or defects in relation to buildings**
>
> (1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.
>
> (2) An action referred to in subsection (1) is one to which—
>
> (a) sections 1, 28, 32, 35, 37 and 38 apply;
>
> (b) the other provisions of this Act do not apply.

(3) In this section "relevant provision" means—

(a) section 1 or 2A of the Defective Premises Act 1972;

(b) section 38 of the Building Act 1984.

(4) Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.

(5) In subsection (4) "the commencement date" means the day on which section 135 of the Building Safety Act 2022 came into force.'

(2) In section 1(5) of the Defective Premises Act 1972, for 'the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963' substitute 'the Limitation Act 1980'.

(3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.

(4) In a case where—

(a) by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the day on which this section came into force, to bring an action against any other person, and

(b) the period of 30 years from the date on which the right of action accrued expires in the initial period,

> section 4B of the Limitation Act 1980 (inserted by subsection (1)) has effect as if it provided that the action may not be brought after the end of the initial period.
>
> (5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.
>
> (6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).
>
> (7) In this section—
>
> > 'Convention rights' has the same meaning as in the Human Rights Act 1998;
> >
> > 'the initial period' means the period of one year beginning with the day on which this section comes into force."

89. The general scheme of section 135 is to provide for a 15-year limitation period for rights of action under a "relevant provision" (which includes, but is not limited to, section 1 of the DPA) which accrue on or after the commencement date – 28 June 2022 (section 4B(1)).

90. In relation to rights of action under section 1 of the DPA which accrued before the commencement date the applicable limitation period is 30 years rather than 15 years (section 4B(4)).

91. This amendment to the Limitation Act "is to be treated as always having been in force" (section 135(3)).

92. Two exceptions to the application of section 135(3) are then provided. First, it is not to be applied if to do so would involve a breach of a defendant's rights under the

Convention (see section 135(5)). Secondly, it is not to be applied in relation to a claim which was settled or determined before the commencement date (see section 135(6)).

(4) The parties' cases

93. Before the Court of Appeal, URS contended that (i) section 135 did not apply retrospectively in relation to claims which were ongoing at the time that the BSA came into force and (ii) the ruling of Fraser J on the negligence claim had "finally determined" BDW's claim before the BSA came into force so that the section 135(6) exception was applicable. In its written case on the appeal to this court, URS abandoned both contentions. Instead, it argued that section 135 does not apply to collateral or incidental issues or deem prior matters of historic fact to be other than they were. It was submitted that this follows from ordinary principles of statutory interpretation but is reinforced by the presumption against conferring on section 135 a more extensive retrospective effect than is strictly required.

94. BDW emphasised that section 135(3) is expressed in general and unqualified terms. The amended limitation periods are to be treated "as always having been in force". This means treating previously time-barred liabilities under section 1 of the DPA as not being time-barred. This is subject to the express exceptions set out in section 135(5) and (6) but not to any implied exception relating to "collateral" issues, the scope of which is itself wholly unclear. It further submitted that no question of re-writing history arises; whether BDW had a liability under section 1 of the DPA is a matter of law, not fact. BDW is therefore to be treated when it carried out the remedial works as having been subject to an in-time liability to the homeowners.

(5) The interpretation of section 135(3)

95. As we stated in *News Corp UK & Ireland Ltd v Revenue and Customs Comrs* [2023] UKSC 7; [2024] AC 89, para 27:

> "…the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: see, eg, *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 8 (per Lord Bingham); *Uber BV v Aslam* [2021] ICR 657, para 70; *Rittson-Thomas v Oxfordshire County Council* [2022] AC 129, para 33; *R (O) v Secretary of State for the Home Department* [2023] AC 255, paras 28-29."

96. The question raised by Ground 2 is whether section 135 applies "in the present circumstances". It is obviously the case, and is not in dispute, that section 135 applies to a claim brought under section 1 of the DPA. However, what is in dispute is whether section 135 also applies where, as in this case, an action is brought claiming damages for repair costs in the tort of negligence, or there is a claim for contribution, and it is contended that the repair costs were voluntarily incurred, or that there was no liability for the same damage, because the DPA claim against BDW by homeowners was time-barred. In other words, does the retrospectivity of section 135 apply to claims which are dependent on the time limit under the DPA but are not actually claims brought under the DPA?

97. If section 135 does apply to BDW's claim in the tort of negligence then it would provide a further answer to URS's case that there is a rule of law denying the recovery of voluntarily incurred expenses. It is critical to that case that, at the time the repairs were carried out, a claim under section 1 of the DPA, by homeowners against BDW, would have been unenforceable because time-barred. If that is wrong as a matter of law, then the foundation of URS's rule of law voluntariness argument falls away. A further question which arises is whether and, if so, how section 135 impacts on voluntariness as an aspect of the mitigation or legal causation issues that, it has been decided, need to go to trial (see paras 12 and 61 above).

98. URS submitted that the focus of section 135(3) is actions under section 1 of the DPA and limitation defences which might otherwise be raised in such actions. It was emphasised that by its express terms section 135(3) concerns "an action by virtue of section 1" of the DPA, which contemplates that an action under the DPA will have been (or could in the future be) brought. That is reinforced by the terms of section 135(5) which creates an exception to safeguard a defendant's Convention rights, but only in relation to an action under the DPA: "[w]here an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it …". That subsection again contemplates an "action" under the DPA being brought.

99. Section 135(3) refers back to the amendment to the Limitation Act 1980 made by subsection (1). This provides its immediate context. The relevant amendment is that set out in subsection 4B(4): "Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years." Although the most obvious circumstances in which the 30-year limitation period will apply will be in an action under section 1 of the DPA, this is not specified or stated. It simply refers to "the action". Similarly, section 135(3) does not refer to an action under section 1 of the DPA but uses the broader expression of an action "by virtue of" section 1. As a matter of language, section 135(3) is not therefore restricted to actions under section 1 of the DPA; it can equally apply to actions dependent on section 1, such as where the claim made is for damages for the tort of negligence or for contribution under the Contribution Act.

100. This broader interpretation is also supported by the title given in section 135(1) to the new section 4B of the Limitation Act 1980 which it introduces. This is that there is to be a "special time limit" for "certain actions in respect of damage or defects in relation to buildings". A claim made for damages for a liability in the tort of negligence or for contribution that is dependent on the time limit under section 1 of the DPA is such an action.

101. Section 135(5) is also relevant context. It most naturally refers to an action under section 1 of the DPA since it talks of an action which would have been "barred". However, an action for damages for a liability in the tort of negligence or for contribution which could not be maintained because of the time-bar applying to section 1 of the DPA can also be described as being "barred". Further, given the importance of a Convention-compliant interpretation, section 135(5) should be interpreted as applying to any action in which a defendant's Convention rights might otherwise be breached.

102. A further relevant matter of context is the importance of retrospectivity to Part 5 of the BSA. As outlined above, this is reflected not only in section 135 but in all the main changes to the law made by Part 5.

103. Considering the meaning of the words used in section 135(3) in their context, there is therefore no reason as a matter of language for restricting the application of section 135(3) to actions under section 1 of the DPA. Moreover, if regard is had to the purpose of the provision there is every reason not to do so.

104. A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. As was stated in the Secretary of State's written submissions, at para 15:

> "The BSA makes a number of important changes to the law including, at Part 5, several mechanisms that achieve the central aims of the BSA in relation to historical building safety defects. These mechanisms are designed to ensure that … those responsible for defects can be held to account … ."

105. This purpose and policy are borne out by various of the Explanatory Notes to the BSA. We were provided with the Explanatory Notes to the Bill and to the BSA which were in materially the same terms. The latter included the following:

> "95. The Act provides an ambitious toolkit of measures which will allow those directly responsible for defective building work to be held to account.

…

917. …This Act also contains a number of provisions to allow those directly responsible for creating building safety defects to be held accountable through the Courts.

…

1015. Remediation contribution orders made against developers complement other legal remedies expanded and created by this Act, which allow those responsible for building safety defects to be held to account. These other remedies include the extension of the limitation period under section 1 of the Defective Premises Act (section 135), building liability orders (sections 130 to 132), and the new cause of action against the manufacturers of defective construction products (sections 147 to 151).

…

1674. There is an exception under this paragraph to the general position that the protections only apply in respect of qualifying leases. Where the landlord is responsible for the defects, then no service charge is payable by any leaseholder in respect of that defect. This aligns with the Government's position that those directly responsible for creating historical building safety defects need to pay to put them right.

…

1688. … The Government's approach to the remediation of historical building safety defects in medium- and high-rise buildings is that in the first instance, those responsible for the defects must pay to remedy them.

…

1757. The Act brings forward a number of provisions which will allow those directly responsible for historical building

> safety defects to be held to account. This includes the extension of the limitation period under section 1 of the Defective Premises Act (to which see section 135) …."

106. These passages show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135.

107. If section 135(3) were restricted to actions under section 1 of the DPA then this purpose would be seriously undermined. The consequence would be that the 30-year limitation period would apply to claims brought by homeowners against a developer under section 1 of the DPA, but would have no relevance to what one may call "onward" claims for contribution or for the tort of negligence brought by that developer against the contractor (whether builder, architect or engineer) directly responsible for the building safety defect, as illustrated by URS's case on this appeal. As the Secretary of State submitted, at para 42 of her written case:

> "If the appellant is correct, then contractors causatively responsible for historical building safety defects will be able to avoid liability in claims (eg negligence or contribution claims) brought against them by developers. This outcome would undermine the legislative purpose of the BSA in ensuring those who caused historical building safety defects should pay for their remediation.
>
> [It] would produce unjust consequences for developers and other stakeholders who are *not* responsible for defects but are unable to bring onward claims against those who are ... [I]n relation to the same building safety defects, contractors and developers would be susceptible to DPA claims brought by leaseholders, but contractors would be insulated from negligence and contribution claims brought by developers."

108. Indeed, it is not just a matter of justice as between the developers and those ultimately responsible. There is also the point that a developer might need to be able to bring onward claims in order to be able to fund the meeting of its own obligations to homeowners.

109. It would also be legally incoherent and create two contradictory parallel universes – one for direct claims by homeowners against a developer or designer or contractor for a building safety defect and another for onward claims by the developer against the designer or contractor responsible for the defect. This can be explained further by

considering the facts (or what appear to be the facts) of this case in relation to the Capital East Developments. The Capital East Developments were completed by 2008. The defects were discovered in 2019. BDW carried out the repairs in 2020 and 2021. Prior to the BSA, for claims under the DPA, time would have run out after six years in 2014. But that was changed by section 135 of the BSA so that homeowners would now have a 30-year limitation period to bring DPA claims running, because retrospective, from 2008 (ie until 2038). But the questions with which we are faced are: as regards the tort of negligence, was BDW under an enforceable (non-time-barred) legal liability to carry out the repairs in 2020 (which relates to the "voluntariness principle" discussed under Ground 1)?; and, as regards contribution, could BDW recover contribution from URS in respect of their both being liable for the same damage under the DPA to homeowners on the basis (as regards BDW's liability) of an enforceable (non-time-barred) liability in respect of the repairs in 2020?

110. In our view, the answers to those questions are "yes". There will otherwise be a contradiction vis a vis limitation as between the claims by the homeowners against BDW under the DPA, on the one hand, and the claims for negligence/contribution by BDW against URS, on the other hand. If one answered "no" to those questions, one would be saying that, on the one hand, in 2020, the homeowners had a limitation period for an action under the DPA against BDW, running from 2008, of 30 years of which they had used up 12 years so that that claim was not time-barred; whereas in relation to claims in negligence by BDW against URS or a claim for contribution by BDW against URS one would be saying that, in 2020, BDW had a limitation defence to claims against it under the DPA by the homeowners.

111. Put another way, all these issues, whether direct claims under the DPA or claims in negligence or for contribution that depend on the DPA, turn on the application of the new DPA retrospective 30-year limitation period. The operation of the DPA limitation period is equally important to all those issues.

112. In partial acknowledgment of the unsatisfactory, incoherent and unjust consequences of limiting the application of section 135(3) to actions under section 1 of the DPA, Laurence Rabinowitz KC, counsel for URS, conceded in oral argument that it also applied to contribution claims brought after the commencement date. As he explained:

> "I make that concession. Your Lordships would appreciate, because otherwise it will be said the language is too narrow and does not capture what it should. I make that concession in the knowledge that one has to have regard to the purpose of these Acts and if you did not allow for contribution claims it might be said that you are not having regard to the purpose of the Act."

He accordingly accepted that section 135(3) may apply to "a claim which was indirectly based on a DPA action". This concession, however, introduces further incoherence to URS's case.

113. First, once it is accepted that section 135(3) may apply to a claim which is indirectly based on a section 1 DPA action there is no good reason to confine that to contribution claims. A claim in the tort of negligence for damages dependent on there being a liability under section 1 of the DPA is equally "indirectly based" on a DPA action.

114. Secondly, there is equally no good reason to confine the further claims covered to those arising after the commencement date of the BSA.

115. As the Secretary of State observed, at para 42 of her written submissions:

> "There is no good policy reason why Parliament would have decided to penalise those developers who undertook remedial works before section 135 BSA came into force."

116. This would "penalise" responsible developers, such as BDW, who had been pro-active in investigating, identifying and remedying building safety defects. Not only had they acted responsibly but they had done so in response to and in accordance with the Government's strong encouragement. Such penalisation of developers would be contrary to the purpose of the legislation.

117. The incoherence of such a split regime for the application of section 135(3) is illustrated by the example of a developer who carries out remedial works which straddle the commencement date. On URS's case, section 135(3) could be relied upon to enable a contribution claim to be brought by the developer in relation to the works carried out after the commencement date, but not those before that date. Again, that would be contrary to the purpose of the legislation.

(6) Collateral purpose?

118. As we have indicated (see para 93 above), URS submitted that BDW's case on section 135 means that it affects all proceedings in which the enforceability of DPA claims at a particular point in time is or may be relevant to a collateral, incidental or secondary issue in the proceedings. This is not so. All that BDW needs to establish is that it applies to actions (eg in negligence or for contribution) for a liability that is dependent on section 1 of the DPA even though it is not an action brought under section 1 of the DPA. Such actions are plainly "in respect of damage or defects in relation to buildings"

which is the wording in the heading to section 4B laying down the "special time limit" introduced by section 135. They are not collateral to section 135 or its purposes.

(7) Re-writing history?

119. As we have also indicated (see para 93 above), URS further submitted that BDW's case requires a court to conclude that section 135(3) deems, contrary to reality, that at the time BDW procured the remedial works: (i) the retrospectively extended limitation periods applied; and (ii) the homeowners had enforceable claims against BDW under the DPA. That would be to falsify history, which is impermissible (and here URS relied on the comments of Lord Browne-Wilkinson dissenting in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 358B and 359C).

120. Any statutory provision which applies retrospectively does, however, re-write history in the sense that a legal state of affairs is deemed to be different to how it was at an earlier time. The only change made by section 135 is to the legal position. Prior to the BSA, BDW had a legal liability under section 1 of the DPA to the homeowners. The availability of a limitation defence meant that that liability was legally unenforceable. Section 135 has changed the legal position by removing that limitation defence. It does not, however, purport to change any historical fact. Nor does it seek to alter a person's subjective state of mind – the subject matter of the comments made by Lord Browne-Wilkinson in his dissenting judgment in the *Kleinwort Benson* case upon which URS relies. Issues which depend upon matters such as what was or should reasonably have been known, understood, contemplated or believed at a historical point in time are unaffected by section 135.

121. This case provides an example of how section 135 would not alter facts. If there is an issue at trial as to the reasonableness of BDW's actions in carrying out the remedial works as a matter of legal causation or mitigation then that would fall to be determined by reference to the facts as at the time of those actions. At that time BDW would reasonably have understood that they had a liability to the homeowners but that it was unenforceable if they chose to rely on a limitation defence. Section 135 would not change that.

(8) Anomalies?

122. URS put forward a number of examples of what it said would be the anomalous consequences of a wide interpretation of section 135(3). These examples included:

(i) In 2020 an owner of a construction company sold their shares with an express warranty that any liability on the part of the company under the DPA was

time barred. Would section 135(3) mean in any claim brought against the company that the warranty would now be deemed breached on the date it was given?

(ii) A construction company had made provision in its accounts for a possible DPA claim which would render the company hopelessly insolvent. Those claims become time barred in 2020 and so the company's 2021 accounts included no provision. Instead they showed the company to have distributable reserves, allowing the company to pay significant dividends. Would section 135(3) mean that the company is deemed to have been insolvent?

(iii) On example (ii), are the company's accounts deemed to have been improperly prepared and the dividend an unlawful return of capital and, if so, are its directors potentially liable for breach of fiduciary duty by failing to take into account the interests of creditors or exposed to a claim for wrongful trading?

(iv) Further on example (ii), suppose the construction company had decided to use the funds set aside for DPA claims to pay gratuitous bonuses to its junior employees. Would section 135(3) render those payments liable to be recovered under the basis of a mistake of law?

123. These suggested anomalies stemmed from an insistence that BDW's case required section 135(3) to apply "for all purposes". BDW does not need so to contend. All it needs to establish is that section 135(3) applies "in the present circumstances", and specifically to actions in respect of damage or defects in relation to buildings for contribution or for the tort of negligence that are dependent on section 1 of the DPA, even though they are not actions brought under section 1 of the DPA. None of URS's suggested anomalies involve such actions. On the contrary, for reasons set out above, it is URS's case that creates anomalies if section 135(3) does not apply in such circumstances.

(9) Presumption against retrospectivity

124. There is no question that section 135 does apply retrospectively. The issue is as to how it so applies. URS submitted that there is a presumption that such retrospective operation extends no further than is necessary – see, for example, *Arnold v Central Electricity Generating Board* [1988] AC 228, 275B, per Lord Bridge. Assuming that to be so, in order to achieve its purpose of holding those responsible for building safety defects to account, it is necessary to interpret the general wording used in section 135(3) as being applicable to claims such as those made in the present case.

(10) Conclusion on Ground 2

125. For all these reasons, URS's appeal on Ground 2 is dismissed. When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. More specifically, they apply where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW's actions in carrying out the remedial works as a matter of legal causation or mitigation.

5. Ground 3: Did URS owe a duty to BDW under section 1(1)(a) of the DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?

(1) The background to the DPA

126. The DPA was enacted following, and substantially implementing, the recommendations of the Law Commission's Report, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970) (the "Report").

127. The Report noted that the issue of civil liability for defective premises had been "causing considerable concern to the public" (para 5) and was a topic which required examination "in the light of current commercial and social considerations with a view to establishing a proper balance between the principle of freedom of contract and the desirability of protecting the public" (para 1).

128. The Law Commission considered that the existing law was generally adequate. The Report said that "caveat emptor is still regarded as the appropriate principle on which the rights of the seller and purchaser of a dwellinghouse should generally be based" (para 17). For that reason, no changes were proposed as regards either the sale of existing, already built, dwellings (para 19), or contracts concerning the construction of "commercial or industrial premises" (para 14). In relation to the latter, the Report observed:

> "In such cases the parties are normally in a position to protect their own interests with the help of their professional advisers. The appropriate terms for inclusion in the contract in such cases are the subject of negotiation."

129. The position as regards the sale of new dwellings was, however, considered to be "entirely different". As the Report stated (para 20):

> "There is no reason why a person who acquires a dwelling from the builder should have to examine it in detail to see whether it is in a sound condition. He should be entitled to rely on the diligence and skill of those whose work has gone into the provision of the dwelling and he should have a remedy if the dwelling proves to be defective."

130. The Report accordingly recommended that a statutory duty be imposed on those whose work has gone into the provision of a new dwelling. The Report also recommended that that duty be extended to developers who arrange for such work to be done but do not themselves take on such work. Their reasons were as follows:

> "36. The reasons for imposing the same obligations upon 'developers' as upon builders are first, that, so far as the provision of new dwellings is concerned, purchasers make no distinction in the reliance they place upon sound workmanship between acquiring from a builder or from a developer who has employed that builder**;** and secondly, unless developers were subject to the obligation there would be serious risks of evasion. These reasons lead us to conclude that the remedies of purchasers in respect of quality defects in new dwellings should not depend upon whether their interest was acquired from a builder on the one hand or a developer on the other."

131. The content of the proposed statutory duty was to see that the work taken on is done in a workmanlike or professional manner with proper materials so that the dwelling be fit for habitation. These recommendations were implemented by the DPA which, so far as material, is in the same terms as the draft Bill attached to the Report.

(2) The DPA

132. The statutory duty imposed by the DPA is set out in section 1(1):

"**1. Duty to build dwellings properly**

(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

133. Under section 1(4) the statutory duty is imposed on developers – ie those who in the course of a business provide or arrange for the provision of dwellings or arrange for others to take on work in connection with the provision of a building rather than taking on the work themselves:

"(4) A person who—

(a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or

(b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work."

134. Under section 6(3) the statutory duty cannot be excluded or restricted by contract:

> "(3) Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void."

(3) The parties' cases

135. It is common ground that BDW owed the statutory duty under section 1(1) of the DPA by reason of section 1(4). The main issue raised by Ground 3 is whether BDW was also owed the statutory duty by those taking on the work (such as URS) because the dwelling was provided "to the order" of BDW so as to bring it within section 1(1)(a).

136. URS contended that on a proper interpretation of section 1(1)(a) it does not confer the benefit of the section 1(1) duty on a developer, ie on a person who falls within section 1(4) of the DPA and therefore owes a duty under the DPA. In particular, the purpose of the DPA was to address unfairness suffered by purchasers of new dwellings, not to protect developers who do not inhabit dwellings. Developers would be owed contractual duties and duties in tort by those they engage, suffer no inequality of bargaining power and are well able to look after their own interests. There is no warrant in the background to the DPA or in its terms for treating developers as being in a privileged position with regard to all other contractors or to interfere with freedom of contract and party autonomy by prohibiting any exclusion or restriction of a duty owed to developers by other commercial parties.

137. BDW contended that a developer such as BDW falls within the plain, grammatical meaning of section 1(1)(a). It is the person to whose "order" URS carried out work in connection with the provision of the dwellings. None of URS's arguments, so it was submitted, adequately address or answer this. Further, in circumstances where, although developers do not themselves take on work, the statutory duty is nevertheless imposed on them by section 1(4), it makes good sense for a duty to be owed to developers by those who do that work.

138. The Court of Appeal upheld BDW's case (see para 25 above). It did so primarily because of what it considered to be "the straightforward grammatical meaning of the words used" in section 1(1)(a) (para 178). It was also faced with different arguments to those addressed to this court, and in particular an argument (now abandoned) that section 1(1) only applies to lay purchasers.

(4) The interpretation of section 1(1)

139. Focusing first on the wording of section 1(1), under section 1(1)(b) the duty is owed to every person "who acquires an interest … in the dwelling". This will cover any purchaser of the dwelling. In the light of that, section 1(1)(a) must be directed at persons other than purchasers of the dwelling. It applies to those who "order" a dwelling – ie those for whose benefit the dwelling is being erected, converted or enlarged. The most obvious example of such a person would be someone who ordered a dwelling to be erected, converted or enlarged on their own land. That person would not be a purchaser of the dwelling or someone who "acquires an interest … in the dwelling" but would be the owner of the dwelling from the outset – ie its first owner. "[T]o the order of any person" therefore includes, most obviously, first owners who order work in respect of a dwelling. That embraces developers who order relevant work and are first owners.

140. The scheme of section 1(1) therefore means that under section 1(1)(a) the duty is owed to a person who has ordered the dwelling to be built, most obviously the first owner; and that under section 1(1)(b) the duty is also owed to all those who subsequently purchase (or acquire any other interest in) the dwelling. So, for example, section 1(1)(a) would cover a scenario where C owns land and enters into a contract with builders and/or an architect for the construction of a dwelling on that land. Section 1(1)(b) would then come into play where C sells the dwelling and would mean that the purchaser would also be owed the duty. But it would be possible for only section 1(1)(b) to apply where a builder builds a dwelling on his or her own land, without ordering work from anyone else, and then sells the dwelling on. In that situation, it would appear that section 1(1)(a) would have no role to play.

141. In practice, it would appear to be an unusual situation where a new dwelling is provided to the order of a person under section 1(1)(a) where that person has no proprietary interest in the land and hence has no proprietary interest in the dwelling being built on it. It follows from this that, although the words "to the order of any person" are wide enough to cover where that person does not have a proprietary interest in the land and new dwelling, they most obviously cover a standard situation where the person ordering the work also has a proprietary interest in the land and the new dwelling (who, for shorthand, we have been referring to as the "first owner").

142. Turning to contextual considerations, Mr Rabinowitz emphasised that the DPA distinguishes between those who owe duties, who he labelled the "providers", and those to whom duties are owed. The former (the providers) are those who "[take] on work for or in connection with the provision of a dwelling" (section 1(1)) and those who arrange for others to take on such work (section 1(4)). The latter (those to whom the duties are owed) are those who order the dwelling (section 1(1)(a)) and those who acquire an interest in the dwelling (section 1(1)(b)). According to Mr Rabinowitz's submissions, those two

categories are mutually exclusive: one cannot both be a provider and someone to whom the duty is owed.

143. However, in our view, applying the words of section 1 in their context, there is no good reason why a person, for example, a developer, cannot be both a provider and a person to whom the duty is owed. That will most obviously be the case where the developer who orders relevant work is the first owner.

144. The purpose of the DPA in general, and section 1(1) in particular, supports an acceptance that those to whom the duty is owed include the first owner of a dwelling. It is well established that Law Commission Reports may assist in identifying the purpose of (including the mischief addressed by) a statute and that the context thereby disclosed may assist in ascertaining the meaning of the statutory words – see *Yaxley v Gotts* [2000] Ch 162, 182, 188-190; *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, para 30.

145. It is clear from the Report that the primary class of persons who it was considered needed the protection of the proposed statutory duty was that of "purchasers". This was defined as meaning "any person who acquires an interest in property on a sale, a letting or a charge" – see footnote 5. So, for example, in relation to newly built dwellings the Report stated at para 21:

> "As a result of our consultations we have found general agreement that the purchaser in such circumstances should have greater protection from the law than he has at present in respect of defects of quality in premises."

146. However, there was clearly a concern that "purchasers" as defined would not capture every person who might acquire a new dwelling from a builder. The Report's recommendation as to whom the duty would be owed was expressed as follows in para 26(c):

> "… a right of action in respect of faulty building of a dwelling should be available during a limited period−
>
> (i) *if the builder builds to the order of a client, to that client* (emphasis added)*;*
>
> (ii) if the builder sells to a purchaser, to the purchaser; and

(iii) in either event, to anyone who subsequently acquires an interest in the dwelling;"

147. Similarly, in summarising the Report's recommendations at para 37 it is stated that the statutory duty should not just be owed "to any person who acquires an interest in the dwelling" but also (at para 37(c)) "should apply in all circumstances, whether the dwelling is built on the land of the 'purchaser' or of a third party or of the builder and, in the last case, whether the building is erected under a contract or, independent of any contract, for disposal as a completed dwelling".

148. Again, in the further summary of recommendations at para 70, the Report states that the statutory duty shall be "owed to any person who acquires a proprietary interest in the property, as well as to *the person (if any) for whom they have contracted to provide the dwelling"* (emphasis added).

149. These emphasised passages demonstrate that the purpose of the statutory duty was to protect the interests of those who acquire an interest in a dwelling (who may conveniently be referred to as "purchasers") and of any person who has an interest in the dwelling other than by acquisition or purchase, most obviously its first owner.

150. This purpose is reflected in sections 1(1)(a) and (b) and it bears out what we consider to be the most natural meaning of the wording of section 1(1)(a), as set out in paras 139-141 above.

(5) The textbooks

151. In the construction law textbooks, section 1(1)(a) is paraphrased in terms consistent with this emphasis on first owners. For example:

(i) *Construction Law* by Julian Bailey (4th ed (2024)), describes the duty as being owed to "the person who commissioned the work" who is "the owner", as well as any subsequent owner of the dwelling at para 19.31:

"The duty of a person who takes on work to, inter alia, perform it in a workmanlike manner, is owed both *to the person who commissioned the work* [Footnote: 'That is, *the owner*…'], and to every person who acquires a proprietary interest in the dwelling. The obligation imposed by the Act is therefore in the nature of a transmissible warranty of quality and of the fitness for habitation of a completed dwelling. However, the right of a

> person who later acquires a proprietary interest in the dwelling against the person who performed work defectively will be limited to the loss (if any) actually suffered by the later proprietor" (emphasis added).

(ii) *Construction Law* by John Uff (13th ed (2021)) refers to the duty being owed to the "present or future owner" at p 318:

> "The duties of engineers and architects to the building owner arise by virtue of their employment under contract. Acts performed for or on behalf of the employer may at the same time give rise to duties and liabilities to other persons. This may arise by virtue of the position as agent for the employer, when there may be personal liability on a contract or liability for acting without authority. In addition, architects and engineers are subject to the Defective Premises Act 1972. Under s.1, they owe a duty *to any present or future owner* of a dwelling to see that their work is done in a professional manner (see Ch.7)" (emphasis added).

(iii) *Wilmot-Smith on Construction Contracts* (4th ed (2021)) refers to the duty being owed to the "first owner" at para 6.92:

> "Section 1(1) of the [DPA] provides that a person who takes on work for or in connection with the provision of a dwelling, whether the dwelling is provided by the erection or by the conversion or enlargement of a building, owes a duty to ensure that the work is done in a workmanlike, or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling, when completed, will be fit for human habitation. By section 1(1)(a) and (b) respectively, that duty is owed both to *the first owner of the dwelling* and to any person who subsequently acquires a legal or equitable interest in it" (emphasis added).

(6) Anomalies?

152. URS submitted that it would be anomalous and illogical for the DPA to be interpreted so as to allow the DPA duty to be both owed by and to the same person.

153. We reject that submission. The words themselves do not support such an approach and there is nothing in the Report, or any of the textbooks, to that effect. Moreover, the purpose of the DPA is better served if the DPA duty is widely, rather than narrowly, owed. So, for example, on the facts of the present case, it would better serve the policy of ensuring the safety of dwellings if BDW itself had rights under the DPA against a party primarily liable for the defects. As the Court of Appeal stated (at para 184):

> "…since most lay purchasers will, in the first instance be buying from a developer, it would be contrary to consumer protection principles to conclude that the developer was not owed the relevant duty by one of the key professionals responsible for the design and construction of the building, so could not play a part in any claims for redress. That would hinder consumer protection rather than enhance it."

154. Of course, a person cannot owe itself a duty. But there is no inconsistency, or logical fallacy, in saying that a developer can both owe a DPA duty (eg to a subsequent purchaser) and be owed that duty (by the builder/architect/engineer).

155. Moreover, there is no reason to think that such an approach would mean that only developers would both owe and be owed the section 1 DPA duty. There may be other situations where those who owe a duty under section 1 of the DPA may also be owed a duty. Say, for example, a builder builds a house on its own land having instructed an architect. The architect would owe a duty under section 1(1)(a) to the builder/owner even if the builder/owner itself owes duties to subsequent purchasers under section 1(1)(b) because it has sold on the dwelling.

156. URS also submitted (see para 136 above) that it would be anomalous for there to be preferential treatment of developers over other construction professionals and contractors both in terms of duty and contractual protection. It further submitted that, because the statutory duty cannot be excluded or limited by contract (by reason of section 6(3)), this would mean that, if the duty were owed to developers, there would be an interference with the principle of freedom of contract between commercial parties and with the general right of such parties to allocate risk as they consider appropriate.

157. However, the duty under section 1(1) is only owed to developers if they order the work, and it appears that that will most obviously be so where the developers are the first owners of the dwelling. Moreover, as explained in para 155 above, developers are not the only persons who may both owe and be owed a DPA duty. Developers are therefore neither always nor uniquely privileged, as URS contends.

158. In any event the person, such as URS, who took on the work would be liable to purchasers under section 1 of the DPA and unable to rely on any exclusion or limitation in respect of such liability. Its commercial position is not materially different if that same duty is owed to a developer, such as BDW. It simply holds the same exposure to a different claimant.

(7) Conclusion on interpretation

159. For all these reasons, when the meaning of the words used in section 1(1)(a) is considered in the light of their context and the purpose of the statutory provision they should be interpreted as applying to any person, including a developer, to whose "order" a dwelling is being built. That person will ordinarily be its first owner (as, on the assumed facts, was BDW: see para 6 above). In this case, relevant work was carried out by URS "to the order of" BDW and URS therefore owed a section 1 DPA duty to BDW.

(8) The losses claimed

160. URS advanced a further argument that BDW's alleged losses are not of a type which are recoverable for breach of that duty. It submitted that the type of damage contemplated was that arising as a result of the ownership of a dwelling which was unfit for habitation.

161. However, as Mr Mark Howard KC, counsel for BDW, submitted, once it is accepted that the wording of section 1(1)(a) contemplates claims by developers against contractors, it follows that the premise of URS's argument cannot be right: the DPA does contemplate losses of the kind incurred by BDW, namely losses incurred by a developer in remedying defects caused by its contractor's breach of duty. We accordingly reject this further argument of URS.

6. Ground 4: Is BDW entitled to bring a claim against URS pursuant to section 1 of the Contribution Act notwithstanding that there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

162. On this ground we agree with the judgment of Lord Leggatt at paras 209-266.

7. Conclusion

163. In summary, our conclusions on the four grounds of appeal are:

Ground 1: There is no rule of law which meant that the carrying out of the repairs by BDW rendered the repair costs outside the scope of the duty of care owed or too remote.

Ground 2: Section 135 of the BSA applies where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW's actions in carrying out the remedial works as a matter of legal causation or mitigation.

Ground 3: The duty under section 1(1)(a) of the DPA is owed to any person, including a developer, to whose "order" a dwelling is being built. That person will ordinarily be its first owner. In this case, relevant work was carried out by URS "to the order of" BDW and URS therefore owed a section 1 DPA duty to BDW.

Ground 4: BDW is not prevented from bringing a claim for contribution against URS by the fact that there has been no judgment against BDW or settlement between BDW and any third party and no third party has ever asserted any claim against BDW. It is sufficient that BDW has made a payment in kind (by performing remedial works) in compensation for the damage suffered by the homeowners.

164. It follows that we would dismiss the appeal.

LORD LEGGATT (CONCURRING):

Introduction

165. In the aftermath of the Grenfell Tower disaster, a wide range of measures was introduced by the Building Safety Act 2022 (the "BSA") to improve building safety. One of these measures was radically to extend the time for bringing claims under section 1 of the Defective Premises Act 1972 (the "DPA"), both going forward and retrospectively. Section 1 of the DPA imposes a statutory duty on builders, construction professionals and developers to ensure that new dwellings are built properly so as to be fit for habitation. Those owed the duty include anyone who subsequently acquires an interest in the

dwelling. The limitation period was originally six years from when the dwelling was completed. Section 135(1) of the BSA introduced a new time limit of 15 years for dwellings completed after it came into force on 28 June 2022 and 30 years for dwellings completed before that date.

166. Section 135(3) of the BSA provides that the new 30-year time limit "is to be treated as always having been in force". This provision makes it clear beyond doubt that section 135(1) has retrospective effect. But the extent of this retrospective effect is disputed and is a central issue in this appeal.

167. The claimant in these proceedings (and respondent to the appeal) is BDW Trading Ltd ("BDW"), the developer of two high-rise residential building developments ("the Developments") which were completed between 2005 and 2012. The defendant (and appellant) is URS Corporation Ltd ("URS"), a firm of consultant engineers employed by BDW to provide structural designs for the Developments. The issues arise on assumed facts. The key facts to be assumed are that, through negligence of URS, the Developments were designed and constructed in a way that created risks to the safety of occupants. BDW discovered the defects in 2019. From 2020 BDW carried out works to remedy them. It did so although (a) no claim against BDW arising out of the defects had been made or intimated and (b) any such claim would, before section 135 of the BSA came into force, have been time-barred.

168. In this action, begun in March 2020, BDW claims compensation from URS for the cost of carrying out the remedial works. It does so on three alternative legal bases. The first is the common law tort of negligence. It is not suggested that this claim is time-barred. The court ordered a trial of preliminary issues to decide whether on the assumed facts the losses suffered by BDW were (a) within the scope of the duty of care owed by URS to BDW and (b) recoverable in principle as a matter of the law of tort. Fraser J gave the answer "yes" to both these questions (except insofar as BDW's losses included "reputational damage"). That decision was affirmed by the Court of Appeal.

169. When section 135 of the BSA came into force on 28 June 2022, BDW applied to amend its statements of case (1) to allege that (because of the retrospective operation of that provision) BDW's liability to the owners of flats in the Developments ("the homeowners") for breach of its duty under section 1 of the DPA was not time-barred when the remedial works were carried out; and (2) to add claims against URS under (a) section 1 of the DPA and (b) the Civil Liability (Contribution) Act 1978 ("the Contribution Act"). The High Court granted permission to make the amendments. That decision was also affirmed by the Court of Appeal, which held that the new claims are valid as a matter of law and have a real prospect of success.

The issues

170. On this further appeal by URS the issues raised by the four grounds of appeal, in the order that I will consider them, can be stated as follows:

(i) Issue 1 is whether, leaving aside the impact of section 135 of the BSA, BDW has on the assumed facts suffered loss for which it is entitled as a matter of law to claim damages from URS in the tort of negligence.

(ii) Issue 3, which I will consider next, is whether URS owed a duty under section 1 of the DPA to BDW (as the developer), in addition to the homeowners, and, if so, whether BDW's loss is of a type for which damages are recoverable.

(iii) Issue 4 is whether BDW is entitled to bring a claim against URS under the Contribution Act although there has been no judgment against BDW or settlement between BDW and any third party and no third party has asserted any claim against BDW.

(iv) Issue 2, which I will consider last, concerns how far the retrospective effect of section 135 of the BSA extends and whether – and, if so, how – it affects BDW's claims (a) in the tort of negligence, (b) under section 1 of the DPA, and (c) under the Contribution Act.

171. On issues 1, 2 and 3 I agree with the conclusions of Lord Hamblen and Lord Burrows for reasons which, in the light of their judgment, I can state more shortly. I would decide issue 4 against URS for the reasons given below.

Issue 1: The negligence claim (apart from section 135)

172. URS has argued that there is a general principle of the common law that a person is responsible for their own voluntary actions and, as a corollary of this principle, that damages cannot be recovered for payments made voluntarily, even if those payments arose as a result of the defendant's wrong and were made reasonably. In developing this argument, Mr Laurence Rabinowitz KC for URS submitted that it does not matter whether, as a matter of legal taxonomy, this principle is characterised as an aspect of the rule that losses, if they are to be recoverable, must fall within the scope of the defendant's duty, or as an aspect of the rule that losses must not be too remote, or as an aspect of the rule that losses must have been caused, in the view of the law, by the defendant's breach of duty. Whichever characterisation is preferred, such voluntarily incurred losses are in principle irrecoverable.

173. Applying that principle here, URS argues that the costs incurred by BDW in remedying building safety defects before section 135 of the BSA came into force were incurred voluntarily because, when the remedial work was done, BDW was not under any enforceable legal obligation or liability to the homeowners, as the time limit for any claim by them against BDW for breach of its statutory duty under section 1 of the DPA or for breach of contract had long since expired. It follows, URS submits, that these costs are irrecoverable as a matter of law.

174. I agree with URS that there is a general principle of the common law that damages cannot be recovered for consequences of a choice freely made by the claimant. But I agree with Lord Hamblen and Lord Burrows that, although it could on particular facts be relevant to questions of scope of duty or remoteness, the voluntariness or otherwise of the claimant's conduct is most obviously and normally relevant to issues of causation and mitigation.

175. The concept of voluntary choice is often used to explain why the mitigation principle limits (or sometimes increases) the damages recoverable by a claimant in respect of a breach of duty by the defendant. Although traditionally described as a duty, it is now well recognised that mitigation is not a duty owed to the wrongdoer but is an aspect of causation: see eg *Koch Marine Inc v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75, 88 (Robert Goff J); *Darbishire v Warran* [1963] 1 WLR 1067, 1075 (Pearson LJ). *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] Bus LR 987, para 81 (Lord Toulson). The principle is that if the claimant chooses to respond to the defendant's breach of duty in a way that would not reasonably be expected, damages will be assessed as if the claimant had responded in the expected way, even though in fact it did not.

176. Although the test is often said to be whether the claimant has acted reasonably, "reasonable" is such a protean term that this statement lacks any explanatory power. In his recently published study of *Mitigation in the Law of Damages* (2024), p 104, Andy Summers prefers to speak of the "normal response" to breach and goes on to give an illuminating analysis of the relevant legal and descriptive norms. The general standard is captured in the approach adopted by the House of Lords in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689-690, of asking whether the course of action taken by the claimant was one which a reasonable and prudent person could be expected to take in the ordinary course of business. In addressing this question, certain business expectations have hardened into legal norms. The most significant is the market rule. Where the defendant's breach of duty has deprived the claimant of goods or services and there is an available market in which an adequate substitute can be obtained, the claimant is expected to enter the market at the earliest reasonable opportunity and obtain such a substitute.

177. The significance of the claimant's voluntary choice and its relationship to the issue of causation in such cases was explained by Lord Toulson in *Bunge SA v Nidera BV*, para 80:

> "The *option* to re-enter or stay out of the market arises from the breach, but it does not follow that there is a causal connection between the breach and his *decision* whether to re-enter or to stay out of the market, so as to make the guilty party responsible for that decision and its consequences. The guilty party is not liable to the innocent party for the adverse effect of market changes after the innocent party has had a free choice whether to re-enter the market, nor is the innocent party required to give credit to the guilty party for any subsequent market movement in favour of the innocent party. The speculation which way the market will go is the speculation of the claimant."

178. The approach is similar whenever the claimant chooses not to take a reasonably available opportunity to extricate itself from damaging consequences of the defendant's wrongdoing. For example, in *Downs v Chappell* [1997] 1 WLR 426 the claimants were induced to purchase a bookshop by fraudulent misrepresentations of the vendor about its profitability which the vendor's accountants negligently verified as being correct. After discovering its true financial condition, the claimants turned down offers from a third party to purchase the business. At the time of the trial, the value of the business was less than the amount offered. Claims against the vendor and the accountants succeeded, but the Court of Appeal held that the damages were limited to the difference between the purchase price paid by the claimants and the price they had been offered for the business. Hobhouse LJ said, at p 437F-G:

> "Even accepting that they acted reasonably, the fact remains that it was their choice, freely made, and they cannot hold the defendants responsible if the choice has turned out to have been commercially unwise. They were no longer acting under the influence of the defendants' representations. The causative effect of the defendants' faults was exhausted; the plaintiffs' right to claim damages from them in respect of those faults had likewise crystallised. It is a matter of causation."

179. The same underlying principle is at play when it is alleged that the claimant's conduct constitutes a new intervening act which breaks the chain of causation between the defendant's breach of duty and damage suffered by the claimant. For example, in *Rushton v Turner Brothers Asbestos Co Ltd* [1960] 1 WLR 96 the claimant's fingers were crushed when he attempted to clean a crushing machine while it was in motion. Although the defendant employer was found to have been in breach of a duty under the Factories

Act 1937, Ashworth J held that the effective cause of the injury was the claimant's deliberate act of folly and that, looked at fairly, the claimant was "the sole author of his own misfortune" (p 102).

180. As noted by Andrew Burrows, *Remedies for Torts, Breach of Contract*, *and Equitable Wrongs* 4th ed (2019), pp 84-85, both the mitigation principle and the intervening act principle can be regarded as denying damages for exactly the same reason, and the courts sometimes use the principles interchangeably. In each case the question is whether the claimant is to be regarded as having made a voluntary choice to act in a particular way following the defendant's breach of duty, such that the claimant alone should be held responsible for the consequences of that choice. The claimant's conduct is usually viewed through the lens of mitigation, rather than intervening act, when the action which the claimant takes or fails to take is one calculated to avoid damage that the claimant might otherwise have suffered.

181. Whether the claimant's conduct is characterised as a voluntary choice is not determined, generally at least, by whether the claimant was under an enforceable legal obligation or liability. A buyer to whom the seller fails to deliver goods or delivers defective goods is not under any legal obligation to enter the market to buy a substitute. A claimant whose car is damaged by the defendant's negligent driving has no legal obligation to get the car repaired. A victim who suffers personal injury and incurs costs of medical care is not under a legal obligation to do so. The proposition asserted by URS in its written case that "a claimant generally cannot recover damages in respect of payments made voluntarily" is therefore untenable if the term "voluntary" is equated with absence of legal liability.

182. In oral argument Mr Rabinowitz KC recognised this and sought to formulate URS's case more narrowly. The narrower formulation can, I think, be stated in this way. A claimant who, when under no enforceable legal obligation or liability to do so, compensates a third party for damage caused to that third party by the defendant's wrongful act, is treated as matter of law as acting voluntarily.

183. The four cases chiefly relied on by URS, which are analysed by Lord Hamblen and Lord Burrows at paras 37-54 above, can all be said to fit this pattern. For example, in *Admiralty Comrs v SS Amerika* [1917] AC 38 the defendants' steamship negligently collided with and sank the claimants' submarine, resulting in the death of members of its crew. The House of Lords held that the damages recoverable did not include payments made by the claimants to widows and other dependants of the drowned men. One reason given was that the payments were "compassionate payments" which the claimants were not legally obliged to pay and which were to be regarded as a voluntary act of the Crown: see pp 41 (Earl Loreburn), 42 (Lord Parker) and 60-61 (Lord Sumner).

184. I would accept that payments made by a claimant to a third party injured by the defendant's wrongdoing are, if the defendant had no or no legally enforceable obligation or liability to make them, likely in many cases to be regarded as consequences of a choice freely made by the claimant rather than of the defendant's wrong. But I do not accept that there is any rule of law to that effect. The reason is simply that it is not usually prudent to spend money remediating other people's losses in the absence of any legal obligation or liability to do so. Such expenditure may also not have been within the reasonable contemplation of the parties and may therefore be irrecoverable on grounds of remoteness. As Lord Hamblen and Lord Burrows point out at paras 46-49 above, this view was taken on the facts in one of the four main cases relied on by URS, *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173.

185. That there is no legal rule of the kind suggested is shown by the decision of the House of Lords in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452. Printers who had a contract to print banknotes for the Central Bank of Portugal were duped into delivering a large batch of notes to a criminal, who put them into circulation. On discovering this, the Bank withdrew all notes of the relevant type and offered to exchange them for other banknotes. On the appeal to the House of Lords, the printers did not challenge the judge's finding that they were in breach of contract but argued that exchanging the unauthorised notes, which the Bank had no legal obligation to honour, was a voluntary act, at any rate after a date by which the judge found that the Bank could have distinguished the unauthorised notes from valid notes. The House of Lords unanimously rejected that argument. There was a difference of opinion about what loss the Bank had suffered by exchanging the unauthorised notes for valid notes. But all the law lords agreed that it was reasonably necessary for the Bank to act as it did to protect its reputation and credit as the body responsible for the Portuguese currency and to avoid the potentially grave economic consequences of a collapse of public confidence in the currency.

186. *Banco de Portugal* is thus an example of a case in which payments made to protect third parties from loss which they would otherwise have suffered as a result of the defendant's wrong were recoverable even though the claimant had no legal obligation or liability to make the payments. On the facts, despite the absence of a legal obligation, the claimant had compelling commercial reasons to act as it did. They included the vital importance to its own (and the country's) finances of protecting its own credit and reputation.

187. Another example of a case in which potential damage to commercial reputation was treated as relevant is *James Finlay & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400. The facts were that a seller tendered bills of lading to the buyer which falsely showed the date of shipment as having taken place in the contract period. The buyer accepted the goods in the mistaken belief that it was contractually obliged to do so but its sub-purchasers in India refused to take delivery. Unlike the buyer, the sub-purchasers were legally bound to accept the goods because the contracts between

the buyer and sub-purchasers contained a clause which made the date stated in bill of lading "conclusive evidence" of the date of shipment. The buyer did not sue its sub-purchasers for non-acceptance, although there would have been no valid defence to such a claim. The seller argued that, although in breach of contract, it was not liable for loss which would have been avoided if the buyer had enforced its rights against the sub-purchasers.

188. The Court of Appeal rejected this argument. Scrutton LJ considered that the buyer was not required to take such action to minimise its loss as it "would not be in the ordinary course of business … and would in fact ruin their credit in India" (p 410). Greer LJ, at p 415, likewise thought it "wholly unreasonable" to say that to hold the sub-purchasers to their bargain and make them pay damages if they did not take the goods "would be the ordinary course of business which they ought to pursue to diminish the damages". He observed that:

> "People … have to consider the effect of their conduct upon their business relations with other people, and I have little doubt that it would not have suited the respondents' business, nor would it be reasonable as a matter of business to require them, to do what is suggested …."

Sankey LJ said, at p 418, that:

> "… a person is not obliged to minimise damages … if by doing so he would, as I think might have happened here, have injured his commercial reputation by getting a bad name in the trade."

In *Banco de Portugal*, at p 471, Viscount Sankey LC (as he had now become) cited *James Finlay* as authority for the proposition stated in the above quotation from his judgment in the earlier case.

189. As Bankes LJ said in *Payzu Ltd v Saunders* [1919] 2 KB 581, 588: "It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case." By a question of fact in this context is meant one that would once have been for a jury to decide, applying the directions of law given by the judge. In this case it will be a matter for the trial judge to evaluate whether in all the circumstances the action of BDW in remedying defects in the Developments is to be regarded as voluntary. As I have explained, the fact that BDW had no enforceable legal liability to compensate the homeowners is not conclusive. The court will have regard to the practical realities and consider whether the action taken was one which BDW would reasonably be expected to take. In addressing that question, the court will need to consider the extent of the risk of

harm to which BDW would have been exposed if it had not remedied the defects. To avoid circularity of reasoning, the possibility that BDW could recover the cost of the work from URS must of course be ignored: see Summers, *Mitigation in the Law of Damages* (2024), p 111.

190. A question which arose in argument is whether it is open to BDW to rely on damage that would have been done to its commercial reputation if it had not remedied the defects at a time when the catastrophic effects of defects in the design and construction of Grenfell Tower were at the forefront of public consciousness. Fraser J, in a ruling not challenged on appeal, held that, as a matter of law, reputational damage is a type of loss for which BDW cannot recover damages from URS both because it is not a type of loss against which a professional structural engineer owes a duty of care to protect a developer and because it is too remote: [2021] EWHC 2796 (TCC), para 64. Mr Rabinowitz KC submitted that, if reputational damage is not itself recoverable, it is logically impossible to see how money spent mitigating loss of this type can be recoverable.

191. The logic of this argument is, in my view, flawed. I can see no good reason to limit the considerations relevant in judging whether losses have been incurred voluntarily to harm for which damages would otherwise have been recoverable from the defendant. I think it clear that there is no such limitation. The claimant's response to a predicament created by the defendant's breach of duty may quite reasonably and in the ordinary course of business be influenced by factors which are not capable of quantification or which, even if they could be quantified, would – if incurred – not represent recoverable losses. Examples are: the fact that the claimant had to make a difficult decision under pressure (see eg *Sayers v Harlow Urban District Council* [1958] 1 WLR 623); the fact that a mitigating step would involve a transaction with someone in whom the claimant has legitimately lost trust (see eg *Payzu Ltd v Saunders* [1919] 2 KB 581, 588-589); or the fact that incurring expenditure in mitigation would require the claimant to make sacrifices which he could not reasonably be expected to make in the light of his impecunious financial position (see *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067, paras 9 and 11). Another such factor, as shown by the *Banco de Portugal* and *James Finlay* cases, is the prospect of serious damage to the claimant's reputation. It is nothing to the point that in those cases the claimant could not have recovered damages for reputational harm from the defendant if the claimant had not responded to the defendant's wrongdoing in the way that it did.

192. I would therefore reject URS's contention that BDW's expenditure in remedying defects in the Developments is, as a matter of law, irrecoverable as damages in the tort of negligence just because it was not incurred pursuant to a legally enforceable obligation or liability. Whether the expenditure should be regarded as incurred voluntarily rather than in consequence of the negligence of URS is a question of causation which requires a judgment to be made about how a person in the position of BDW could reasonably be expected to act in the particular circumstances, and does not involve the application of a hard-edged rule of law. It is a question which, as Fraser J rightly held, is "highly fact

dependent and can only be finally determined at trial": see order dated 22 October 2021, para 2(c).

Issue 3: The DPA claim

193. The duty imposed by section 1 of the DPA to build dwellings properly so that they are fit for habitation when completed is owed by anyone "taking on work for or in connection with the provision of a dwelling". By section 1(4), such persons are deemed to include property developers - that is, anyone who "in the course of a business which consists of or includes providing or arranging for the provision of dwellings … arranges for another to take on work for or in connection with the provision of a dwelling".

194. As for the persons to whom the duty is owed, section 1(1) states that the duty is owed:

> "(a) if the dwelling is provided to the order of any person, to that person; and
>
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling; …"

195. It is common ground that both URS (as the structural engineer) and BDW (as the developer) owed the statutory duty to the first and any subsequent purchaser of each of the flats in the Developments (each flat being a "dwelling" for the purpose of the DPA). The issue is whether BDW is also a person to whom URS (and others who took on work) owed the statutory duty.

196. On a plain reading of section 1(1)(a) the answer is "yes" because the dwellings were provided "to the order" of BDW. URS contends, however, that section 1(1)(a) should be construed as excluding a commercial developer and as applying only to a purchaser who orders a dwelling which is not yet completed from a builder or developer.

197. Three main points are made in support of this contention. First, although there are no words in the statute which say so, URS submits that section 1 only makes sense on the footing that the persons who owe the statutory duty and the persons to whom the duty is owed are mutually exclusive. Otherwise a person could be in the conceptually impossible position of owing a duty to itself. Commercial developers are deemed by section 1(4) to be among the persons who have taken on the work when they arrange for the provision of a dwelling in the course of their business and who therefore owe the statutory duty to

see that the dwelling will be fit for habitation. It would not make sense to classify them as, simultaneously, persons to whom that same duty is owed.

198. Second, URS submits that the DPA has rightly been characterised by the House of Lords as legislation in the field of "consumer protection": see *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, 208A (Lord Bridge); and *Murphy v Brentwood District Council* [1991] 1 AC 398, 472F (Lord Keith) and 498E (Lord Jauncey). The relevant mischief identified by the Law Commission in proposing the legislation was inequality of bargaining power between the providers and purchasers of newly built dwellings (against the background of a long-term shortage of housing). In the view of the Law Commission, this made it desirable to give greater legal protection to the purchasers of new houses to ensure that they are properly built rather than applying the principle of caveat emptor and making the rights of the purchaser dependent on contractual negotiation: see the Law Commission's Report "*Civil Liability of Vendors and Lessors for Defective Premises*" (Law Com No 40, 1970), paras 14-21. The Law Commission contrasted the case of commercial or industrial premises where "the parties are normally in a position to protect their own interests with the help of professional advisers" (para 14). This indicates that it was not the purpose of the legislation to protect commercial developers such as BDW.

199. Third, an important feature of the statutory duty is that it is impossible to contract out of it. Section 6(3) of the DPA provides:

> "Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void."

200. This is a substantial interference with freedom of contract. It is hard to see any reason which might justify preventing building contractors and construction professionals who take on work for a commercial developer from freely negotiating the allocation of risk in their contracts. URS submits that this also supports interpreting section 1(1)(a) as excluding developers from the persons to whom the statutory duty is owed.

201. These points raise questions about the design of a statute which has been the subject of trenchant criticism: see, in particular, JR Spencer, "The Defective Premises Act 1972 – Defective Law and Defective Law Reform" (1974) 33 CLJ 307, describing the DPA as "a measure which adopts excessively cumbrous means to achieve relatively modest ends; which is drafted in terms which are longwinded, ugly and obscure; and which ultimately changes little – a poor show in view of the complications it creates in the process". I am, however, persuaded that, for the reasons given by Lord Burrows and Lord Hamblen, the arguments advanced do not justify an interpretation which excludes

developers from the scope of section 1(1)(a) and that this would require an impermissible re-writing of the legislation.

202. Taking first the points made about freedom of contract and consumer protection, I agree that the Law Commission report evinces a concern to improve the legal position of the "ordinary citizen" (a phrase used in para 17 of its report). But there is nothing in the report, let alone the language of the Act, to indicate an intention to limit the benefit of the statutory duty to such a person (however he or she might be defined). No distinction is drawn, as it is for example in legislation such as the Unfair Contract Terms Act 1977 and the Consumer Insurance (Disclosure and Representations) Act 2012, between purchasers who enter into a contract as consumers and others who do so in the course of a business. The persons to whom the duty imposed by section 1(1) is owed are not limited to any particular category of purchaser or owner considered to be particularly vulnerable.

203. What is more, this is so even on URS's own case. By section 1(1)(b), the statutory duty is owed to "every person who acquires an interest (whether legal or equitable) in the dwelling". As Mr Rabinowitz KC accepted, those words cannot be read as referring only to consumers or any other particular category of owner. They would embrace a major property company which acquires the building as an investment or a bank which acquires an interest in a dwelling when lending on the security of a mortgage. The words "without prejudice to paragraph (a) above" signify that section 1(1)(b) is not to be read as limiting the scope of section 1(1)(a). Once the breadth of the persons to whom the statutory duty is owed under section 1(1)(b) is acknowledged, any argument for restricting the meaning of "any person" in section 1(1)(a) falls away.

204. If the result is to extend the scope of the statutory protection beyond those who most need it, that cannot be regarded as irrational. There is often a choice to be made in regulation between adopting a broad rule which, even if over-inclusive, avoids the need for case-by-case determinations or a more targeted rule which is more uncertain in its effect. The advantages of a general rule may reasonably be thought to outweigh any countervailing detriment. For example, a restaurant may sensibly adopt the rule "No dogs allowed" even though the effect is to exclude some pets which would cause no possible inconvenience to other customers. Likewise, even if the main concern was to protect those who lack bargaining power, it cannot be said to be irrational or unreasonable to impose a duty which applies across the board without seeking to distinguish between different types of client, purchaser or owner to whose order the dwelling is provided or who acquires an interest in the dwelling.

205. In any case I think it wrong to assume that the duty imposed by section 1 of the DPA is aimed only at consumer protection. A broader aim, which is also reflected in the Law Commission Report, is improving the quality of construction of new housing. That aim is promoted by imposing a duty on anyone engaged in the provision of a new dwelling to ensure that it is built properly and so as to be fit for habitation, which is owed to anyone

to whom the dwelling is provided or who subsequently acquires an interest in the dwelling, and which cannot be excluded.

206. As for the argument based on conceptual impossibility, it is of course true that a person cannot owe a duty to itself. But it is not inconsistent for a person who has houses built for sale and therefore owes the statutory duty to purchasers at the same time to be owed an equivalent duty by those who actually did the construction (and professional) work. Any person who takes on work to be done in accordance with instructions given by a developer (or other person commissioning the work) has a potential defence under section 1(2) to the extent that the work is done properly in accordance with those instructions. It would be a concern if a defence of contributory negligence were not also available where the claimant is a developer who is considered to be partly responsible for the failure to build a habitable dwelling. I think it clear, however, that the Law Reform (Contributory Negligence) Act 1945 would apply to such a claim. Under that Act the definition of "fault" includes a breach of statutory duty (section 4). Although the duty imposed by section 1 of the DPA is stricter than a duty to exercise reasonable skill and care, it involves failure to achieve an objective standard of performance. That is sufficient to enable fault-based apportionment to take place.

207. URS has also argued that the only type of loss which section 1 of the DPA is intended to provide protection against is loss arising out of the ownership of a dwelling that is unfit for habitation. Hence, as the loss suffered by BDW in repairing defects in the Developments did not result from any proprietary interest of BDW in the Developments (which ended when it sold the flats), that loss is not recoverable as damages from URS. Like the Court of Appeal (see para 192 of Coulson LJ's judgment), I do not accept the premise of this argument. It is clear from the wording of section 1(1) that a duty is owed to a person to whose order the dwelling is provided whether or not that person acquires an interest in the dwelling. If that were not so, subsection (1)(a) would be redundant and subsection (1)(b) would not begin with the words "without prejudice to paragraph (a) above". To regard the type of loss recoverable by a person falling within subsection (1)(a) as limited to loss arising out of a proprietary interest in the dwelling would therefore be inconsistent with the terms of the Act, since the Act expressly contemplates that such a person may never acquire a proprietary interest in the dwelling. Further, once it is accepted that the persons to whom the statutory duty owed may include a commercial developer who also owes the duty to others, it is naturally to be expected that the economic loss suffered as a result of a breach of the duty may arise from liability to the current owner of the dwelling. There is no justification for regarding this type of loss as outside the scope of the Act.

208. I would therefore reject URS's case on issue 3.

Issue 4: Contribution

209. The Contribution Act addresses the situation where two or more people are liable (whether jointly or individually) in respect of damage suffered by another person. I will refer to the person who has suffered the damage as "C" (for claimant). C can choose which of those liable (whom I will call "D1", "D2" etc) to claim against and can recover compensation for its loss from any of them. It would be unjust if C's choice to recover full compensation from D1, perhaps for reasons of convenience, were to leave D1 bearing the entire loss while D2, whose responsibility for the damage may have been just as great or greater, did not have to pay anything. By creating a statutory right to recover contribution, the Contribution Act enables the loss to be redistributed among those liable according to the extent of their relative responsibility for the damage in question.

210. In this case BDW, having paid for remedial works, wishes to claim contribution from URS on the basis that BDW and URS are each liable to the homeowners in respect of the damage remedied. To decide whether BDW can make such a claim, it is necessary to know when a right to recover contribution arises and, if different, when time starts to run for the purpose of calculating the two-year time limit that applies to claims for contribution. The answer to those questions depends on the correct interpretation of the Contribution Act and section 10 of the Limitation Act 1980 (which prescribes the two-year time limit).

211. The interpretations for which BDW and URS, respectively, contend are at opposite extremes. BDW contends that the right to recover contribution arises as soon as damage is suffered by C for which D1 and D2 are each liable, even if C has not claimed, let alone recovered, compensation from D1 or D2 in respect of the damage. If correct, this would mean that BDW's right to recover contribution arose when damage was suffered by the homeowners. On BDW's own case that occurred at the time of completion of the Developments. By contrast, URS contends that the right to recover contribution does not arise unless and until the existence and amount of D1's liability to C in respect of the damage has been ascertained by a judgment against D1, an admission of liability by D1 or a settlement between C and D1. If correct, this would mean that no right to recover contribution has yet arisen because no claim has been made against BDW by any homeowner, let alone been admitted or settled or resulted in a judgment against BDW. It seems unlikely that such a claim will ever be made, since BDW has undertaken the remedial works without waiting for any claim to be made against it by any homeowner. According to URS, this has the advantageous consequence that BDW will never be entitled to recover contribution from URS.

212. In my view, both these contentions are wrong. For the reasons that I am about to give, the true legal position lies in between. On the correct interpretation of the Contribution Act, the right of D1 to recover contribution from D2 arises when (1) damage has been suffered by C for which D1 and D2 are each liable and (2) D1 has paid or been

ordered or agreed to pay compensation in respect of the damage to C. At that point, but not before, D1 is entitled to recover contribution from D2 and the two-year limitation period within which any claim for contribution must be brought begins. There is no further requirement that, before an action can be brought, D1's liability to pay compensation to C and the amount which D1 is liable to pay in compensation must have been established by a judgment against D1, an admission by D1 or a settlement agreement between D1 and C.

The relevant statutory provisions

213. Answering this question requires analysis of the wording of the Contribution Act. Almost all of section 1 needs to be considered:

> "**1 Entitlement to contribution.**
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
>
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to

whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; …"

214. Also relevant is section 2(1) and (2):

"**2 Assessment of contribution.**

(1) … in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

(2) … the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

215. I will also need to refer to section 6(1):

"**6 Interpretation.**

> (1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

Accrual of a cause of action

216. In *Kazakhstan Kagazy plc v Zhunus* [2016] EWHC 1048 (Comm); [2016] 4 WLR 86, para 65, I distinguished three questions which may be asked in relation to the accrual of a cause (or right) of action: (1) when does a right to obtain a particular remedy from a court arise; (2) when is a claimant entitled to commence proceedings claiming that remedy; and (3) when does time begin to run for the purpose of calculating the time limit for commencing such proceedings?

217. Typically, all three dates coincide. In general, a claimant will not be entitled to commence proceedings claiming a remedy unless and until the right to obtain that remedy from a court has arisen; and that is also when time begins to run for the purpose of calculating the time limit for commencing such proceedings. A cause of action in the sense of a right to obtain a remedy arises when all the elements of the claim (ie the facts on which the existence of the right to obtain the remedy depends) are capable of being proved because the events which establish those facts have occurred.

BDW's case

218. BDW contends that all the necessary elements of a claim to recover contribution are set out in section 1(1) of the Contribution Act. There are three. First, a person (C) must have suffered damage. Second, another person (D1) must be liable in respect of that damage. Third, a third person (D2) must be liable in respect of the same damage. When those three conditions are met, D1 has a right to recover contribution from D2 and proceedings claiming contribution may therefore be brought.

219. It is common ground that the word "liable" in section 1(1) is not equivalent to "held liable" but is of wider scope: it requires only that the person is "responsible in law". That is made clear by section 1(6), which states that references to a person's liability in respect of any damage are references to "any such liability which has been *or could be* established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage" (emphasis added). A liability which could be established in court proceedings on the existing facts is therefore sufficient to make a person liable in respect of any damage for the purposes of section 1(1) even if no proceedings have in fact been brought. This is reinforced by section 6(1), which states

that a person is liable in respect of any damage if "the person who suffered it … *is entitled* to recover compensation from him in respect of that damage" (emphasis added). Thus, each of D1 and D2 is a person liable in respect of damage suffered by C within the meaning of section 1(1) even if C has not recovered or attempted to recover compensation from that person, provided only that C is entitled to do so.

220. On this basis BDW submits that, at the moment when C suffers damage for which D1 and D2 are each responsible in law, D1 and D2 each acquire a right to recover contribution from the other.

221. The Court of Appeal accepted this contention. Coulson LJ said, at para 202, that:

> "… as a matter of simple statutory interpretation, I consider that the right to make a claim for contribution - the accrual of the cause of action - is established when the three ingredients in [section 1(1) of the Contribution Act] can be properly asserted and pleaded. Is [D1] liable, or could be found liable, to [C]? Check. Is [D2] liable, or could be found liable, to [C]? Check. Are their respective liabilities in respect of the same damage suffered by [C]? Check. If those three ingredients are capable of being pleaded, then there is a cause of action for a contribution."

222. A similar view was expressed in obiter dicta in *Aer Lingus plc v Gildacroft Ltd* [2006] EWCA Civ 4; [2006] 1 WLR 1173, para 7, where Rix LJ observed that, "provided the liability is in respect of the same damage, the liability to contribute appears to arise at the same time as the primary liability to the person who has suffered the damage".

223. This view assumes, however, that the three elements set out in section 1(1) of the Contribution Act are the only necessary ingredients of a right to recover contribution. When the Act is read as a whole, I think it clear that they are not.

224. We can see this by noting two essential features of contribution as provided for in the Act. First, contribution is an amount of money. That is plain from the language used throughout the statute. For example, section 2(1) stipulates how in any proceedings for contribution "*the amount of the contribution* recoverable from any person" is to be assessed (emphasis added). Second, the amount of the contribution recoverable under the Act is a proportion – which may be anywhere between 0% and 100% – of another amount of money. (Section 2(2) makes it clear that an award at either extreme is permissible, ie either a nil award or a complete indemnity.) It is therefore not possible for a court to make an order for contribution in favour of D1 against D2 unless and until an amount of money can be identified of which D2 may be ordered to pay a proportion.

225. Section 1(1) does not tell us how to identify the amount of money to which D2 may be ordered to "make contribution" (in the phrase used in section 2(2)). The answer, however, can be found in section 1(2). Section 1(2) states that D1 is entitled to recover contribution provided that he was liable in respect of the damage in question "immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought", even if he has ceased to be so liable since the damage occurred. It is implicit in this provision that D1 may only recover contribution when it has made or been ordered or agreed to make a payment in respect of which the contribution is sought.

226. The word "payment" in this context need not be given a restrictive meaning. It is common ground on this appeal that, as held in *Baker & Davies plc v Leslie Wilks Associates* [2005] EWHC 1179 (TCC); [2006] PNLR 3, para 16, it includes a payment in kind where the payment in kind is capable of valuation in monetary terms. It is also not in dispute that BDW has here made a payment in kind to the homeowners by carrying out the remedial works. The value of those works can be quantified as a sum of money, which enables the amount of any contribution recoverable from URS to be assessed.

227. BDW submits that an order for contribution need not be an order to pay an amount of money: it may take the form of a declaration of the respective percentages of D1's and D2's liability for the damage suffered by C. I do not accept this. A declaratory judgment is a distinct type of order that a court may make whether or not any other remedy is claimed. It is different from, and cannot constitute, an order for contribution, which is clearly contemplated by the Act to be a money order. Apart from the reference in section 2(1) to "the amount" of the contribution recoverable, the word "recover" used throughout the Contribution Act is inapt to refer to a declaratory judgment. So is the phrase "liable to make contribution" used in sections 1(3) and 2(2). A person whose percentage of liability is declared cannot be said thereby to "recover" anything let alone "make contribution". The language used is only consistent with the understanding that a "contribution" is a money sum.

228. There is another reason for rejecting BDW's interpretation of when the right to recover contribution arises. It is inconsistent with section 10 of the Limitation Act 1980. This states:

> "**Special time limit for claiming contribution.**
>
> (1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be

brought after the expiration of two years from the date on which that right accrued.

(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.

(3) If the person in question is held liable in respect of that damage –

(a) by a judgment given in any civil proceedings; or

(b) by an award made on any arbitration;

the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).

For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.

…"

229. If it were correct that, as BDW contends, D1 becomes entitled to a right to recover contribution in respect of any damage from D2 as soon as the damage is suffered by C, this would present a serious problem. It would mean that in many cases the two-year time limit prescribed by section 10 would expire before D1 knew that it would face a claim for

which it could claim contribution from D2. Indeed, this could mean that BDW's own claim for contribution here is time-barred because on BDW's case damage was suffered by the homeowners when they acquired their interests in the Developments. For most of the homeowners, that must have been much more than two years before BDW asserted a claim for contribution against URS in these proceedings.

230. BDW's proposed solution to this problem is to argue that under section 10 of the Limitation Act 1980 a right to recover contribution does not accrue until (1) a judgment is given or an arbitration award is made against D1 or (2) D1 makes or agrees to make a payment to C in compensation for the damage.

231. I agree that this is the effect of section 10. Section 10(3) expressly provides that, when D1 is held liable to C by a judgment or arbitration award, the date of the judgment or award is "the relevant date", as defined in subsection (2), on which a right to recover contribution in respect of any damage accrues. Section 10(3) does not state in terms that the judgment or award must not merely be a decision on liability but a judgment or award for a quantified amount of damages. But this is implicit in the second sentence of the subsection. And in the *Aer Lingus* case, where judgment was given against D1 for damages to be assessed followed more than two years later by a judgment quantifying and awarding damages, the Court of Appeal held that time did not begin to run until the date of the second judgment which fixed the amount recoverable. That reflects the need, before a right to recover contribution can arise, to have an identifiable amount of money to which D2 may be ordered to make contribution.

232. The wording of section 10(4), which applies in every case where there is no such judgment or arbitration award, is elliptical. It appears to assume that, whenever D1 makes any payment to C in compensation for the damage, the amount of the payment will be agreed between D1 and C before the payment is made. This is implied by the references to "the amount *to be* paid" and "the person … to whom the payment *is to be* made" (emphasis added). Those phrases assume that, at the relevant date, the payment has not yet been made. It is clear from the opening words, however, that subsection (4) applies when D1 makes a payment as well as when D1 agrees to make a payment. No doubt when a person makes a payment in compensation for damage, the amount to be paid will usually have been agreed before the payment is made. But that need not be so. (It was not so here, for example, as it is not suggested that BDW agreed the monetary value of the remedial works with the homeowners – or indeed agreed anything with them – before the works were carried out.) The only way that I can make sense of section 10(4) is to interpret it as meaning that, in any case where D1 makes or agrees to make any payment to C in compensation for the damage, the relevant date is the date when the payment is made or, if earlier, the date on which the amount to be paid is agreed. In this way, time begins to run, as it does as under section 10(3), as soon as there is an identifiable amount of money to which D2 may be ordered to make contribution.

233. In oral argument Mr Howard KC on behalf of BDW agreed that this is how section 10(4) should be understood. Yet this interpretation is inconsistent with BDW's case that the right to recover contribution arises as soon as damage is suffered by C, without the need for any payment or agreement to make any payment to C in compensation for the damage. BDW's response to that inconsistency is to suggest that the date on which a right to recover contribution accrues for the purpose of calculating the time limit for bringing an action is different from the date on which the right to obtain an order for contribution arises. They rely on the distinction between these dates that I drew in *Kazakhstan Kagazy* (see para 216 above) and emphasise the opening words of section 10(2) ("For the purposes of this section"). They submit that the date on which a right to recover contribution in respect of any damage accrues for the purposes of section 10 of the Limitation Act 1980 can be later than the date on which a right to recover contribution in respect of any damage accrues under section 1 of the Contribution Act.

234. It is true that in theory the two dates could differ. But they can be expected to coincide because, when specifying a limitation period for bringing an action to obtain a remedy, it is natural and normal to take as the start of the period the earliest date when the remedy could be obtained from a court.

235. In any case, the wording of section 10(1) confirms that the dates are the same. It provides that the period of two years for bringing an action to recover contribution starts on "the date on which *that right* accrued" (emphasis added). The phrase "that right" refers back to the right identified earlier in section 10(1). That is the right to recover contribution to which a person becomes entitled under section 1 of the Contribution Act. So the date on which the limitation period starts to run is expressly provided to be the date on which a right to obtain an order for contribution arises under section 1 of the Contribution Act.

236. It follows that the definition in section 10(3) and (4) of "the relevant date" must be interpreted to match the date on which a right to obtain an order for contribution arises under section 1 of the Contribution Act. Although section 10 of the Limitation Act 1980 ought not to be read as cutting down the scope of the right created by section 1 of the Contribution Act, it is appropriate to read the provisions together as they were enacted together in the same statute as part of the same comprehensive reform of the law relating to contribution. What is now section 10 of the Limitation Act 1980 was originally enacted by the Contribution Act. Section 9 and Schedule 1, para 6, of the Contribution Act substituted a new section 4 of the Limitation Act 1963 in place of the previous text. That new section 4 was then re-enacted (without any material change) as section 10 of the Limitation Act 1980.

237. The interpretations of when a right to recover contribution arises under section 1 of the Contribution Act and when the right arises for the purposes of limitation under section 10 of the Limitation Act 1980 that I have reached independently above exactly match. They therefore reinforce each other. Both lead to the same conclusion that the

right arises when D1 is ordered (by a judgment or arbitration award) to make, or makes or agrees to make, a payment to C in compensation for the damage.

238. There is one more point to mention about the date when proceedings claiming contribution can be commenced. Suppose that C chooses only to sue D1, although D2 is also arguably liable in respect of the same damage. If D1 fights C's claim, then, on the interpretation of the law that I have just outlined, D1 has no right to recover contribution from D2 before a judgment is given against D1. It would be very inconvenient if D1 had to wait until then before it could take any proceedings against D2. It is usually more efficient, and avoids the risk of inconsistent decisions, for questions of contribution to be decided in the same litigation as C's claim against D1 (and D2, if C also sues D2). What are now CPR rr 20.6 and 20.7 create procedural machinery which makes this possible. These rules enable D1, when defending a claim for compensation brought against it by C, to make a claim for contribution against a co-defendant or a third party. Such a claim may be initiated before the cause of action in the other two senses discussed above has accrued: that is, before the right to obtain an order for contribution has arisen and before the limitation period has started to run.

URS's case

239. As mentioned earlier, URS advances a different interpretation of the legislation. Its case is that a right to recover contribution does not arise – for the purpose of obtaining an order for contribution or for the purpose of calculating the limitation period – unless and until D1 has not only made or agreed to make a payment to C in compensation for the damage, but also the existence and amount of D1's liability to C has been ascertained by a judgment, an admission or a settlement. That requires C to have asserted a claim against D1 which has been resolved in one of these ways. On this view a payment made by D1 to C – such as the payment in kind made by BDW to the homeowners – is not a sufficient basis for claiming contribution even if the payment remedied damage for which D1 and D2 were both liable. It is also necessary that, as between D1 and C, D1's total liability to C has been established.

240. I am unable to find any basis for this additional requirement in the language of the Contribution Act or that of section 10 of the Limitation Act 1980. The argument made by URS, however, does not start from the language of the legislation. Instead, it starts by considering how the previous statutory provision for contribution was interpreted by the courts. That was section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 (the "1935 Act"), which stated:

> "Where damage is suffered by any person as a result of a tort … any tortfeasor liable in respect of that damage may recover

> contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage …."

241. As can be seen, this provision was laconic in comparison with section 1 of the Contribution Act. It gave rise to various difficulties of interpretation. These included the question of when a cause of action for contribution arose, for the purposes of limitation or otherwise. URS submits that the case law on section 6(1)(c) of the 1935 Act established that a cause of action arose only when the liability of D1 to C was ascertained by a judgment, admission or settlement.

242. The next step in its argument is to submit that there is nothing in the immediate background to the Contribution Act – in particular the report of the Law Commission, "Law of Contract, Report on Contribution" (Law Com No 79, 1977) which preceded its enactment – to suggest any intention to change this aspect of the law. URS emphasises the Law Commission's assessment that the scheme of the 1935 Act, "although in need of overhaul, is basically sound" and that "the broad principles of contribution between wrongdoers, as provided by the 1935 Act, should be retained" (report, para 31). It asserts that the Law Commission made no recommendation to change the law as to when a cause of action for contribution accrues. Nor, so URS submits, does the language of the Contribution Act justify a conclusion that any such change was intended. The conclusion which URS invites the court to draw is that under section 1 of the Contribution Act, as under the 1935 Act, a cause of action arises only when D1's liability to C is ascertained by a judgment, admission or settlement.

243. I think that this argument starts in the wrong place. In deciding what legislation means, the starting point must always be the words which Parliament has enacted. Examining how courts have interpreted earlier legislation on the same subject is very much a secondary form of reasoning and is seldom likely to assist where, as here, the language of the later legislation is notably different. Sometimes an inference can be drawn that the later legislation was intended to confirm, or reverse, an interpretation placed on a predecessor provision by a court. But generally the most reliable basis for making such an inference is the language of the legislation itself. A conclusion that a change to the law was, or was not, intended should be reached by interpreting the language enacted rather than by making an a priori assumption about what effect the legislation was intended to have.

244. I do not in any case accept the premises of the argument advanced by URS that the position under the 1935 Act was clearly established and that the Law Commission did not recommend any relevant change in the law. Both assertions, in my view, are mistaken.

Cases under the 1935 Act

245. In most of the cases decided under the 1935 Act in which the question of when D1's cause of action accrued was considered, D1 had been sued to judgment and held liable to C. The question was then raised whether D1's cause of action for contribution against D2 accrued at the date of the accident, when C suffered damage, or only at the date of the judgment given against D1. In *Merlihan v AC Pope Ltd* [1946] KB 166 Birkett J held that the relevant date was the date of the accident. But subsequent authority went the other way. In *Hordern-Richmond Ltd v Duncan* [1947] KB 545 Cassels J disagreed with that view, as did Donovan J in *Morgan v Ashmore, Benson, Pease & Co Ltd* [1953] 1 WLR 418 and Parker J in *Littlewood v George Wimpey & Co Ltd* [1953] 1 WLR 426, 436-438. On appeal in *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501 all the members of the Court of Appeal, in agreement with Parker J, considered that the cause of action for contribution in that case did not arise until judgment was given against D1 (although D1's claim failed on another ground). And on a further appeal to the House of Lords the point was conceded: see *George Wimpey & Co Ltd v British Overseas Airways Corpn* [1955] AC 169, 193. In *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, 108, McNair J thought it implicit, though not a matter of decision, in the speeches of the House of Lords in the *George Wimpey* case that D1's cause of action for contribution did not arise until a judgment for damages was given in the action brought by C against D1.

246. Although it was therefore clearly established that, when D1 had been sued to judgment, its cause of action for contribution did not arise until the judgment was given, the reasoning by which this conclusion was reached was not consistent. One reason given was that the word "liable" where it first appeared in section 6(1)(c) of the 1935 Act meant "held liable". So it was only once D1 had been held liable in respect of damage suffered by C that D1 acquired a right to recover contribution. A forceful expression of this view (although not a necessary part of his reasoning) can be found in the speech of Viscount Simonds in the *George Wimpey* case, at p 178. He began by considering what was meant by the word "liable" when used for the second time in section 6(1)(c) in the words "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage". The phrase "who is, or would if sued have been, liable", as the Law Commission later observed, caused great difficulties of interpretation: see Law Commission Working Paper No 59 (1975) on Contribution, para 30. Viscount Simonds, however, thought it "plain beyond argument" that the word "liable" in that phrase meant "held liable in judgment" because the words "would if sued have been" made a suit a condition of liability. He reasoned that the word "liable" ought to be given the same meaning where it was first used in section 6(1)(c) and that the right to recover contribution was therefore limited to "the case where he who seeks contribution has himself had been sued to judgment" – a restriction which Viscount Simonds did not consider unreasonable: *George Wimpey* [1955] AC 169, 178.

247. In the Court of Appeal in the *George Wimpey* case Singleton LJ had also thought that the natural meaning of the word "liable" in section 6(1)(c) was "held liable", though

he was "prepared to assume" that the term should be interpreted as extending to a case where a tortfeasor paid a claim without being sued to judgment. In such a case, to be entitled to contribution, D1 would have to prove: "(a) that he was a tortfeasor; and (b) that he was liable at the time he paid": see *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501, 510. Morris LJ, while noting that the matter was not directly in issue, also did not think that the word "liable", when first used in section 6(1)(c), need be limited to tortfeasors who had been held liable by a judgment. In his view, in that context "the word may include one who has properly admitted liability to the person who has suffered damage": see p 523. Denning LJ took a different view again (which attracted the support of Lord Keith at p 196 in the House of Lords). He interpreted the word "liable" in both places where it was used in section 6(1)(c) of the 1935 Act to mean, not "held liable", but "responsible in law" for the damage. He nevertheless said, at p 519:

> "It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or by admission, then he has a cause of action for contribution against the second tortfeasor."

The situations (a) where a tortfeasor "has paid nothing and admitted nothing" and (b) where the liability of the tortfeasor has "been ascertained by judgment against him or by admission" are not opposite sides of the same coin. Denning LJ did not consider the intermediate possibility that D1 has made or agreed to make a payment in compensation for the damage but D1's liability has not been ascertained by a judgment or an admission.

248. The differing views about the meaning of the word "liable" in section 6(1)(c) of the 1935 Act expressed in the *George Wimpey* case were regarded by the High Court of Australia as "small wonder, considering the economy of expression practised in the provision" and prompted the High Court to describe the provision as "a piece of law reform which seems itself to call somewhat urgently for reform": see *Bitumen and Oil Refineries (Australia) Ltd v Comr for Government Transport* (1955) 92 CLR 200, 207, 211.

249. At that time there was no statutory limitation period which specifically applied to claims for contribution. Such a limitation period was introduced as section 4 of the Limitation Act 1963. Section 4(1) was similar in structure to the current section 10(1) and (2) of the Limitation Act 1980. The "relevant date" on which a right to recover contribution in respect of any damage accrues, however, was defined differently in section 4(2) as follows:

> "(a) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;
>
> (b) if, in any case not falling within the preceding paragraph, the tortfeasor admits liability in favour of one or more persons in respect of that damage, the relevant date shall be the earliest date on which the amount to be paid by him in discharge of that liability is agreed by or on behalf of the tortfeasor and that person, or each of those persons, as the case may be; …"

250. These provisions reflected the dicta of Denning LJ and Morris LJ in the *George Wimpey* case suggesting that a cause of action for contribution would accrue when D1 was held liable by a judgment or admitted liability for an ascertained amount.

251. In *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651 the Court of Appeal was confronted with a case which did not fall within either limb of section 4(2)(b). D1 was sued in connection with a road traffic accident but settled C's claim before trial by paying £10,000 "without any admission of liability". D1 then claimed contribution from D2, who argued that D1 had no cause of action because no judgment had been given against D1 and D1 had expressly not admitted liability. The Court of Appeal rejected that argument and decided that D1 could make a claim for contribution. Lord Denning MR and Megaw LJ sought to reconcile this conclusion with the wording of section 4(2) of the Limitation Act 1963 by saying that D1 could admit its liability to C in the subsequent proceedings against D2 and thus come within section 4(2)(b). Salmon LJ thought that section 4(2) simply did not cover the situation or affect when the cause of action arose.

252. All the members of the Court of Appeal recognised that the terms of section 4 of the Limitation Act 1963 showed that Viscount Simonds' view that the word "liable", when first used in section 6(1)(c) of the 1935 Act meant "held liable in judgment" could not prevail. Lord Denning felt free in these circumstances to adhere to the view he had expressed in the *George Wimpey* case that "liable" meant "responsible in law" (pp 656F-657A). Salmon LJ agreed with that interpretation (see p 659B-C). All the members of the court made the point that, to establish a right to contribution from D2, D1 would need to prove in the contribution proceedings that it was liable for the damage and that an admission by D1 of its liability to C would not avoid that requirement.

253. There was no further decision of note before the Contribution Act was enacted.

254. On this state of the case law it is unrealistic for URS to suggest that the position under the 1935 Act was clearly established. URS relies on a dictum of Lord Denning MR in *Stott*, at p 657, that "a tortfeasor is entitled to recover contribution from another tortfeasor (i) when he has been held liable in judgment; (ii) when he has admitted liability; and (iii) when he has settled the action by agreeing to make payment to the injured person, even though, in making the settlement, he has not admitted liability". That was an accurate list of the situations in which a right to sue for contribution had been recognised. But there is no reason to suppose that Lord Denning had in mind a case where D1 paid compensation without entering into a settlement agreement with C, just as in the *George Wimpey* case he had not considered the situation that occurred in *Stott* where D1 entered into a settlement without admitting liability.

255. No reported case arose under the 1935 Act in which D1 made a payment to C without entering into a settlement agreement. It is a matter of speculation how such a case, if it had arisen, would have been decided. But the logic of the Court of Appeal's reasoning in *Stott* suggests that D1 should have been entitled to recover contribution in such a case. Salmon LJ thought that the fact that in *Stott* D1's payment was made without any admission of liability was "without any legal significance", given that D1 would still have to prove its liability in the contribution proceedings against D2 (p 659H). Megaw LJ made the same point, at p 661A-B:

> "… I can see no reason, apart from an argument based on the wording of section 4(2)(b) of the Limitation Act 1963, why the right of the defendant to seek contribution from an alleged joint tortfeasor should depend on whether or not the settlement between the plaintiff and the defendant is one in which the latter has admitted liability. Such a distinction would be illogical and, so far as I can see, without any practical justification. For even if the defendant in his settlement with the plaintiff has expressly admitted liability, the alleged joint tortfeasor can still, if he sees fit, require the defendant to show, not merely an admission of liability to the plaintiff, but the existence of such liability."

The same point can be made about any requirement for the liability of D1 to C to be ascertained as between those parties: D2 could still require D1 to prove in the contribution proceedings the existence of its liability to C in an amount at least as great as the amount which D1 had paid or agreed to pay to C as compensation for the damage.

256. The Law Commission, in its report which preceded the Contribution Act, criticised the need, highlighted by the decision in *Stott*, for a "settling" defendant to prove its own liability in order to recover contribution. It was particularly concerned that this might deter defendants from compromising claims for fear that to do so would put their right to contribution at risk. The Law Commission recommended that a person who made a bona

fide compromise of a claim should be entitled to recover contribution without the need to show that the claim would have succeeded if it had not been compromised: see report (Law Com No 79, 1977), paras 44-57 and 81(e). That recommendation, however, as I will explain shortly, was not fully adopted.

What the Law Commission recommended

257. Turning to the next step in its argument, URS is also wrong to assert that the report of the Law Commission which preceded the Contribution Act did not recommend any change to the law about when a cause of action for contribution accrued.

258. The Law Commission criticised as lacking clarity the phrase used in section 6(1)(c) of the 1935 Act "who is, or would if sued have been, liable", which had been interpreted in a variety of ways. It recommended that instead "a person should be liable to contribution proceedings if he was liable for the damage at the time when the damage occurred": see report, para 59. Although not discussed in the body of the report, the draft Bill annexed to the report proposed that the same rule should determine when a person becomes entitled to recover contribution. Clause 3(1) of the draft Bill read:

> "Subject to the following provisions of this section, any person who is liable in respect of any damage suffered by another person *at the time when the damage in question occurs* may recover contribution from any other person who is liable in respect of the same damage at that time (whether jointly with him or otherwise)" (emphasis added).

259. Nothing in the following provisions of clause 3 qualified the proposal that a person liable in respect of the damage when it occurred should be able to recover contribution from any other such person or added any further requirement – such as a judgment, admission, settlement or even a payment – which would have to be satisfied before a right of action arose. The Explanatory Notes to clause 3 of the draft Bill (note 3) confirmed that the right to recover contribution was intended to arise as soon as the damage occurred and that under the proposed legislation "a person seeking to recover contribution does not cease to be able to do so because his liability has been discharged by payment or compromise".

260. Had this recommendation of the Law Commission been adopted, far from maintaining the status quo, it would have made a radical change to the law about when a cause of action for contribution accrued. The basic rule would have been the approach taken in *Merlihan* but rejected in the subsequent case law under the 1935 Act, that the relevant date was the date of the accident. Far from making ascertainment of liability an essential element of the cause of action, it would also have confined the elements that

must be established to the three which BDW contends are sufficient: that is, (1) C has suffered damage for which (2) D1 is liable and (3) D2 is also liable. Adoption of the Law Commission's proposal would certainly have required reconsideration of the law specifying the limitation period for bringing contribution proceedings. The Law Commission, however, deliberately refrained from making any recommendations in its report for changing this aspect of the law because the law of limitation was at the time being examined by the Law Reform Committee (see report, paras 32 and 80(d)).

261. In the event the report of the Law Reform Committee said nothing about claims for contribution. What is, however, clear is that Parliament did not adopt the Law Commission's proposal that the liability of D1 and D2 should be determined at the time when the damage occurred. Section 1 of the Contribution Act is worded in very different terms and has a different scheme from clause 3 of the Law Commission's draft Bill. Under section 1(1) the basic rule is that the liability of D1 and D2 is to be determined, not at the time when the damage occurred, but at the time when contribution is being sought. I would adopt on this point the analysis of Lord Hope, with whom the other members of the House of Lords agreed, in *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17; [2002] 1 WLR 1419, paras 52-60. Qualifications to that basic rule are contained in section 1(2) and (3), which do not reflect any recommendation of the Law Commission. As noted earlier, section 1(2) entitles D1 to recover contribution even if D1 has ceased to be liable to C, provided that D1 was liable in respect of the damage "immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought".

262. Under the scheme of section 1 the only significance of a settlement is that it modifies the requirement, in any case where D1's liability has not been established by a judgment in an action brought by C, for D1 to prove that its liability could be established in such an action. The recommendation of the Law Commission that a bona fide compromise should obviate altogether the need for D1 to show that it was responsible in law for the damage was not accepted. Section 1(4) of the Contribution Act provides that a person who has made a bona fide compromise of a claim is entitled to recover contribution "without regard to whether or not he himself is or ever was liable in respect of the damage", but adds a proviso: "provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established". The result is that a bona fide compromise removes the need for D1 to prove the facts alleged against him by C; but D1 still has to show that it was liable in law to C based on those facts. So, for example, in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, a solicitor's firm settled a claim based on an allegation that a partner in the firm had dishonestly assisted in a fraudulent scheme by drafting sham agreements. To recover contribution from other participants in the scheme, the firm still had to show that as a matter of law on the facts alleged it was vicariously liable for the partner's conduct.

263. In cases where (in the absence of a judgment) D1 has made or agreed to make a payment to C, I think it impossible to interpret the language of section 1 of the

Contribution Act as making it a condition of D1's entitlement to recover contribution that the payment was made, or agreed to be made, in settlement or compromise of a claim. The only difference that a bona fide settlement or compromise of a claim makes is that D1 then gets the benefit in contribution proceedings of the statutory assumption provided by section 1(4) that the factual basis of the claim could be established. It is inherent in the statutory scheme that, where there is no settlement agreement ascertaining the existence and amount of D1's liability, D1 is entitled to recover contribution provided it can prove the relevant facts as well as its liability in law to C on the basis of those facts.

264. The amendment made by the Contribution Act to section 4(2)(b) of the Limitation Act 1963 confirms that this is its intended effect. When the amended wording (now contained in section 10(4) of the Limitation Act 1980 quoted at para 228 above) is compared with the original wording (quoted at para 228 above), the following material changes can be seen. First, the provision is no longer limited to cases where D1 "admits liability". Instead, it applies when D1 "makes or agrees to make any payment … (whether he admits any liability in respect of the damage or not)". This change addresses the deficiency identified in *Stott*. Second, there is no requirement that the payment which D1 makes or agrees to make must be in settlement or compromise of a claim. The only requirement is that it be "in compensation for [the] damage". Third, the agreement between D1 and C contemplated by the provision is no longer an agreement on the amount to be paid by D1 "in discharge of [D1's] liability" but is instead simply an agreement on the amount to be paid by D1. These changes make it clear that, in a case where there is no judgment or arbitration award, the accrual of a right to recover contribution does not depend upon D1's liability being ascertained by an admission of liability or by a compromise and that a payment (or agreement to make a payment) is by itself enough.

265. Is there any reason of legal policy that would favour requiring D1's total liability to C to be ascertained before D1 can recover contribution? URS points out that such a requirement would promote legal certainty by protecting D2 against the risk of being required to pay twice. This could otherwise happen here if it turns out that the remedial works have not cured all the defects in the Developments for which BDW and URS were responsible. Some risk of multiple claims is, however, unavoidable even on URS's case. For example, a settlement between C and D1 does not on any view prevent C from suing D2 after D2 has paid contribution to D1. Nor would a settlement between some homeowners and BDW which gave rise to a right to recover contribution from URS prevent other homeowners from suing BDW and, if that claim succeeds, giving rise to a second contribution claim. In any case, the burden on D2 of being exposed to multiple claims must be set against the unfairness of denying D1 a right to recover contribution in a situation where D1 has reduced or discharged a common liability of D1 and D2 to C but C is unwilling to enter into a settlement agreement with D1, or it is impracticable to negotiate such an agreement (as may be the case with the many owners of flats in a large residential development). A policy choice to allow contribution to be recovered without requiring D1's total liability to be ascertained is not irrational or unreasonable. At all events it is plainly not a requirement that Parliament has imposed.

Conclusion on contribution

266. I would therefore decide issue 4 against URS. In my view, BDW is not prevented from bringing a claim for contribution against URS by the fact that there has been no judgment against BDW or settlement between BDW and any third party and no third party has ever asserted any claim against BDW. It is sufficient that BDW has made a payment in kind (by performing remedial works) in compensation for the damage suffered by the homeowners.

Issue 2: The effect of section 135 of the BSA

267. I consider last the impact of section 135 on BDW's claims to recover from URS all or part of its costs incurred in remedying defects in the Developments.

268. For convenience I repeat the relevant text of section 135:

> "**135 Limitation periods**
>
> (1) After section 4A of the Limitation Act 1980 insert—
>
> **'4B Special time limit for certain actions in respect of damage or defects in relation to buildings**
>
> (1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.
>
> …
>
> (3) In this section "relevant provision" means—
>
> (a) section 1 or 2A of the Defective Premises Act 1972;
>
> (b) section 38 of the Building Act 1984.

(4) Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.

(5) In subsection (4) "the commencement date" means the day on which section 135 of the Building Safety Act 2022 came into force.'

…

(3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.

…

(5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.

(6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).

(7) In this section—

'Convention rights' has the same meaning as in the Human Rights Act 1998; … ."

269. Although the new 15-year time limit applies to actions which a person becomes entitled to bring "by virtue of a relevant provision", and three such provisions are specified, the 30-year time limit which is given retrospective effect by section 135(3) applies only to actions which a person became entitled to bring by virtue of one of these provisions: namely, section 1 of the DPA. The reason for this is not obvious at first sight.

But it is explained by the fact that section 1 of the DPA was the only "relevant provision" already in force. Of the other two provisions, section 2A of the DPA was introduced by the BSA itself (see section 134(1)); and the relevant part of section 38 of the Building Act 1984 had not (and still has not) been brought into force. So there was no possibility of the new time limit operating retrospectively in relation to those provisions.

270. As it affects claims for remedies for breach of the statutory duty imposed by section 1 of the DPA, the basic scheme of section 135 is clear enough:

> (i) Whenever a right to bring an action for breach of the statutory duty arises after section 135 has come into force, the limitation period for bringing the action is 15 years from when the right to do so accrued, ie from the date when the dwelling was completed (see section 1(5) of the DPA and the new section 4B(1) of the Limitation Act 1980).
>
> (ii) Where a right to bring such an action had already accrued before section 135 came into force, then upon its commencement the limitation period became 30 years from when the right to bring the action accrued (see the new section 4B(4) of the Limitation Act 1980).
>
> (iii) This new 30-year limitation period applies even if the original six-year limitation period had already expired before section 135 came into force (see section 135(3)).

271. It is a strong thing to legislate to revive a limitation period that has already expired because doing so is unfair to those who can now once again be sued. As Lord Brightman, giving the judgment of the Privy Council, said in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 563:

> "When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence."

272. Because of the unfairness to potential defendants, courts approach legislation with a presumption that it is not intended to have such an effect. To quote Lindley LJ in *Lauri v Renad* [1892] 3 Ch 402, 420-421:

> "It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

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

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.

275. It is common ground that section 135 has such retrospective operation. That is the undoubted effect of section 135(3), which requires the new 30-year time limit "to be treated as always having been in force". But the extent of this retrospective operation is disputed. As with the contribution issue, the interpretations advanced by URS and BDW were, at least initially, at opposite extremes.

URS's case

276. URS submitted in its written case that section 135(3) should be construed as applying only between a claimant who brings an action under section 1 of the DPA and a defendant who asserts a limitation defence in such an action. It does not apply when a question about whether a claim under section 1 of the DPA was time-barred arises in any other context. Thus, section 135(3) does not affect BDW's claim in the tort of negligence or its claim for contribution. And even as regards BDW's claim under section 1 of the DPA, it applies only to prevent URS from asserting that the claim is time-barred; it does not enable BDW to say that, when it carried out remedial works before section 135 came into force, it was under an enforceable legal liability to the homeowners for breach of the statutory duty imposed by section 1 of the DPA.

277. The points made in support of this extremely narrow interpretation of section 135(3) include the following. Section 135(3) does not provide, as it could have done, that the amendment made by section 135(1) to the Limitation Act 1980 is to be treated as retroactive "for all purposes". It applies only "in relation to an action by virtue of section 1 of the [DPA]", which presupposes the existence of an action for breach of the statutory duty imposed by section 1 of the DPA. Section 135(5), which requires a court to dismiss an action if satisfied that it is necessary to do so to avoid a breach of the defendant's Convention rights, is only apt where the action is brought under section 1 of the DPA. Section 135(5) applies "[w]here an action is brought that, *but for [section 135(3)]*, would have been barred by the Limitation Act 1980" (emphasis added). The only claims that fall within this description are claims for redress for breach of the statutory duty imposed by section 1 of the DPA. URS also relies on the presumption against retrospectivity described above which requires giving the legislation no greater retrospective effect than is necessary to give effect to its clear language or manifest purpose. That favours giving section 135(3) the narrowest possible interpretation.

278. Taking these points in turn, noting that different words could have been used is seldom a fruitful approach to interpretation. Although section 135(3) does not include the words "for all purposes", its language is unqualified. So if there is any limitation on the purposes for which the amendment made by section 135(1) is to be treated as "always having been in force", it must be derived by necessary implication from the object and/or other words of the legislation. The words "in relation to an action by virtue of section 1 of the [DPA]" are explained, as noted above, by the fact that section 1 of the DPA is the only "relevant provision" to which the new 30-year time limit applies. Those words cannot, in my view, reasonably be read as restricting the context in which section 135(3) applies to actions brought under section 1 of the DPA. They signify only that the sole part of the amendment made by section 135(1) which is to be treated as "always having been in force" is the new section 4B(4) of the Limitation Act 1980, which introduces the 30-year time limit.

279. Section 135(5) does seem to me only apt where an action is brought under section 1 of the DPA in which a limitation defence is raised. But it does not follow that section 135(3) cannot have any legal impact in any other type of action. An action under section 1 of the DPA is on any view the only type of action which could itself be barred by the Limitation Act 1980 but for the retrospective operation of the 30-year time limit, and I find it hard to envisage any other situation in which the retrospective operation of the time limit might be said to infringe the defendant's Convention rights. Finally, the presumption against retrospectivity is important, but does not dispense with the need to analyse the language and purpose of the legislation.

280. In the event, in oral argument Mr Rabinowitz KC did not seek to defend the interpretation advanced in URS's written case. He accepted that the 30-year time limit operates retrospectively not only in an action which is itself brought under section 1 of the DPA but also in an action brought under the Contribution Act when a question arises about whether a claim under section 1 of the DPA is or was time-barred. In my opinion, that concession was rightly made. As counsel for BDW pointed out, the narrow interpretation initially advanced by URS would lead to the absurdity that a homeowner could bring a claim against a developer or against a contractor (or both) for breach of the statutory duty, invoking the 30-year limitation period; yet neither the developer nor the contractor, if held liable to pay damages, could recover contribution from the other. Such a result would defeat both the purpose of the Contribution Act and the purpose of the BSA in seeking to ensure that the cost of compensation is ultimately borne by those who were responsible for the damage.

281. This concession cannot be accommodated just by making an exception. It requires a return to the drawing board. The proposition that section 135(3) applies only between a claimant suing under section 1 of the DPA and a defendant who asserts a limitation defence in such an action no longer holds. If, as conceded, section 135(3) also applies in contribution proceedings, then why not in any proceedings including where the claim is in the tort of negligence? And if the retrospective operation of the time limit is not confined to cases where the time limit is relied on to bar the action in which the issue arises, what restriction is there, if any, on the purposes for which the time limit is to be treated as "always having been in force"? Answers to these questions are needed.

BDW's case

282. The case initially advanced by BDW (and by the Secretary of State in her written intervention) was that there is no restriction at all on the scope of section 135(3) and that its unqualified language means that the new time limit is to be treated as always having been in force for all purposes. Like the case originally advanced by URS, this case also has the merit of simplicity. But examples raised in argument showed that it too cannot be sustained. Lord Hamblen and Lord Burrows have described some examples put forward by URS at para 122 of their judgment. Another, posed in argument by Lord Briggs, is a

hypothetical case of a solicitor who advised a developer client that any potential claim against it for breach of the statutory duty was time-barred. Relying on that advice, the client did not take any steps to remedy building safety defects at a time when (let it be supposed) this could have been done at much less expense than would now be required. Subsequently, the BSA is enacted and comes into force. Can it now be said that, because the 30-year time limit is to be treated as always having been in force, the solicitor is liable to the client for professional negligence in advising that any claim against it for breach of the statutory duty was time-barred?

283. It seems obvious that the answer must be "no". But the question then is: why not? The same applies to most of the examples described by Lord Hamblen and Lord Burrows.

284. I think there are two reasons. The first is that, as Lord Hamblen and Lord Burrows observe at para 121 of their judgment, there is a distinction between altering the law and altering other facts which were dependent on or affected by what the law was at a given time. In the case of the solicitor, whether the advice given was negligent depends on what advice a reasonably competent and careful solicitor would have given in the circumstances existing when the advice was given. Changing the limitation period retrospectively does not change what advice such a solicitor would have given about whether the limitation period had expired. It would be a further, and unwarranted, step to treat the answer to that question as retrospectively altered by section 135(3) of the BSA.

285. This may be the point that URS was seeking to make when it submitted that section 135(3) should not be interpreted as "re-writing history". I do not, though, find that expression helpful, as requiring a new statutory provision "to be treated as always having been in force" necessarily involves replacing historical fact with a historical fiction. The only question is how far the fiction extends.

286. The second reason for not interpreting section 135(3) as affecting such cases is that to do so would not be justified by the purposes of the legislation. For example, the relevant aim of seeking to ensure that historical building safety defects are remedied by those responsible for them would not be promoted by treating a solicitor who gave what at the time was impeccable legal advice as if that advice had been negligent. Such a measure would visit serious unfairness on the solicitor without advancing any relevant policy goal.

287. In my view, these are the two criteria which determine the extent to which the 30-year time limit must be treated as having retrospective operation.

The contribution claim

288. With these criteria in mind, I consider first how section 135(3) affects BDW's claim for contribution. For this purpose I am assuming that: (1) the homeowners suffered damage either when they acquired their flats or when defects in the Developments were discovered; and (2) apart from the question of limitation, each of BDW and URS was liable in respect of the damage on the basis that the damage resulted from breach of the statutory duty imposed on them by section 1 of the DPA.

289. To decide whether BDW is entitled to recover contribution from URS, it is necessary to consider the effect of section 1(2) of the Contribution Act. When, within the meaning of that provision, is it to be said that a person "has ceased to be liable in respect of the damage in question"? There seem to me to be two potentially relevant circumstances. First, D1 ceases to be liable if and in so far as D1 rectifies the damage, whether by carrying out repairs or by paying compensation to C. A second way in which D1 ceases to be liable is by virtue of the expiry of the limitation period within which a claim for compensation by C must be brought.

290. It might be suggested that the expiry of a limitation period does not cause D1's liability to cease because its effect is not, in general, to extinguish the right on which C's claim is based but only to prevent C from obtaining a remedy if D1 raises a defence of limitation. Comparison with section 1(3), however, shows that this cannot be the correct interpretation. Section 1(3) uses similar wording to section 1(2) in providing that a person shall be liable to make contribution notwithstanding that "he has ceased to be liable in respect of the damage in question". But it is subject to a different proviso. In section 1(3) the proviso is: "unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based". The necessary implication is that the expiry of a limitation period of any kind causes a person to cease to be liable, as that phrase is used in section 1 of the Contribution Act; and that, as section 1(2) contains no proviso corresponding to that in section 1(3), it makes no difference for the purpose of section 1(2) whether the limitation period which, on its expiry, causes D1 to cease to be liable is one which extinguishes the right or merely creates a procedural bar to obtaining a remedy.

291. In so far as the remedial works that BDW has carried out have rectified the damage suffered by owners of flats in the Developments, any liability of BDW in respect of the damage ceased when the works were performed. Under section 1(2) of the Contribution Act BDW is entitled to recover contribution notwithstanding that fact, provided that BDW was liable immediately before the works (which represented payment in kind) were carried out. Whether that condition is met depends on whether, at that time, the liability of BDW in respect of the damage could have been established in an action brought against BDW by owners of flats. That in turn depends on whether, at that time, such an action by homeowners was time-barred.

292. No such question arises in relation to the liability of URS to make contribution. For that purpose, under section 1(3) of the Contribution Act it does not matter whether, immediately before the works were carried out, an action by homeowners against URS would have been time-barred. That is because the expiry of the time limit would only have barred the homeowners from obtaining a remedy and would not have extinguished the right on which the claim against URS (under section 1 of the DPA) was based.

293. Returning to the test imposed by section 1(2) of the Contribution Act, it is necessary to consider separately remedial works carried out before and after section 135 of the BSA came into force on 28 June 2022. After that date the liability of BDW could (on the assumed facts) have been established in an action brought against it by homeowners claiming compensation for damage caused to them by breach of BDW's statutory duty under section 1 of the DPA to build the flats properly. Such an action would not have been barred by the Limitation Act 1980 because the original six-year time limit had been replaced by the 30-year time limit introduced by section 135(1) of the BSA, which has a long way still to run. So BDW is entitled to recover contribution in respect of remedial work carried out after 28 June 2022.

294. The same applies as regards remedial work carried out before that date. URS accepts that the purposes for which the 30-year time limit is to be treated, by reason of section 135(3), as always having been in force include a claim under the Contribution Act. In any case, applying the first criterion identified above, the question about the expiry of the limitation period that arises in applying section 1(2) of the Contribution Act is a pure question of law. It is simply whether, immediately before the work that constituted payment in kind was done, the limitation period for an action brought by the homeowners against BDW under section 1 of the DPA had expired. The right to recover contribution does not depend on any further factual issue which is itself affected by whether that limitation period had expired.

295. I have already observed that interpreting the retrospective effect of section 4B(4) of the Limitation Act 1980 as inapplicable when a question about the time limit for bringing a claim under section 1 of the DPA is raised in contribution proceedings would defeat both the purpose of the Contribution Act and the purpose of the BSA in seeking to ensure that the cost of compensation is ultimately borne by those who were responsible for the damage. For this reason too the legislation must be interpreted as enabling BDW to recover contribution from URS in respect of remedial work done before as well as after section 135 of the BSA came into force.

The negligence claim

296. The position is different as regards BDW's claim against URS for damages based on the tort of negligence. Ironically, if URS were right that there is a legal rule that

payments which the claimant was not legally liable to make are irrecoverable, section 135 could be said to have a relevant retrospective effect. But, as discussed above, there is in my view no such rule. The key question is one of causation: whether BDW's decision to carry out remedial works should be regarded as a consequence of the assumed negligence of URS or of a choice freely made by BDW.

297. As regards remedial work done after 28 June 2022, the answer to that question seems clear. On the assumed facts, as a result of the negligence of URS, BDW was in breach of its statutory duty owed to the homeowners under section 1 of the DPA and exposed to the risk of proceedings claiming compensation for breach of that duty. The limitation defence which BDW would previously have had to such a claim had been removed on the coming into force of section 135 of the BSA. It would be very difficult for URS to argue that carrying out remedial work which discharged the liability of BDW (and URS) to the homeowners was not a step that BDW could reasonably be expected to take in mitigation.

298. As regards remedial work done before 28 June 2022, I have considered in addressing issue 1 how the matter stood when the work was carried out. Any claim by the homeowners against BDW for breach of its statutory duty would at that stage have been time-barred. So BDW could not have argued in the present action that carrying out remedial work was a step that it could reasonably be expected to take to discharge its legal liability to the homeowners, as BDW was not under any enforceable legal liability to the homeowners. As discussed earlier, BDW would have had to rely on other reasons to justify its conduct, such as avoiding or minimising damage to its commercial reputation. Whether the decision to carry out remedial work should be regarded as voluntary is a fact-sensitive question which will require the judge at a trial to make an evaluative judgment, having regard to the circumstances in which BDW found itself at the relevant time.

299. The position is not changed by the coming into force of section 135 of the BSA. That provision has altered the law with retrospective effect but, applying the distinction drawn above, it would be an unwarranted further implication to treat it as having altered facts which were dependent on or affected by what the law was at the relevant past time (here, the time when the remedial work was carried out). The question of what mitigating action BDW would reasonably be expected to take and whether its decision to remedy defects in the Developments should be regarded as a consequence of the negligence of URS or a choice freely made by BDW must therefore still be answered by reference to the circumstances as they actually were when BDW decided to carry out the work. The fact that the time limit for claims under section 1 of the DPA has changed retrospectively does not retrospectively change what a reasonable and prudent person in the position of BDW would have done.

300. Nor is a different approach required to give effect to the manifest purpose of section 135 of the BSA. The aim of ensuring that historical building safety defects are

remedied without the leaseholders having to bear the cost is not furthered by creating a new cause of action in respect of remedial work that had already been done by a developer before the law was changed. It is impossible, by changing the law, to have any impact on what has already happened in the past. Further, suppose for the sake of argument that when BDW carried out the remedial work it would have understood, if correctly advised, that the expense would be regarded as voluntary and that this is what the court would have found if this action had been tried before 28 June 2022. It would be arbitrary and unjust if a different answer were given at a trial taking place after that date – in the same way as it would be unjust if the solicitor were now to be held to have given negligent advice in the case postulated by Lord Briggs (see para 282 above). Section 135 of the BSA should not be given an interpretation which gives rise to such unfair and unreasonable results.

301. This conclusion is reinforced by the principle that a statute, even though clearly intended to have retrospective effect, should not be construed as having any greater retrospective operation than is clearly necessary.

The DPA claim

302. This leaves the DPA claim. On the basis that URS owed a duty under section 1 of the DPA to BDW, the time limit for a claim by BDW for loss caused by URS's breach of this duty is now 30 years from when the flats were completed. So URS has no limitation defence to such a claim.

303. In so far, however, as BDW is claiming compensation for the cost of carrying out remedial work before section 135 came into force, the same issues of causation, mitigation and remoteness arise as in the claim based on the tort of negligence. Again, therefore, for the same reasons, section 135 on its proper interpretation does not affect the analysis of those issues.

Conclusion on retrospective effect

304. I would therefore answer issue 2 as follows. Section 135 of the BSA makes it possible for BDW to bring claims in these proceedings against URS for damages for breach of a duty owed to BDW under section 1 of the DPA and for contribution. But in relation to its claim for damages in the tort of negligence (which BDW had already begun before the BSA came into force) and the DPA claim, section 135 does not retrospectively affect the answer to the questions of causation, mitigation and remoteness which determine whether BDW can recover compensation from URS for the cost of remedial work carried out before section 135 of the BSA came into force.

Result

305. For these reasons, I would dismiss the appeal.