Case No: PT-2024-CDF-000024 /
PT-2024-CDF-000025 /
PT-2024-CDF-000026

[2024] EWHC 2831 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISON
DIVISIONAL COURT

Cardiff Civil and Family Justice Centre
2 Park St, Cardiff, CF10 1ET

8 November 2024

B E F O R E:

THE HONOURABLE MR JUSTICE GRIFFITHS

HIS HONOUR JUDGE JARMAN KC (sitting as a Judge of the High Court)

- -

PT-2024-CDF-000024

B E T W E E N:

(1) COASTAL HOUSING GROUP LIMITED
(2) TAI CALON COMMUNITY HOUSING LIMITED

CLAIMANTS

- and -

(1) MRS DAWN MITCHELL
(2) MS HELEN LOUISE JONES

DEFENDANTS

PT-2024-CDF-000025

B E T W E E N:

VALLEYS TO COAST HOUSING LIMITED

CLAIMANT

- and -

MR ANDREW WALLBRIDGE

DEFENDANT

PT-2024-CDF-000026

B E T W E E N:

BRON AFON COMMUNITY HOUSING LIMITED

CLAIMANT

- and -

MR WILLIAM JOHN WADLEY

DEFENDANT

A N D:

(1) THE WELSH MINISTERS
(2) TRIVALLIS LIMITED
(3) WALES AND WEST HOUSING ASSOCIATION LIMTIED

INTERVENERS

- - - - - - - - - - - - - - - - - - - -

PT-2024-CDF-000024
Justin Bates KC, Sarah Salmon and Jack Barber (on Issues 1 to 4) and
Paul Bowen KC and Sarah Salmon (on Issue 5)
(instructed by Devonshires Solicitors LLP) for the Claimants
Ranjit Bhose KC and Tara O' Leary
(instructed by Winckworth Sherwood LLP) for the Defendants

PT-2024-CDF-000025
Justin Bates KC, Sarah Salmon, Owain Rhys James and Jack Barber
(instructed by Legal Department, Valleys to Coastal Housing Limited) for the Claimant
Ranjit Bhose KC and Tara O' Leary
(instructed by Winckworth Sherwood LLP) for the Defendant

PT-2024-CDF-000026
Justin Bates KC, Sarah Salmon and Jack Barber
(instructed by Hugh James) for the Claimant
Ranjit Bhose KC and Tara O'Leary
(instructed by Winckworth Sherwood LLP) for the Defendant

Intervening in all three cases (PT-2024-CDF-000024/25/26)
Emyr Jones and Jack Stanley
(instructed by Legal Services, Welsh Government) for the First Interveners
Paul Bowen KC and Sarah Salmon (instructed by Devonshires Solicitors LLP)
for the Second and Third Interveners (written submissions only)

Hearing dates: 18-19 July 2024,
further written submissions 22 July - 1 August and 14 October 2024

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Approved Judgment

The Hon. Mr Justice Griffiths and His Honour Judge Jarman KC:

1. The Renting Homes (Wales) Act 2016 ("the Act") came into force on 1 December 2022. It is an Act of the National Assembly of Wales (now the Senedd) under its devolved powers. It has been fairly described to us in argument as the most significant change to housing law in England and Wales since rent controls were introduced, over a hundred years ago, by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

2. This is the judgment of the court to which both of us have contributed. It has been written in English but it will be translated and also made available in Welsh in accordance with previous practice in suitable cases in Wales, e.g. *R (Jones v Denbighshire County Council* [2016] EWHC 2074 (Admin) and *R (The Welsh Language Commissioner) v National Savings and Investments and The Welsh Ministers* [2014] EWHC 488 (Admin).

Background

3. All the claimants (and the second and third interveners) are Registered Social Landlords within the meaning of the Housing Act 1996, based in Wales. Together, the claimants are collectively responsible for over 25,000 homes in Wales (around 15% of the homes provided by not-for-profit housing associations in Wales).

4. All the defendants are occupiers whose tenancies have been converted into housing contracts under the Act. They have agreed to be defendants so that the issues the claimants wish to raise can be brought to court. Although they are parties to this test case by arrangement, they have been represented by leading and junior Counsel who have argued in their interests (and in the interests of contract-holders in general) as strongly and independently as in any other adversarial litigation. The Welsh Ministers have also intervened and made submissions, as have two other housing associations. We are grateful to all the parties, and all their lawyers, for the work which has been done to bring these cases to court at speed, in order to resolve questions which are considered urgent because of their potential impact on the auditing of the housing associations' accounts and on county court claims for possession based on alleged arrears of rent.

5. The immediate reason for bringing these cases to court is that the claimants recognise that they were under an obligation to give electrical condition reports to the defendants following the coming into force of the Act. Unfortunately, although they commissioned and obtained these reports, they failed physically to provide them to contract-holders, including the defendants, by the due dates. By the time this oversight was spotted, they were several months overdue. No contract-holder, and certainly no defendant, withheld rent on this account. But the claimants recognise that it is arguable that they were entitled to do so. By these proceedings, the claimants seek a definitive determination of whether that is the case and, if so, what the full implications of that are for them, together with other, related, matters. We have been told that the claimants estimate that over £50 million may be at stake, when all their contract-holders (not just the defendants) are taken into account.

6. Since no defendant in fact withheld rent, there is a separate issue as to whether they are or may be entitled to counterclaim for repayment of rent. For practical reasons, the

parties have decided not to ask for that to determined at this stage, and we are not, therefore, at present concerned with the counterclaims.

The Law Commission proposals

7. The Renting Homes (Wales) Act 2016 derives from recommendations of the Law Commission, which began a consultation on legislation relating to renting homes in 2002.

8. In 2003, the Law Commission produced its first report to the UK Parliament, *Renting Homes* (Law Com No 284). It proposed fundamental changes together with a new approach, and a bill to implement these changes. The report identified as "a primary objective" the creation of a scheme which would reduce "the complexity of the law regulating the relationship between landlords and the occupiers of residential accommodation" [2.3]. It quoted Lord Hewart LCJ who said, in *Parry v Harding* [1925] 1 KB 111, 114:

> "It is deplorable that in dealing with such a matter as this, a Court, and still more a private individual, and most of all a private individual who lives in a small tenement, should have to make some sort of path through the labyrinth and jungle of these sections and schedules. One would have thought that this was a matter above all others which the Legislature would take pains to make abundantly clear."

9. At [2.5] the report said:

> "The proposed Bill will not only include detailed changes to the existing rules, but also fundamental change to the legislative approach to the regulation of this sector of the housing market. In particular the historic linkage between principles of property law and housing legislation will, so far as is practicable, be abandoned; instead, a new approach based on contract which incorporates consumer law principles of fairness and transparency is proposed."

10. The report emphasised the Law Commission's recommendation that the contract between owner and occupier should be the primary source of their respective rights and obligations, see for example [3.2] and [4.2-4.3]. At [4.3], it said:

> "Two essential principles underpin this approach:
>
> (1) agreements between landlords and occupiers should be more transparent; so far as possible the rights and obligations of both parties to the agreement should be set out there, and should not have to be discovered by reference to supplementary rules in Acts of Parliament, law reports or legal textbooks;
>
> (2) agreements should be fair; there should be a fair balance of rights and obligations on both sides of the agreement, for both landlords and occupiers."

11. These principles were maintained in the final report produced in 2006, *Renting Homes: The Final Report* (Law Com. No 297) ("the Final Report"). Volume 2 of the Final Report contained the draft bill. The Final Report anticipated the passing of the Government of Wales Act 2006, which conferred further legislative competence upon what was then the National Assembly for Wales, and it made specific recommendations for implementation in Wales.

12. In 2007, the then Welsh Minister for Housing accepted the recommendations in principle.

13. The UK Government in 2009 rejected the Law Commission proposals and there has been no UK-wide legislation in response to them.

14. In 2012, the Welsh Government committed to introduce a housing bill that was closely modelled on the Law Commission's proposals and asked it to review and update its recommendations. It did so in 2013 in *Renting Homes in Wales* (Law Commission paper 337). Its summary of recommendations included:

> "2.2 The complexity of the legal framework is a contributory factor to the poor reputation of the rented sector, as many landlord and tenant disputes result from ignorance of the law. It also means that compliance costs are high and the outcomes of litigation unpredictable, which particularly affects the providers of social housing.
>
> 2.3 At the heart of the Renting Homes recommendations is the replacement of dense statutory provisions, obscure common law rules and multiple tenancy types with statutorily regulated contracts to be used by all rental providers. Model contracts, underpinned by statute, will set out the basis upon which accommodation is rented, provide clear and accurate statements of the rights and responsibilities of the parties, and explain the circumstances in which rights to occupy may be brought to an end. The contracts will be easily available and easily understood."

The legislation

15. The Act is closely modelled on the Law Commission's proposals and replaces in Wales the many legislative provisions which previously governed the renting of homes.

16. Most people who rent their homes in Wales will enter into a contract with their landlord known as an occupation contract (section 1(1)(a) of the Act). The contract gives a person the right to occupy a dwelling as a home for rent or consideration: (section 7(1), (2)-(3)) and each such person is described as a contract-holder rather than a tenant (section 7(5)). Contracts may be either secure or standard (section 1(1)(b)) and there may be either community or private landlords (section 2). Community landlords will usually enter into a periodic secure contract and that is the type of contract with which we are concerned.

17. The Act also provides for the terms of the contract. The key matters to be included in secure contracts include the dwelling, the occupation date, the amount of rent or other consideration and the rental periods (section 26). There are also fundamental provisions to be incorporated into contracts as fundamental terms (section 19). Section 19(3) provides:

> "(3) A reference in this Act to a section or other provision which is a fundamental provision has effect, in relation to a contract in which the fundamental provision is incorporated (with or without modifications), as a reference to the fundamental term of the contract which incorporates the fundamental provision."

18. The landlord and contract-holder may agree that there is no such incorporation or modified incorporation as long as that the position of the contract-holder is thereby improved (section 20). Then there are set out supplementary provisions which may be incorporated as supplementary terms, or may be omitted or modified by agreement but not so as to be incompatible with a fundamental term (sections 24-25). The parties may also agree additional terms, but there are restrictions on what may be agreed (section 28).

19. The landlord must "give" the contract-holder within 14 days of occupation a written statement setting out key matters in relation to the contract and its fundamental supplementary and any additional terms with prescribed explanatory information (section 31). Any applicable fundamental or supplementary provision not incorporated as a term must be identified (section 32). In default the contract-holder may apply to the court for a declaration as to the terms of the contract (section 34(1)) and the landlord is liable to pay the contract-holder compensation under section 87. That section, which also sets out other failures which may give rise to compensation, is important in the context of these proceedings and so will be set out in full:

> **"87 Compensation for failures relating to provision of written statements etc.**
>
> (1) The following sections set out the circumstances in which a landlord may be liable to pay compensation under this section—
>
> (a) section 35 (failure to provide a written statement under section 31);
>
> (b) section 36 (providing an incomplete written statement);
>
> (c) section 37 (providing an incorrect written statement);
>
> (d) section 40 (failure to provide information under section 39);
>
> (e) section 110 (failure to provide written statement of variation of secure contract);
>
> (f) section 129 (failure to provide written statement of variation of periodic standard contract);

> (g) section 137 (failure to provide written statement of variation of fixed term standard contract).
>
> (2) Where the landlord under an occupation contract is liable to pay compensation to the contract-holder under this section, the amount of compensation payable in respect of a particular day is equivalent to the amount of rent payable under the contract in respect of that day.
>
> (3) If the contract provides for rent to be paid in respect of periods other than a day, the amount of rent payable in respect of a single day is the appropriate proportion of the rent payable in respect of the period in which that day falls.
>
> (4) If compensation is payable because of section 35, 110, 129 or 137 (failure to provide statement), the contract-holder may apply to the court for an order increasing the amount of the compensation on the ground that the landlord's failure to provide a written statement was intentional.
>
> (5) If compensation is payable because of section 36 or 37 (incomplete or incorrect statement), the contract-holder may apply to the court for an order increasing the amount of the compensation.
>
> (6) On an application under subsection (4) or (5) the court may increase the amount of the compensation payable in respect of a particular day by such percentage, not exceeding 100 per cent, as it thinks fit."

20. Section 88 sets out as a fundamental provision, incorporated as a term of all occupation contracts, that, if the landlord is liable to pay compensation under section 87, the contract-holder may set off that liability against rent. The contract-holder may also apply to the court for a declaration that a written statement is incorrect. The court, if satisfied that the written statement is incorrect because of the intentional default of the landlord, may order the landlord to pay compensation under section 87 (section 37).

21. The vast majority of tenancies which existed when the Act came into force on the appointed day (1 December 2022) are converted into occupation contracts, and assured, secure and other tenancies are abolished (section 239). Fundamental provisions are incorporated into converted contracts and existing terms continue to have effect unless incompatible with such a provision or the subject of repealed legislation. Supplementary provisions are incorporated as terms to the extent that they are compatible with existing terms (section 240).

22. At the heart of these proceedings are the landlord's obligations as to the condition of the dwelling. Section 91 deals with fitness for human habitation as follows:

> "**91 Landlord's obligation: fitness for human habitation**
>
> (1) The landlord under a secure contract, a periodic standard contract or a fixed term standard contract made for a term of less than seven years must ensure that the dwelling is fit for human habitation—
>
> (a) on the occupation date of the contract, and
>
> (b) for the duration of the contract.
>
> (2) The reference in subsection (1) to the dwelling includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts.
>
> (3) This section is a fundamental provision which is incorporated as a term of all secure contracts, all periodic standard contracts, and all fixed term standard contracts made for a term of less than seven years."

23. The landlord's duty of repair is a separate obligation and is set out in section 92:

> "**92 Landlord's obligation to keep dwelling in repair**
>
> (1) The landlord under a secure contract, a periodic standard contract or a fixed term standard contract made for a term of less than seven years must—
>
> (a) keep in repair the structure and exterior of the dwelling (including drains, gutters and external pipes), and
>
> (b) keep in repair and proper working order the service installations in the dwelling.
>
> (2) If the dwelling forms part only of a building, the landlord must—
>
> (a) keep in repair the structure and exterior of any other part of the building (including drains, gutters and external pipes) in which the landlord has an estate or interest, and
>
> (b) keep in repair and proper working order a service installation which directly or indirectly serves the dwelling, and which either—
>
> (i) forms part of any part of the building in which the landlord has an estate or interest, or
>
> (ii) is owned by the landlord or is under the landlord's control.

> (3) The standard of repair required by subsections (1) and (2) is that which is reasonable having regard to the age and character of the dwelling, and the period during which the dwelling is likely to be available for occupation as a home.
>
> (4) In this Part, "service installation" means an installation for the supply of water, gas or electricity, for sanitation, for space heating or for heating water.
>
> (5) This section is a fundamental provision which is incorporated as a term of all secure contracts, all periodic standard contracts, and all fixed term standard contracts made for a term of less than seven years."

24. The Act does not itself set out how fitness for human habitation may be determined but instead puts the onus on the Welsh Ministers to prescribe matters to which regard must be had when making that determination. Section 94 provides:

> "**94 Determination of fitness for human habitation**
>
> (1) The Welsh Ministers must prescribe matters and circumstances to which regard must be had when determining, for the purposes of section 91(1), whether a dwelling is fit for human habitation.
>
> (2) In exercising the power in subsection (1), the Welsh Ministers may prescribe matters and circumstances—
>
> (a) by reference to any regulations made by the Welsh Ministers under section 2 of the Housing Act 2004 (c. 34) (meaning of "category 1 hazard" and "category 2 hazard");
>
> (b) which may arise because of a failure to comply with an obligation under section 92.
>
> (3) The Welsh Ministers may by regulations—
>
> (a) impose requirements on landlords for the purpose of preventing any matters or circumstances which may cause a dwelling to be unfit for human habitation from arising;
>
> (b) prescribe that if requirements imposed under paragraph (a) are not complied with in respect of a dwelling, the dwelling is to be treated as if it were unfit for human habitation."

25. The sections which follow set limits on these obligations. If the dwelling is unfit for human habitation wholly or mainly because of the act or omission of the contract-holder or a permitted occupier, then section 91 does not impose any liability on the landlord (section 96(1)). Section 97 provides:

> "**97 Limits on sections 91 and 92: notice**
>
> (1) The landlord's obligations under sections 91(1)(b) and 92(1) and (2) do not arise until the landlord (or in the case of joint landlords, any one of them) becomes aware that works or repairs are necessary.
>
> (2) The landlord complies with the obligations under those provisions if the landlord carries out the necessary works or repairs within a reasonable time after the day on which the landlord becomes aware that they are necessary."

26. The Renting Homes (Supplementary Provisions) (Wales) Regulations 2022 ("the Supplementary Regulations"), which came into force on 1 December 2022, set out the supplementary provisions which are incorporated into all occupation contracts relevant to these proceedings. Regulation 11 of the Supplementary Regulations provides:

> "**Periods when the dwelling is unfit for human habitation**
>
> 11. The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation."

27. The Welsh Ministers also made regulations under section 94(1), which prescribe matters and circumstances to which regard must be had when determining whether a dwelling is fit for human habitation.

28. The Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 ("the Fitness Regulations") came into force, simultaneously with the Act, on 1 December 2022.

29. Regulation 2(1) provides that words and expressions used in the Fitness Regulations "have the same meaning as they have in the Act" (subject to modifications elsewhere in relation to dates relevant to converted contracts, which we consider separately).

30. Regulation 3 provides that in determining whether a dwelling is unfit for human habitation for the purposes of section 91(1) of the 2016 Act, regard must be had to the presence or occurrence, or the likely presence or occurrence, of the matters listed in the schedule. This lists 29 hazards, which include the following:

> "*Electrical hazards*
>
> 23. Exposure to electricity.
>
> *Fire*
>
> 24. Exposure to uncontrolled fire and associated smoke."

31. Regulation 5 deals with smoke alarms and carbon monoxide alarms.

32. Regulation 6 of the Fitness Regulations deals with electrical safety and provides:

> "**Electrical safety**
>
> (1) The landlord must ensure that there is a valid electrical condition report in respect of the dwelling during each period of occupation.
>
> (2) An electrical condition report –
>
> (a) is a condition report setting out the results of an electrical safety inspection carried out by a qualified person;
>
> (b) is valid -
>
> (i) until the end of the period of 5 years beginning with the day on which the electrical safety inspection is carried out ("the inspection date"), or
>
> (ii) if the electrical condition report states that the next electrical safety inspection should be carried out less than 5 years after the inspection date, until the end of the day by which, in accordance with the report, the next electrical safety inspection should be carried out."

33. There then follow the provisions in relation to electrical safety-related information which must be provided by the landlord to the contract-holder (we have emboldened regulation 6(6) for emphasis):

> "(3) The landlord must ensure that the contract-holder is, before the end of the period of 14 days starting with the occupation date, given -
>
> (a) a copy of the most recent electrical condition report, and
>
> (b) where investigatory or remedial work has been carried out on or in relation to an electrical service installation in the dwelling after the electrical safety inspection to which that report relates (and before the occupation date), written confirmation of work.
>
> (4) Where an electrical safety inspection is carried out after the occupation date, the landlord must ensure that the contract-holder is given a copy of the electrical condition report relating to the inspection before the end of the period of 14 days starting with the day on which the inspection was completed. [See however the substituted wording applied to converted contracts, such as those in the present case, set out at para 35.iii) below]
>
> (5) Where investigatory or remedial work is carried out on or in relation to an electrical service installation in the dwelling after the occupation date, the landlord must ensure that the contract-holder is given written confirmation of work before the end of

> the period of 14 days starting with the day on which the landlord received the confirmation.
>
> **(6) A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation.**
>
> (7) For the purposes of paragraph (6), a landlord -
>
> (a) who has not complied with paragraph (1) is to be treated as in compliance with that paragraph at any time when -
>
> (i) the landlord has obtained an electrical condition report, and
>
> (ii) that report is valid.
>
> (b) who has not complied with paragraphs (3)(a) or (4) is to be treated as in compliance with the provision in question from the time the contract-holder is given a copy of the most recent valid electrical condition report;
>
> (c) who has not complied with paragraph (3)(b) or (5) is to be treated as in compliance with the provision in question from the time the contract-holder is given written confirmation of work."

34. Regulation 6(8) of the Fitness Regulations sets out the definitions of phrases used in the regulation (which are given in both English and in Welsh) and include the following:

> "electrical safety inspection" ("archwiliad diogelwch trydanol") means the inspection and testing of every electrical service installation in a dwelling in accordance with the electrical safety standards;
>
> "electrical safety standards" ("safonau diogelwch trydanol") means the standards for electrical service installations set out in the eighteenth edition of the Wiring Regulations, published by the Institution of Engineering and Technology and the British Standards Institution as [BS 7671:2018+A2:20226];
>
> "electrical service installation" ("gosodiad gwasanaeth trydanol") means an installation for the supply of electricity; and references to an electrical service installation in a dwelling include, where the dwelling forms part only of a building, an electrical service installation which directly or indirectly serves the dwelling, and which either -
>
> (a) forms part of any part of the building in which the landlord has an estate or interest, or
>
> (b) is owned by the landlord or is under the landlord's control;

> "qualified person" ("person cymwysedig") means a person who is competent to undertake the inspection and testing of an electrical service installation, and any further investigative or remedial work, in accordance with the electrical safety standards;
>
> "written confirmation of work" ("cadarnhad ysgrifenedig o'r Gwaith") means, in relation to investigatory or remedial work, a copy of written confirmation, from a qualified person, that the work in question has been carried out."

35. Regulation 7 applies these provisions to converted contracts as follows:

    i) By regulation 7(2), in regulation 6(1), "period of occupation" means the period starting with the day which is 12 months after the conversion date.

    ii) By regulation 7(4), "occupation date" in regulation 6(3) means the day which is 12 months after the conversion date [the conversion date is the date on which the tenancy or licence became an occupation contract under section 240 of the Act].

    iii) By regulation 7(5), in the case of a converted contract, paragraph (4) of regulation 6 is to be read as if substituted with:

> "(4) Where an electrical safety inspection is carried out after the contract-holder has been given a report in accordance with sub-paragraph (a) of paragraph (3) (as modified by regulation 7(4)), the landlord must ensure that the contract-holder is given a copy of the electrical condition report relating to the inspection before the end of the period of 14 days starting with the day on which the inspection was completed".

The Welsh language

36. In accordance with the usual practice in Wales, both the Act and the statutory instruments made under the Act have been promulgated in both English and Welsh from the outset. By section 5(2) of the Legislation (Wales) Act 2019, "The Welsh language text and the English language text have equal status for all purposes", and section 156 of the Government of Wales Act 2006 is to the same effect (stating that they are "to be treated for all purposes as being of equal standing").

37. In *R (Driver) v Rhondda Cynon Taf County Borough Council* [2020] EWCA Civ 1759; [2021] ELR 193, the Court of Appeal (Sir Geoffrey Vos (Chancellor), Davies LJ and Lewis LJ), gave guidance on the approach of the courts of England and Wales to construing legislation passed in both the English and Welsh languages. The judgment of the court said (at paras 11-12, including in square brackets the Court of Appeal's own footnotes):

> "11. We have had regard to the Law Commission's Final Report on the *Form and accessibility of the law applicable in Wales* 2016. It concluded, and we agree, that the best approach to the

> interpretation of bilingual legislation, where different language texts bear different meanings, and where it is not possible to reach an interpretation consistent with the literal meaning of both language versions, is to discern the legislative intention by reference to the purposes or objects of the legislation as they appear from the texts, rather than by searching for a shared meaning. [Footnote 1: See paragraph 12.40 of the Law Commission report.] The court should, we think, apply normal principles of statutory interpretation to its analysis of the meaning of both texts equally. There should be no special rule about the admissibility of pre-legislative material and legislative history, but the court should always be astute to the possibility that such materials may favour one language version.
>
> 12. The aim of interpreting legislation is to determine the intention of the legislature. Where legislation is enacted in two languages of equal standing, and the parties submit that there is, or may be, a conflict, difference or distinction between the two language versions, detailed analysis of each version may be necessary. Where it is not suggested that the different language versions differ in meaning, the court can be sure that either version reflects the intention of the legislature. Counsel for the Welsh Language Commissioner accepted that this was the position. The approach is also consistent with the principle of ensuring equal standing for both languages, and accords with the position adopted by the Law Commission. [Footnote 2: See paragraphs 12.5-12.8 and 12.17-12.20. Paragraph 12.20 expresses the view that "it is only in circumstances where there is a concern that there is a difference in meaning between the English and Welsh texts that detailed analysis of the two texts will need to take place". See the observations of the Law Commission on article 33 of the Vienna Convention on the Law of Treaties in paragraphs 12.5 to 12.8 of the Law Commission's Report.]"

38. All counsel before us argued the case primarily by reference to the English texts. This was because they all agreed that there is (in the words of the Court of Appeal in *Driver*) no "conflict, difference or distinction between the two language versions". We were also referred to a written opinion from Welsh speaking counsel (Helen Roddick) to that effect.

39. However, we were urged to form our own opinion on this point, in case it should be said in a later case that it had been wrongly or unnecessarily conceded. We have, therefore, done so. We have carefully examined the texts both in English and in Welsh. In doing so, we have been assisted by Owain Rhys James of Counsel who helpfully made submissions to us at the hearing about the Welsh versions of the provisions upon which all the arguments have focussed. We are quite satisfied (as Mr James himself suggested) that there is no conflict, difference or distinction between the two language versions for the purposes of the issues before us and the arguments which have been

made to us. It is, therefore, immaterial whether we cite them, in this judgment (issued in both English and Welsh), in English or in Welsh.

The issues

40. The parties have argued five issues before the court.

Issue 1

41. Issue 1 relates to the contractual position between the claimants (as landlords) and the defendants (as contract-holders). It is divided into two parts, Issues 1A and 1B.

42. **Issue 1A** is a dispute about the supplementary term of the defendants' occupation contracts which provides that the contract-holder is "not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation". The claimants and the defendants disagree about whether this applies in circumstances where, as in this case, the claimants have failed to give the defendants (at material times) a copy of the most recent electrical condition report, as required by regulation 6(3) of the Fitness Regulations (para 33 above). The claimants seek a declaration that regulation 11 of the Supplementary Regulations (as incorporated as a supplementary term into the occupation contracts) "does not have the effect that rent was not payable by the defendants in respect of a period when the most recent electrical reports had not been given to them". They rely on the fact that electrical reports had in fact been obtained, and were satisfactory, and their only default was the failure physically to provide them to the contract-holders by the due dates.

43. **Issue 1B** is the claimants' alternative case that, even if they fail on Issue 1A, the words

> "…not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation"

do not preclude payment of rent by the contract-holder in respect of a period when the most recent electrical condition report has not been given to them. In other words, even if payment was not "required", the contract-holder could choose to pay rent (and all the defendants in this case did pay rent). The defendants, on the other hand, argue under Issue 1B that the words "not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation" mean that rent was not lawfully due.

Issue 2

44. Issue 2 is whether the words "from the time" in regulation 6(7) of the Fitness Regulations have retrospective effect. The claimants argue that the effect of regulation 6(7) is that, once they had served the ECRs, albeit late, they were (as it is put in their skeleton argument at para 5(b)), absolved of any consequences flowing from the previous breach. Rent in respect of the period of breach then became payable, although that period preceded the rectification of the breach.

Issue 3

45. Issue 3 is about the extent to which electrical reports have to cover common parts as well as the defendants' own flats. This affects Ms Mitchell only.

Issue 4

46. Issue 4 is a dispute about the meaning of the "occupation date" in Regulation 6(5) of the Fitness Regulations in the case of converted contracts.

Issue 5

47. Issue 5 is whether the effect of Issue 1 and 2, if those issues are decided against the claimants and against the Second and Third Interveners, is (or may be, subject to the outcome of the defendants' counterclaims) to render the legislation incompatible with the rights of the claimants and of the Second and Third Interveners under Article 1 Protocol 1 of the European Convention on Human Rights, as enacted in Schedule 1 of the Human Rights Act 1998.

ISSUE 1A

48. Issue 1A is the dispute about whether the defendants are required to pay rent when the claimants have failed to provide them with the mandatory electrical reports.

Issue 1A - Facts

49. The following facts are agreed. They are relevant to Issue 1A (and also to some of the other issues).

50. Before the Renting Homes (Wales) Act 2016 came into force on 1 December 2022, all the defendants were already tenants of the claimants. They had assured tenancies under the Housing Act 1988.

    i) Mrs Mitchell had an assured tenancy from Coastal Housing Group Ltd dated 12 July 2010. This was for a flat in St Helens Road, Swansea. Hers was the only contract which involved common parts as well as her own flat.

    ii) Ms Jones had an assured tenancy from Tai Calon Community Housing Ltd dated 5 December 2011. This was for a house in Nantyglo, Ebbw Vale.

    iii) Mr Wallbridge had an assured tenancy from Valleys to Coast Housing Ltd dated 17 February 2014. This was for a house in Garth, Maesteg.

    iv) Mr Wadley had an assured tenancy from Bron Afon Community Housing Ltd dated 17 October 2011. This was for a flat in Croesyceiliog, Cwmbran.

51. When the Renting Homes (Wales) Act 2016 came into force on 1 December 2022, all the defendants became converted contract-holders at the same addresses (see para 21 above).

52. The claimants prepared for them converted occupation contracts which were based upon their existing assured tenancy agreements but which incorporated the fundamental and supplementary terms required by the Act and its associated regulations.

53. Agreed Fact 12 is that each of the new occupation contracts, because they are converted contracts, had a deemed occupation date of 1 December 2023 (i.e. 12 months after the

original tenancies converted to contracts under the Act): see regulation 7(4) of the Fitness Regulations, set out at para 35 above.

(i) Mrs Mitchell's occupation contract

54. Mrs Mitchell's occupation contract was given to her on 11 May 2023. It included the following terms, including terms which were "fundamental terms" (marked F) and terms which were "supplemental terms" (marked S) for the purposes of the Act:

> "*Care of the dwelling*
>
> 6.1 We must ensure that the dwelling is fit for human habitation:
>
> a. on the occupation date of the contract, and
>
> b. for the duration of the contract. (F)
>
> 6.2 The meaning of "dwelling" under term 6.1 above includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts. (F)
>
> 6.3 Term 6.1 does not impose any liability on us:
>
> a. in respect of a dwelling which we cannot make fit for human habitation at reasonable expense, or
>
> b. if the dwelling is unfit for human habitation wholly or mainly because of an act or omission (including an act or omission amounting to lack of care) of you or a permitted occupier of the dwelling. (F)
>
> 6.4 Where the dwelling forms part only of a building, term 6.1 does not require us to rebuild or reinstate any other part of the building in which we have an estate or interest, in the case of destruction or damage by a relevant cause i.e. fire, storm, flood or other inevitable accident. (F)
>
> 6.5 You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation. (S)"

(ii) Ms Jones' occupation contract

55. Ms Jones was given her occupation contract on 26 March 2023. It included the following terms:

> "*Care of the dwelling*
>
> 6.1 We must ensure that the dwelling is fit for human habitation:
>
> a. on the occupation date of the contract, and
>
> b. for the duration of the contract. (F)

> 6.2 The meaning of "dwelling" under term 6.1 above includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts. (F)
>
> 6.3 Term 6.1 does not impose any liability on us:
>
> a. in respect of a dwelling which we cannot make fit for human habitation at reasonable expense, or
>
> b. if the dwelling is unfit for human habitation wholly or mainly because of an act or omission (including an act or omission amounting to lack of care) of you or a permitted occupier of the dwelling. (F)
>
> 6.4 Where the dwelling forms part only of a building, term 6.1 does not require us to rebuild or reinstate any other part of the building in which we have an estate or interest, in the case of destruction or damage by a relevant cause i.e. fire, storm, flood or other inevitable accident. (F)
>
> 6.5 You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation. (S)"

(iii) Mr Wallbridge's occupation contract

56. In Mr Wallbridge's case, his landlords (Valleys to Coast Housing Ltd) think they served him with a copy of his secure occupation contract in March 2023 and with a copy of a correction slip in May 2023. Mr Wallbridge does not believe he received either of these documents, and says he first saw them on or around 19 April 2024 when he was served with the Particulars of Claim.

57. We are not asked to resolve this dispute. We are asked, if necessary, to decide the issues on the two alternative bases; i.e. on the basis that he did receive the occupation contract and on the alternative basis that he did not.

58. On page 7, the occupation contract prepared for Mr Wallbridge said that (F+) in brackets denoted terms which could be left out or changed and (S) in brackets denoted supplementary terms.

59. Terms marked F+ were fundamental terms which can be omitted or altered under the Act by agreement between the parties provided the contract-holder's position is improved as a result (see section 20 of the Act, and para 18 above).

60. On page 8, the occupation contract prepared for Mr Wallbridge said: "Footnotes do not form part of the terms of this contract, but have been included where that is helpful".

61. The occupation contract prepared for Mr Wallbridge included the following terms.

> (On page 12):
> **Periods when the dwelling is unfit for human habitation (S)**
> 1. You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation [5].

> [5] is a footnote which reads:
> "When determining whether a dwelling is fit for human habitation regard must be had to the matters and circumstances set out in the regulations made under section 94 of the Act which can be found on the Welsh Government's website."
>
> (On page 28):
> **Landlord's obligation: fitness for human habitation (F+)**
> 12. (1) The landlord must ensure that the dwelling is fit for human habitation [18] —
> (a) on the occupation date of this contract, and
> (b) for the duration of this contract.
> (3) The reference to the dwelling in paragraph (1) of this term includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts.
>
> [18] is a footnote which reads: "When determining whether a dwelling is fit for human habitation regard must be had to the matters and circumstances set out in the regulations made under section 94 of the Act, which can be found on the Welsh Government's website."

(iv) Mr Wadley's occupation contract

62. Mr Wadley's occupation contract was given to him in January 2023. It included the following terms.

> "**4. Periods when the dwelling is unfit for human habitation (S)**
>
> You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation".
>
> "**39. Landlord's obligation: fitness for human habitation (F+)**
>
> (1) The landlord must ensure that the dwelling is fit for human habitation —
>
> (a) on the occupation date of this contract, and
>
> (b) for the duration of this contract.
>
> (2) The reference to the dwelling in paragraph (1) of this term includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts."

"**40. Landlord's obligation to keep a dwelling in repair (F+)**

(1) The landlord must —

(a) keep in repair the structure and exterior of the dwelling (including drains, gutters and external pipes), and

(b) keep in repair and proper working order the service installations in the dwelling.

(2) If the dwelling forms part only of a building, the landlord must —

(a) keep in repair the structure and exterior of any other part of the building (including drains, gutters and external pipes) in which the landlord has an estate or interest, and

(b) keep in repair and proper working order a service installation which directly or indirectly serves the dwelling, and which either —

(i) forms part of any part of the building in which the landlord has an estate or interest, or

(ii) is owned by the landlord or is under the landlord's control.

(3) The standard of repair required by paragraphs (1) and (2) of this term is that which is reasonable having regard to the age and character of the dwelling, and the period during which the dwelling is likely to be available for occupation as a home.

(4) In this contract, "service installation" means an installation for the supply of water, gas or electricity, for sanitation, for space heating or for heating water

Guidance Note – Service installations

Service installations do not include any fixtures, fittings or appliances for making use of water, gas or electricity. It is your responsibility to ensure that there is credit on any applicable meters and that any bills in relation to the supply of services to the Dwelling are paid. Your Landlord will not be responsible where services are interrupted due to non-payment of charges by you."

(iv) No requirement to pay rent when unfit for human habitation in every case

63. The terms set out above mirror the Welsh Government's model contract. They all include (as set out above) the following supplementary term relevant to Issue 1A:

> "You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation."

Inclusion of this term was required by regulation 11 of the Supplementary Regulations (set out in para 26 above).

64. In the case of Mr Wallbridge, although there is a dispute about whether he was given the occupation contract prepared for him which included this term, it is common ground that the landlord's obligation to "ensure that the dwelling is fit for habitation" under section 91 of the Act (para 22 above) was incorporated into his contract as a fundamental term by the operation of section 240(3) and (4) of the Act. It is also common ground that section 240(3) and (6) of the Act incorporated into Mr Wallbridge's contract the supplementary term in regulation 11 of the Supplementary Regulations that the contract-holder is "not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation" (para 26 above).

65. There is therefore no dispute, by one means or another, that all the defendants had the benefit of these terms. The question is what they mean, on the facts of the present cases.

(v) Dates of the electrical safety inspections ("ESIs") and the electrical condition reports ("ECRs") in this case

66. Regulation 6 and (in the case of converted contracts) regulation 7 of the Fitness Regulations require landlords to ensure that there is a valid electrical condition report ("ECR") setting out the results of an electrical safety inspection carried out by a qualified person and, further, require landlords to ensure that these reports are given to their contract-holders by certain dates. These provisions are set out at paras 32 to 35 above.

67. For the purposes of Issue 1A, the agreed facts about these reports are as follows.

68. All the claimant landlords carried out electrical safety inspections ("ESIs") at the defendants' dwellings on various dates before 15 December 2023.

69. The ESIs were carried out by a qualified person, i.e., competent to undertake the inspection and testing of an electrical service installation and any further investigative or remedial work in accordance with electrical safety standards. The defendants do not dispute this although it is not within their knowledge.

70. ECRs have existed since the date of each inspection (or shortly afterwards) and at all material times have been in the possession of the relevant claimant as landlord. They are in our papers.

71. The claimants assert that, leaving aside the impact of their failure to provide ECRs to the defendants, the defendants' dwellings were in fact fit for human habitation between 15 December 2023 and 4 April 2024 (which is the material time for this case). The defendants do not positively agree that point but do agree that, for the purposes of this case, we should assume it in the claimants' favour.

72. Notwithstanding the failure to provide ECRs to the defendants by the due dates, no defendant has failed to pay rent for the period between 15 December 2023 – 4 April 2024 or, indeed, for any period relevant to this case.

73. The details of the ESIs and ECRs are not, perhaps, important for present purposes. However, they have been agreed and so, for what they are worth, we record them as follows.

    i) In relation to Mrs Mitchell's dwelling, her landlord Coastal Housing Group Ltd obtained an ECR for her flat which was signed off by the qualifying supervisor on 2 September 2019. They sent a copy by post to Mrs Mitchell by first class post on or about 12 March 2024. It is agreed that it was, therefore, given to her on or about 14 March 2024. For the common parts, the ECR was obtained on 26 July 2019 and given to her by 4 April 2024.

    ii) In relation to Ms Jones' dwelling, her landlord Tai Calon Community Housing Ltd carried out an inspection which resulted in an ECR sent to her by first class post on or about 11 March 2024. It is agreed that it was, therefore, given to her on or about 13 March 2024.

    iii) In relation to Mr Wallbridge's dwelling, his landlord Valleys to Coast Housing Ltd obtained an ECR on or about 23 August 2022. They sent a copy to him by first class post on 19 March 2024. It is agreed that it was, therefore, given to him on or about 21 March 2024.

    iv) In relation to Mr Wadley's dwelling, his landlord Bron Afon Community Housing Ltd obtained an ECR on or about 25 May 2023. They sent him a copy by post in the week ending 22 March 2024. It is agreed that it was, therefore, given to him by 25 March 2024.

Issue 1A – Arguments

(i) Claimants' arguments

74. The claimants' case on Issue 1A (disputed by the defendants) is that the words "during which the dwelling is unfit for human habitation" in the contracts and in the statutory provisions do not include circumstances in which the dwelling is only treated as unfit for human habitation because the landlord has failed to ensure that the contract-holder has been given a copy of the most recent ECR by the due date.

75. The claimants argue that the right to withhold rent only arises when the property is objectively unfit for human habitation. That is not the case (it is argued) when there has been a technical failure to provide reports, but there is no evidence of an underlying electrical problem or other actual unfitness for human habitation.

76. The claimants point out that, although section 87 of the Act provides for compensation, equivalent to the amount of rent, in the event that a landlord fails to provide the contract-holder with a complete and up-to-date copy of the written contract, section 87 does not apply to cases in which there has been a failure to provide an ECR.

77. The claimants trace the phrase "unfit for human habitation" back to section 5 of the Housing of the Working Classes Act 1885 and make the point that, although it has appeared in many enactments since then, it has never before the Renting Homes (Wales) Act 2016 been suggested that a property that is not, in fact, unfit for human habitation should be deemed as such.

78. The claimants submit that they are conscientious landlords who failed to provide ECRs only because of an understandable oversight in circumstances where the law was new and not at first fully understood in all its ramifications. They point out that, as soon as the oversight was picked up, it was remedied at speed, despite the large number of contract-holders involved. They say that the statutory purpose is to ensure actual fitness for human habitation and that this is not undermined by late service of documents, as opposed to late compliance with substantive safety measures.

79. They point to the financial impact on each of them if the defendants succeed in proving that they were not required to pay rent and if they succeed in counterclaiming the rent they did nevertheless pay. Coastal Housing Group Ltd estimate that between £8 million and £9.5 million might be at risk for them. Tai Calon Community Housing Ltd estimate a figure of a little over £5 million in potential loss of rent. Valleys to Coast Housing Ltd approximate a figure of a little less than £13.4 million. Bron Afon Community Housing Ltd put the risk for them at a little under £20 million. All these figures exclude interest and legal fees and costs. They say that losses in this scale will affect future investment in social housing and will be to the detriment of the community.

80. The claimants argue that the relevant words are those in the contracts, not in the Act and regulations which mandate their inclusion in the contracts, and that contractual principles of interpretation should therefore apply. They recognise that cannot be the case for Mr Wallbridge on the hypothesis that he did not in fact receive his contract, with the result that his rights derive directly from the legislation.

81. In relation to statutory construction, the claimants invoke the presumption against an interpretation which is absurd, citing Lord Sales JSC in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at para 43. They rely on the principle that legislative intention is assumed to be a law which is just, citing *Driver and Vehicle Standards Agency v Rowe* [2018] RTR 2 at para 21.

82. They cite the principles applicable to deeming provisions in statute law summarised by Lord Briggs JSC in *Fowler v Revenue and Customs Commissioners* [2020] 1 WLR 2227 at para 27:

> "(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably follow from the fiction being real."

83. In relation to contractual interpretation (the claimants' preferred approach in these cases), the claimants cite the usual principles familiar from cases such as *Arnold v Britton* [2015] AC 1619 at paras 14-23. This includes (at para 19) Lord Neuberger's observation that:

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made."

84. The claimants submit that it cannot be assumed that the statute and the contracts have the same effect. Even when the words of the statute have been incorporated verbatim, the words must be construed in the context of the contract, and their meaning in the context of the contract is not necessarily the same as their meaning in the context of the statute, citing Forbes J in *GREA Real Property Investments Ltd v Williams* [1979] EGLR 121. However, no circumstances particular to the contract-holders in this case are identified in the evidence or the agreed facts to suggest that their contracts should be interpreted differently from others with identical wording, or that there is some reason for adopting a contractual interpretation because of such factors which might vary from the statutory interpretation. Indeed, it is in the nature of these cases, as test cases, that it is suggested that a universal interpretation should be provided.

85. The claimants strongly emphasise that, whilst the contracts all provide that the landlord will "ensure that the dwelling is fit for human habitation", and that, should it not be fit for human habitation, the contract-holder is "not required to pay rent", in none of the contracts is it specified or agreed that there will be no requirement to pay rent when the dwelling is, in fact, fit for human habitation, but may be deemed unfit only by virtue of the operation of regulation 6(6) of the Fitness Regulations. Regulation 6(6) is not imported into the contracts by reference; nor is the wording of regulation 6(6) reproduced within them. Therefore, it is submitted, the parties did not agree that payment would not be required only by virtue of deemed, as opposed to actual, unfitness for human habitation.

86. The claimants go so far as to suggest that the absence of the regulation 6(6) deeming provision from the contracts must have been a conscious choice by the draftsman,

because the existence of regulation 6(6) would have been known, and its omission must therefore have been deliberate (para 25 of the claimants' skeleton argument).

87. The claimants submit that the contract-holders do not require documentation but only substantive fitness for human habitation. Therefore, they submit it is consistent with the legislative purpose that the deeming provision in regulation 6(6) should not be imported into contracts and should not, therefore, entitle contract-holders not to pay rent.

88. The claimants limit the operation of regulation 6(6) of the Fitness Regulations by reference to section 94 of the Act, and say that section 94 provides for factors to which regard must be had when deciding if a property is unfit for the purposes of section 91, and not for any contractual purposes. Section 94 is set out at para 24 above. Section 91 provides that the landlord "must ensure" that the dwelling is fit for human occupation, and that this is a fundamental provision incorporated into the relevant contracts. Its full terms are quoted in para 22 above. Section 92 imposes repair obligations including, specifically, in relation to electrical installations (set out at para 23 above). The duty on Welsh Ministers to make regulations imposed by section 94 is, by section 94(1), a duty to prescribe matters and circumstances "to which regard must be had when determining, for the purposes of section 91(1), whether a dwelling is fit for human habitation" (set out in para 24 above). Regulation 6(6) was made, like all the Fitness Regulations, in exercise of powers conferred "by sections 94(1), (2)(b) and (3) and 256(1)" of the Act.

89. To the objection that the claimants' rigorous exclusion of regulation 6(6) from the contracts, deprives regulation 6(6) of any purpose, the claimants respond that a contract-holder who is not given an ECR so as to engage regulation 6(6) "is entitled to sue so as to require the provision of the ECR. But that does not mean that they are entitled to withhold rent. That is a contractual right only triggered where a property is *actually* unfit for human habitation." (claimant's skeleton argument para 34). In argument, they also point to para 5B of Schedule 9A of the Act which provides that landlords cannot give notice at a time when the dwelling is "treated" as unfit for human habitation by virtue of regulation 6(6) of the Fitness Regulations. They submit that this prevents regulation 6(6) being entirely redundant or inconsequential despite their exclusion of regulation 6(6) from the statutory or contractual provisions about there being no requirement to pay rent.

90. In argument, the claimants said that, as long as there was in fact an ECR as required by regulation 6(1) of the Fitness Regulations, regulation 6(6) was of less importance. They said that the ESI and ECR obligations were directed at the landlord, and it was not in accordance with common sense or the statutory purpose that, if the only failure was to communicate the results of a satisfactory inspection and report to the contract-holder, there should be no right to rent. They point out that deemed unfitness was not an idea suggested by the Law Commission papers.

91. They submit that, whilst regulation 11 of the Supplementary Regulations says "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation", regard should also be had to the footnote to regulation 11, which says:

> "See the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 (SI 2022/6 (W.4)) made by the Welsh Ministers under section 94(1) of the Act, which prescribe matters

> and circumstances to which regard must be had when determining whether a dwelling is fit for human habitation. See also section 91(1) of the Act, which makes it a fundamental provision for a landlord to ensure that the dwelling is fit for human habitation."

They suggest it is significant that this footnote refers to various factors relevant to actual unfitness for human habitation in section 94(1) of the Act, but does not refer to the deeming provision in section 94(3).

(ii) Defendants' arguments

92. The defendants emphasise that, once the ECR had been obtained, as it was in all these cases, providing it to the contract-holders was easy, requiring no more than a stamp and an envelope. Although the legislation was novel at the time of the claimants' breaches, the Fitness Regulations did not come into force until nearly 11 months after they had been issued. There was therefore plenty of time for familiarisation. The time for compliance was set at 14 days (as opposed to 7 days before amendments prompted by landlord representations to the Welsh Government). This was in addition to the delayed date for compliance in cases of converted contracts (such as the defendants') which started time running one year after the date the Fitness Regulations came into force.

93. The defendants cite *Uber BV v Aslam* [2021] UKSC 5 per Lord Leggatt JSC at para 70:

> "The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose."

94. The defendants point out that, although the claimants are responsible social landlords, their arguments would benefit every landlord throughout the Welsh private rented sector as well as the public sector. Not every failure to provide an ECR will be an honest mistake. There may be cases of deliberate or careless omission by irresponsible landlords who are not parties to these actions. The question is what the consequences should be, consistent with the statutory purpose.

95. The defendants referred us to section 89 of the Act, which applies Chapter 2 of this part of the Act "to all secure contracts, all periodic standard contracts, and all fixed term standard contracts made for a term of less than seven years", which covers the contracts in this case. Chapter 2 of that part of the Act consists of sections 91 to 99 of the Act. It therefore includes the obligation to "ensure the dwelling is fit for human habitation" in section 91(1), which is said by section 91(3) to be a fundamental provision incorporated into all these contracts. It also includes section 94 ("Determination of fitness for human habitation") which requires Welsh Ministers to prescribe matters and circumstances to which regard must be had when determining, for the purposes of section 91(1), whether a dwelling is fit for human habitation (by section 94(1)) and which permits Welsh Ministers to make regulations whereby if requirements are not complied with, "the dwelling is to be treated as if it were unfit for human habitation" (by section 94(3)). It follows that these provisions apply to the contracts. The defendants submit that, although section 94(3) does not refer to section 91 in terms, that is the provision requiring fitness for human habitation, and so it is linked by necessary implication.

96. The defendants submit that the Supplementary Regulations (including the provision in regulation 11 that contract-holders without the required ECRs are not required to pay rent) came into effect on the same day as the Fitness Regulations, and the provisions are to be read as a single code, operating as a whole and interacting with each other, rather than being atomised in accordance with the arguments of the claimants. Regulation 6(6) of the Fitness Regulations governs the contracts, even when (as here) the wording is absent from the contracts. It follows that the provision that rent is not required to be paid when the property is not fit for human habitation, which is both in regulation 11 of the Supplementary Regulations and in the contracts themselves, applies when the property is not fit for human habitation because of the operation of regulation 6(6). It is only by reading it in this way that regulation 6(6) has force for the benefit of the contract-holders as must have been intended, in accordance with the purpose of the legislation as a whole.

97. The defendants emphasise that the duty on landlords is to "ensure" that the dwelling is fit for human habitation (section 91 of the Act). In relation to electrical installations, safety cannot be ensured without an ESI, and assurance cannot be provided to the contract-holder without supplying an ECR. To say, after the event, in litigation such as this, that it can now be said that there was, in fact, no electrical installation risk is not compliant with the letter or the spirit of the legislative scheme.

98. The defendants argue that, since the contract terms were mandated by the statutory scheme, the correct approach is to adopt a statutory rather than contractual interpretation. It is enacted that modifications to the statutory provisions (where they are permitted) can only improve the position of the contract-holders. Therefore, the statutory interpretation sets a minimum standard and should be the starting point of the construction exercise.

99. Section 94(3) of the Act (set out in para 24 above) empowers Welsh Ministers to make regulations "for the purpose of preventing any matters or circumstances which may cause a dwelling to be unfit for human habitation from arising". These are wide words, and go beyond the worst case in which a dwelling is actually unfit for human habitation. Section 94(3) goes on to say, expressly, that such regulations may prescribe that "the dwelling is to be treated as if it were unfit for human habitation" in the event of non-compliance. The concept of deemed rather than actual unfitness is therefore hard-wired into the primary legislation.

100. That concept, of deemed unfitness, must, however, have been introduced (say the defendants) for a purpose. It must have consequences. They suggest the only possible purpose is found in section 91(1), which says that a landlord "must ensure" that there is fitness for human habitation, and it follows that the deeming provision envisaged by section 94(3) and implemented by regulation 6(6) applies to section 91(1) and renders the dwelling unfit for human habitation for the purposes of section 91(1). It is then unfit for all purposes, and carries with it the non-requirement to pay rent.

(iii) Welsh Ministers' arguments

101. The Welsh Ministers (who appeared as Interveners) agree with the defendants that the primary canons of construction in this case should be statutory rather than contractual, because the contract terms are mandated by the legislation. However, they cite *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74 at para 33

in support of a modern tendency to harmonise the approach to the interpretation of different types of documents.

102. The Welsh Ministers also agree with the defendants that, on a straightforward reading of regulation 6(6) of the Fitness Regulations, the claimants' failure to serve the ECRs meant that the dwellings were treated as unfit for human habitation and thus were unfit for human habitation.

103. The Welsh Ministers support the defendants in arguing that regulation 6(6) of the Fitness Regulations applies, and so therefore does the consequence in regulation 11 of the Supplementary Regulations, which is that the contract-holders are not required to pay rent when the dwelling is deemed unfit for human occupation because of the operation of regulation 6(6). This is said to be in accordance with the statutory scheme and the common law in making rent an appropriate measure of compensation for breach in relation to unfitness for human habitation.

104. The Welsh Ministers say that this interpretation is, not only straightforward, but also aligned with the underlying purpose of the legislation which is to encourage landlords to ensure that dwellings are free of hazards such as fires and electric shocks and to reassure contract-holders that problems and dangers which are not as obviously apparent as broken windows and the like are being guarded against.

105. The Welsh Ministers disagree with the claimants' submission that it is only actual safety that matters, and that investigations, reports, and the provision of information to contract-holders is not so important as to justify (or as a matter of construction require) the suspension of the requirement on the contract-holder to pay rent by operating regulation 11 of the Supplementary Regulations in conjunction with regulation 6(6) of the Fitness Regulations, and by operating regulation 6(6) with the terms of the occupation contracts dispensing with rent in a case of unfitness for human habitation. The obligation is not merely to ensure that electrical installations are safe. The obligation is to inspect, test and report. Inspections may show that remedial work or other measures are necessary, and there are examples of recommended measures being identified in the reports, and evidence, in this case. The legislation introduces a process, and not just a pass or fail examination. The contract-holders are entitled both to be made aware of the state of the electrical installations, and of the steps required to bring them to the required standards. They are entitled to reassurance, when the state of the electrical installations is satisfactory, and to the information which can empower them to press for action, when it is not. The landlords, likewise, are not entitled to point, perhaps even retrospectively, to actual fitness, but are incentivised by the linking of the rent requirement to the regulation 6 compliance, to do all that is necessary when it is required of them and not later. Contract-holders may be more motivated to ensure that everything is checked and satisfactory than landlords are. Some landlords may not care at all. Others may not be paying enough attention to properties in which they are not themselves living. Others may not be well informed of their obligations. It is not appropriate to adopt a statutory construction which allows landlords to leave contract-holders out of the loop with no or little consequence. It is fundamental to the statutory scheme that contract-holders are kept informed and that they are not required to pay rent when they are not kept informed.

106. The Welsh Ministers also reject the distinction between statutory and contractual interpretation proposed by the claimants in this case. They point out that it is a key

feature of the Act, identified from the very first Law Commission paper, that contract-holders should be able to rely on their contracts for their rights and should not also have to rely separately on complex legislation or caselaw which is not incorporated into the contracts. There should not be any contradiction, they argue, between the express terms of the contracts and the terms imposed by statute or the provisions of the statute and statutory instruments.

107. They also provide an example. Working smoke alarms and working carbon monoxide alarms are required by regulation 5 of the Fitness Regulations. ESIs and ECRs are required by regulation 6. The contracts say nothing about smoke alarms, carbon monoxide alarms and ESIs and ECRs. Therefore, the claimants' argument that the defendants cannot go outside the express terms written into their contracts cannot be correct. The scheme operates as a whole, and the contract-holders are entitled to all of it, read as a whole. This includes the deeming provision in regulation 6(6) of the Fitness Regulations and the effect on the requirement to pay rent in regulation 1l of the Supplementary Regulations. If the contract-holders cannot enforce their rights through their contracts, something has gone fundamentally wrong, and they have little ability in practice to enforce them at all. The Welsh Ministers submit that this cannot be correct.

Issue 1A - Decision

108. We prefer the arguments of the defendants and the Welsh Ministers on Issue 1A to those of the claimants.

109. The contracts are mandated by the legislation and, to the extent that the legislation includes provisions which are not reproduced in the contracts, that does not mean that these parts of the legislation do not bind the landlords or the contract-holders in their contractual relations as well as in law. The Law Commission proposal is that rights should flow from contracts, and it is logical that rights conferred by the legislation flow into the contracts accordingly, if the legislative wording and purpose permit them to do so, and they appear to do so.

110. The Act and the regulations form part of a single legislative scheme and it is artificial to limit the operation of any part of the scheme for no good reason. They are to be read as a whole and they operate as a whole.

111. We are not persuaded that in a case where the contracts and the legislation are so closely bound up with each other, the contracts being largely the creature of the legislation, and the legislation having reduced impact if it does not provide contractual rights to the contract-holders, it should make a difference to the outcome of these cases whether principles of statutory construction or principles of contractual construction are adopted.

112. As it happens, all the relevant wording is both in the legislation and in the contracts, and they should be construed in the same way in both locations. The only exception is regulation 6(6) of the Fitness Regulations, which is not in the contracts. However, regulation 6(6) is in terms which suggest general application: "A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation". We see no reason to limit its application so that it does not affect the contractual right to fitness for habitation or the contractual and statutory right not to be required to pay rent.

113. We do not accept the importance of the distinction between actual and deemed unfitness drawn so sharply by the claimants. We prefer the submission that it is only when electrical installations are properly inspected, and the reports have been obtained and provided, that the landlords can be said to have complied with the section 91 obligation that they "must ensure" fitness for human habitation. It is not enough that a landlord can establish, if challenged, eventually, and retrospectively, that electrical installations were, as a matter of objective fact, safe. The landlord's obligation is to "ensure" that they are. The statutory regime and purpose is that this should be done, mandatorily, through the regime of ESIs and ECRs and through a process, including a process of communication with contract-holders, which is subject to time-limits. It is logical and fair that this process should be underpinned by the discipline of regulation 6(6) and its effect on rent.

114. The contract-holders are entitled, not only to live in fact with electrical installations which are safe, but to know that they are safe, or to know (if they are not safe) what needs to be done in order to make them so. They are the people with the strongest interest in this information and it is reasonable and fair that their rights to it are linked (as in the case of actual unfitness for human habitation) to the payment of rent. If the deeming provision in regulation 6(6) is not linked to the regulation 11 provision about rent not being required, the force of regulation 6 is weakened for no good reason, and the full benefit of it is not secured to contract-holders, again for no good reason.

115. We find this interpretation to be in accordance with the statutory purpose of providing and securing the rights of contract-holders in a fair, transparent and straightforward way. The claimants' approach is convoluted and strained. It is justified only by an outcome which will reduce the consequences of breach for the benefit of the claimants, but that is not part of the statutory purpose and, although the overall sums are large, they are in each case limited to the amount of rent, and to the period of default. They are not large in the case of any individual defendant.

116. It is not likely that contract-holders who have not received ECRs will be able or inclined to go to the trouble or expense of bringing legal proceedings under regulation 6(6) to obtain an ECR in many or perhaps any cases if the best they can hope for is late provision of the ECR. The remedy that they are not required to pay rent is much more apt to secure compliance, and (in default of compliance) to provide an appropriate remedy to contract-holders than the limited scope of regulation 6(6) afforded by the claimants' interpretation on Issue 1A, which excludes it from operation on the contracts. This remedy is in accordance with both the apparent meaning of the words, and the underlying purpose of the legislation and of the contracts, which is to provide contract-holders (among other things) with assurance that their dwellings will be fit for human habitation, in respect of electrical installations as in other respects.

117. It is consistent with the legislative purpose that landlords should be incentivised to provide contract-holders with their statutory rights, including their rights to ESIs and ECRs, by linking those rights to whether the dwelling is to be treated as fit for human habitation and to whether rent is payable accordingly.

118. There is nothing unfair, absurd or surprising in this interpretation.

119. The obligations in question are not onerous. The claimants do not claim to have failed to have complied because it was difficult to do so. It was an oversight on their part that

they did not do so and, when they realised what they had overlooked, they had no difficulty in putting things right.

120. The construction we have adopted gives regulation 6(6) what seems to us to be its ordinary and natural meaning, and applies it in the way that seems most obvious from the words that are used. Neither the words themselves nor their context suggest that they have limited effect. "A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation." These are words in general terms. The phrase "is to be treated" is not limited by other words, and we see no reason to limit it on the basis of the statutory purpose or the other contextual considerations proposed by the claimants. Everything points towards the effect argued by the defendants and by the Welsh Ministers. The effect of regulation 6(6) is that the dwelling is to be treated as unfit for habitation for the purposes of the contract terms as well as the statutory provisions from which the contract terms are derived.

121. We therefore find for the defendants on Issue 1A. The landlords failed to provide them with the ECRs required by regulation 6(3) of the Fitness Regulations. Therefore, the landlords were "not in compliance with a requirement imposed by this regulation", i.e. regulation 6, within the meaning of regulation 6(6). Therefore, regulation 6(6) operated and the contract-holders' dwellings were "to be treated as unfit for human habitation" at the material times. They were so treated for the purposes of regulation 11 of the Supplementary Regulations, which meant that the contract-holders were "not required to pay rent" because the dwellings were "unfit for human habitation" within the meaning of regulation 11 as a result of the operation of regulation 6(6). The same applied to the contract provisions which were included in compliance with the legislation. The contracts all provided, in terms, and in accordance with the legislation, that the contract-holders were not required to pay rent when their dwellings were unfit for human habitation. Regulation 6(6) applied to their cases and to their contracts, with the result that their dwellings were "to be treated as unfit for human habitation" in accordance with regulation 6(6) although those words were absent from the contracts.

ISSUE 1B

122. Issue 1B is about the meaning of the word "required" in the contract provisions, derived from regulation 11 of the Supplementary Regulations, to the effect that:

> "You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation."

123. The claimants seek a declaration in the following terms:

> "The words "not required" in Regulation 11 (as incorporated as a supplementary term into occupation contracts) do not preclude payment of rent by the contract-holder in respect of a period when the most recent electrical condition report had not been given to them."

Issue 1B – Facts

124. Regulation 11 of the Supplementary Regulations (para 26 above) incorporates the following into all the occupation contracts relevant to these proceedings (including Mr Wallbridge's, regardless of the unresolved question of whether he was given a copy of it):

> "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation."

125. Essentially the same wording (including, in particular, the word "required") therefore appears in each of the defendants' occupation contracts. This is mandated by the fact that regulation 11 is one of the supplementary terms fixed by the legislation.

    i) Clause 6.5 of the occupation contracts of both Mrs Mitchell and Ms Jones says: "You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation. (S)".

    ii) Clause 1 on page 12 of Mr Wallbridge's occupation contract says: "You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation".

    iii) Clause 4 of Mr Wadley's occupation contract says: "You are not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation".

126. We will refer to this as the "Not Required to Pay" provision, and for present purposes this covers the provision whether it is in the legislation (regulation 11) or in the various occupation contracts themselves.

127. The agreed facts for the purposes of Issue 1B are the same as those for Issue 1A (para 73 above). The essential point is that, in every case, the claimant did not provide the defendant with a copy of the most recent ECR by 14 December 2023, which was the deadline set by the legislation. Instead, the claimants did not provide them until various dates in March 2024.

128. The parties ask us to assume, solely for the determination of the issues arising in the claims, that in all cases, any works required by these ECRs have been completed as required.

129. As a result of our decision on Issue 1A, the failure to provide the ECRs on time, being a breach of regulation 6 of the Fitness Regulations, meant that the dwellings were to be treated as unfit for human habitation under regulation 6(6), and the provisions above in relation to non-payment of rent therefore applied.

Issue 1B – Arguments

(i) Claimants' arguments

130. The claimants argue that the words "not required to pay rent" do not *preclude* payment of rent by the contract-holder in respect of a period when the most recent ECR has not

been given to them. In other words, even if payment was not "required", the contract-holder could choose to pay rent (and all the defendants in this case did pay rent, although they did so without knowing that they might have a legal argument that they were not required to do so). The claimants hope that, if successful on this point, they will be better placed to defend counterclaims for repayment of the rent. The defendants, on the other hand, argue under Issue 1B that the words "not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation" mean that rent was not lawfully due.

131. The claimants argue, essentially, that the Not Required to Pay provision creates a window of opportunity during which contract-holders are not required to pay rent. But, say the claimants, if contract-holders in fact pay rent (whether deliberately or in ignorance of their right not to do so), the window closes and the Not Required to Pay provision becomes immaterial. They were not required to pay. But they paid anyway. That, say the claimants, is the end of the operation of the Not Required to Pay provision (without prejudice to any success they may have in recovery under their counterclaims, which are to be argued and decided at a later date).

132. The claimants submit that if (as we have decided) the result of our decision on Issue 1A is that the defendants are entitled to the benefit of the Not Required to Pay provision, they must have a choice as to whether or not to exercise that right. There is no bar on demanding or receiving rent in these circumstances. They suggest there may be many reasons why a contract-holder might wish to continue paying rent in spite of not getting the ECR when they should have done. The contract-holders might be in a fully mutual co-op or similar arrangement where non-payment of rent would have "terrible consequences for all parties" (claimants' skeleton argument para 35). The claimant Bron Afon Community Housing Ltd is, as a witness statement from its Chief Executive Mr Brunt explains, owned by its members, who are either contract-holders or residents of Torfaen (or Board Members).

133. They refer to Mrs Mitchell's witness statement in these proceedings, which explains how providential it was for her and her husband that they were able to find housing with Coastal Housing Group Ltd thirteen years ago, and how grateful she is to her landlords, not only for that, but for its support of community schemes, such as a community garden, with which she is actively and happily involved. For these reasons, she says that, even knowing, as she does now, about the breach in providing her with the ECR and its effect on whether her property was or may have been unfit for human habitation, "everything I have discussed above explains why I would be conflicted about withholding rent".

134. She goes on in her witness statement to say:

> "If someone had told me that I didn't need to pay my rent, the first thing I would have done would be to contact the First Claimant and ask for my ECR. Withholding my rent would not be the first thing I would consider. Even if I knew I was legally entitled to withhold my rent, this would not be my preferred course of action.
>
> (…) I am not a combative person and withholding rent to me feels quite combative. I try and resolve matters in the first

> instance by finding solutions. Withholding rent does not feel like a solution to me.
>
> Withholding rent is a big step, I would find it hard to justify it purely because my landlord failed to give me my certificate. (…)
>
> If people knew that they didn't have to pay their rent I fear that many others would have chosen to do the same thing. This would have been very stressful for the First Claimant and I understand the consequences this would have.
>
> I would need to have been informed in writing by the First Claimant to consider withholding my rent. My occupation contract does not contain the relevant provisions that tells me I can withhold my rent. This is contained within the legislation and as a lay person I would not have understood this.
>
> If the First Claimant wrote to me and told me that I didn't have to pay rent because they were in breach of the Renting Homes Regulations, I would have felt differently and I would have withheld my rent because of their failings."

(ii) Defendants' arguments

135. The defendants reject the claimants' limited interpretation of the Not Required to Pay provision. The defendants say that it simply means that rent is not lawfully due, and this is the case whether it is in fact paid or not.

136. The defendants' counter-proposal for the appropriate declarations on Issue 1B is therefore:

> "The words "not required" in regulation 11 (as incorporated as a supplementary term into occupation contracts) mean that rent is not lawfully due from the contract-holder in respect of any day or part day during which the dwelling is unfit for human habitation.
>
> Regulation 11 (as incorporated as a supplementary term into occupation contracts) has the effect that rent was not payable by any Defendant in respect of a period when the most recent electrical condition reports had not been given to them."

137. The defendants submit that the claimants' analysis makes no sense in circumstances where contract-holders will not necessarily know, before paying the rent, both that their dwelling is unfit for human habitation (for any reason, not only as a consequence of non-compliance with regulation 6(3)(a) of the Fitness Regulations) and also of their right under the Not Required to Pay provision. For those without the requisite knowledge of both these points, on the claimants' interpretation the Not Required to Pay provision would serve no purpose, because it would be useless to them. The window would close before they knew about it.

138. The defendants argue that, even if a contract-holder is aware of his or her rights in this respect, the claimants' interpretation (that the Not Required to Pay provision ceases to have effect as soon as rent is in fact paid) requires the contract-holder to take a risk and withhold rent in every case (unless their landlord has formally admitted the dwelling is unfit for human habitation). The defendants suggest this will be likely in the majority of cases. Therefore, unless the contract-holder is permitted to pay rent under protest (which is not provided for, at least expressly, in the legislation or in the contracts), the claimants' interpretation requires contract-holders to take risks with their homes in order to get the benefit of the Not Required to Pay provision. The defendants point to evidence, not only from Mrs Mitchell, but also from Ms Jones, that they would not have been prepared to gamble with their homes in this way and suggest that this is a view that would be shared by many other contract-holders for whose benefit the Not Required to Pay provision in regulation 11 and (consequently) in the contracts was put in place.

139. The defendants accept that the particular form of words in the regulation 11 supplementary provision could have been different. The form could, for example, have been that rent was not "lawfully due" (which the claimants appear to accept would have closed off this contention to them). The defendants say this does not matter. It is rare that the same meaning cannot be expressed in more than one way. The meaning of the phrase used in this provision is clear and it is in line with the modernisation of language in the legislation that the well-known but old-fashioned language of "lawfully due" should be replaced by the less antiquated phrase "not required to pay". Clarity and accessibility of language are among the principles for the Act suggested by the Law Commission *Renting Homes in Wales* paper (para 14 above).

140. The defendants also query how the Not Required to Pay provision could work, on the claimant's interpretation, in cases where part or all of the contract-holder's rent is met through universal credit (or housing benefit in those limited cases where it remains available). This point is pleaded in the Defences but the claimants' response is only by way of a general denial.

(iii) Welsh Ministers' arguments

141. The Welsh Ministers support the claimants' case on Issue 1B.

142. They suggest that the defendants' counterclaims "are unlikely to be successful" (Welsh Ministers' skeleton argument para 27), but we absolutely decline to form or express a view on that. It has been agreed that the counterclaims are for another day.

143. They submit that individuals make payments when there is no contractual obligation to do so for any number of reasons: a sense of honour or fairness, or because they are content with an arrangement and want it to continue, or out of ignorance. Accordingly, they accept that the Not Required to Pay provision (whether in regulation 11 of the Supplementary Regulations or in the contracts) does not preclude a payment of rent even though such payments were not contractually required and even if there is no right to reclaim them. They say this analysis applies whether the contract-holder has a social or private landlord.

144. They therefore agree with the claimants' case on Issue 1B, and support the claimants' proposed declaration (set out at para 123 above).

Issue 1B - Decision

145. There is a slight disjunction between the arguments advanced to us on Issue 1B and the form of the declaration claimed by the claimants on that issue.

146. The declaration on a superficial reading appears unobjectionable in its statement that the words "not required" in the Not Required to Pay provision "do not preclude payment of rent" by the contract-holder in respect of a period when the most recent ECR had not been given to them. In one sense, of course payment of rent is not "precluded". It is not unlawful to pay the rent. There is nothing wrong with paying the rent. No-one is going to stop a contract-holder paying their rent as usual. No-one is going to object to it. No-one did object to it when the contract-holders did, in fact, pay their rent even during the period when (in accordance with our finding on Issue 1A) they were not required to.

147. But the claimants' proposed declaration does not really capture the arguments being addressed to us. The declaration does not make it explicit that what the claimants are arguing is that, once the rent has been paid, the Not Required to Pay provision has no continuing force. It does not capture the point which we have described as the window of opportunity, which closes when the opportunity is not taken and the rent is paid notwithstanding that it was not required.

148. We are not minded to make a declaration which does not capture the issue between the parties and which risks being parsed like a statute with consequences which may be unintended and inappropriate, once it has the status of a declaration in the case which binds the parties.

149. Moreover, the declaration is sought in circumstances where there is no dispute or live issue which the declaration directly addresses. Each of the defendants in this case did make the payments. It is not argued by the claimants or by the defendants that they were "precluded" from doing so. Whether they were "precluded" or not, they have done it, and they have done it without obstruction or objection.

150. The grant of a declaration is discretionary, and the governing principles were summarised in *Rolls Royce plc v Unite the Union* [2010] 1 WLR 318; [2009] EWCA Civ 387 at para 120. The court will be prepared to give declaratory relief in respect of a friendly action or where there is an academic question if all parties so wish, as they do in this case, particularly when it is a test case or may affect a significant number of other cases, if it is in the public interest to decide the issue concerned. However, the court must always ask: is this the most effective way of resolving the issues raised? There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. (See *Rolls Royce* at para 120.)

151. We will, however, address and decide the argument on Issue 1B in this judgment, whether or not a declaration in some form or other should follow from what we say.

152. We prefer the defendants' submissions on Issue 1B to those of the claimants and the Welsh Ministers.

153. The wording of regulation 11 of the Supplementary Regulations – "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling

is unfit for human habitation" – is, for present purposes, similar to the more old-fashioned expression that rent is not lawfully due in such a period.

154. The use of more modern and direct language is to be expected in new legislation based upon Law Commission proposals which introduce a wholly new regime for renting homes in Wales. It is that which explains the adoption of simple and contemporary language rather than a more tried and tested formula such as "lawfully due".

155. We construe the phrase "is not required to pay rent" in accordance with its own terms. The payment was not required before, and after, the point when it was paid, if it was paid. There was no legal obligation to pay it. It was not required by the occupation contracts. It was not required by the legislation.

156. Rent was not in this case required to be paid, because of our decision on Issue 1A. Payment of rent was, whether a deliberate choice or not, and whether made with full information or not, and whether recoverable (in the manner claimed in the counterclaims) or not, "not required" because the dwellings were (by regulation 6(6) of the Fitness Regulations) "to be treated as unfit for human habitation" and (by regulation 11 of the Supplementary Regulations), the contract-holder "is not required to pay rent" when the dwelling is unfit for human habitation.

157. Payment of rent was "not required" in these circumstances as a continuing state of affairs, and that state of affairs was not altered or ended by the fact of a payment being made notwithstanding.

158. If (as the claimants hypothesise), a contract-holder makes a fully-informed and deliberate decision not to withhold rent in circumstances when they are "not required to pay rent", it is perhaps unlikely that they will subsequently change their mind and try and make something of the fact that there was no requirement to pay rent at that time. If they do change their mind, or if the payment was not fully-informed, issues such as those raised in the counterclaims (alleging payment by reason of mistake of law and/or fact and claiming restitution) and the defences to counterclaims will come into play and require resolution. Those matters have not been argued before us and we express no view on them.

ISSUE 2

159. Issue 2 is whether, when the claimants eventually gave copies of the ECRs to the defendants, albeit after the statutory deadline for doing so, they cured their breach of regulation 6 retrospectively as well as prospectively. If the effect was retrospective, rent which was not due while the ECRs had not been provided could be claimed (the claimants will argue) in arrears and (if already paid) could be retained as of right.

Issue 2 - Facts

160. The essential facts behind Issue 2 are those already stated. The claimants failed to give ECRs to these defendants by the deadline of 14 December 2023 which applied to all of them (that being the deadline for every occupation contract converted from tenancies originally started under the old regime). As a result, we have decided that the defendants were not required to pay rent until the date when the ECRs were, eventually, provided, which was in March or April 2024, depending on the defendant in question (see para

73 above). The question is whether late provision of the ECRs placed the claimants in the position they would have been in had they not been late, with retrospective effect.

Issue 2 – Arguments

(i) Claimants' arguments

161. By regulation 6(3)(a) of the Fitness Regulations (para 33 above), a landlord "must ensure that the contract-holder is… given… a copy of the most recent electrical condition report" by the specified date, and, by Regulation 6(6), "A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation". But Regulation 6(7) then provides (with emphasis added) that, for the purposes of paragraph (6), a landlord who has not complied with paragraphs (3)(a) or (4)

> "…is to be treated as in compliance with the provision in question <u>from the time</u> the contract-holder is given a copy of the most recent valid electrical condition report" (Regulation 6(7)(b) in para 33 above).

162. The claimants' argument on Issue 2 relies on applying retrospective effect to the words "from the time" in regulation 6(7)(b).

163. We have set out the whole of regulation 6 at paras 32 to 34 above.

164. Regulation 6(7) provides:

> "(7) For the purposes of paragraph (6), a landlord -
>
> (a) who has not complied with paragraph (1) is to be treated as in compliance with that paragraph at any time when -
>
> (i) the landlord has obtained an electrical condition report, and
>
> (ii) that report is valid.
>
> (b) who has not complied with paragraphs (3)(a) or (4) is to be treated as in compliance with the provision in question from the time the contract-holder is given a copy of the most recent valid electrical condition report;
>
> (c) who has not complied with paragraph (3)(b) or (5) is to be treated as in compliance with the provision in question from the time the contract-holder is given written confirmation of work."

165. In these cases, the landlords were compliant with regulation 6(1) (because it is agreed for present purposes that they had valid ECRs at all the material times, although they had omitted to give them to the contract-holders). They were also compliant with regulation 6(3)(b) (which did not apply to the facts of these cases) and regulations 6(4) and 6(5) (which did not apply either). They were in breach only of regulation 6(3)(a)

(because of their failure to give contract-holders a copy of the most recent ECR by the due dates).

166. The claimants argue that although, as a consequence, it is only regulation 6(7)(b) which is directly applicable to these cases, regulation 6(7) falls to be construed as a whole, including regulation 6(7)(a), which (although it does not apply to these cases) says that a landlord who fails to comply with regulation 6(1) is nonetheless in compliance "at any time when" a valid certificate has been obtained. They say that regulation 6(7)(b) (which does apply to these cases) should be read similarly, when it provides that a landlord who has failed to comply with regulation 6(3) is in compliance "from the time when" the certificate is provided.

167. By regulation 6(6), a dwelling is to be treated as unfit for human habitation "at a time when" the landlord is not in compliance with a requirement imposed by regulation 6. They point out that late compliance is, however, in principle permitted (by regulation 6(7)).

168. They argue that the effect of the phrase "at any time when" in regulation 6(7)(a) is that when a landlord has obtained a valid ECR, they will be treated as being in compliance with regulation 6(1).

169. Regulation 6(7)(a) envisages that compliance can be achieved ("treated as in compliance…"), notwithstanding previous non-compliance ("who has not complied with"). Based on the wording of regulation 6(1), they argue that this means that the landlord is treated as having ensured that there is a valid ECR in respect of the dwelling during each period of occupation. Assuming there is no breach of any other part of regulation 6, they argue that the operation of regulations 6(1) and 6(7) together means that regulation 6(6) will not be engaged as a landlord will be treated as having complied with the requirement in regulation 6(1) even with late compliance. They say that the result of regulation 6(7)(a) read with regulation 6(1) (and assuming no other breaches of regulation 6) is that there would be no day or part day when the dwelling was unfit for human habitation because the landlord is treated as in compliance with the obligation to have a valid ECR for the period of occupation.

170. The claimants say that it follows that any withheld rent in respect of a non-compliant period becomes payable once a landlord has complied with regulation 6(1) (assuming no other breach of the regulations) even if that compliance was late. In other words, the late compliance restores the right to receive rent for the past period of breach. They submit that, if this construction is not adopted, the outcome is "unnecessarily punitive" because it deprives the landlord of rent when, although the landlord failed to provide the ECR on time, it did so eventually, and the property was "objectively" fit for human habitation (claimants' skeleton argument para 45).

171. The claimants point to the inclusion of language such as "at a time when" or "at any time before" and similar phrases in relation to the service of notices and the provision of other information. They give, as examples, section 21A and 21B of the Housing Act 1988, section 215(1) of the Housing Act 2004 and sections 47 and 48 of the Landlord and Tenant Act 1987. They cite *Lindsey Trading Properties v Dallhold Estates (UK) Pty Ltd* (1995) 70 P. & C.R. 332 as a case under section 48 of the Landlord and Tenant Act 1987 where late compliance still achieved the legislative purpose and both pre- and post-notice rent then became due. They also cite *Trecarrell House Ltd v Rouncefield*

[2020] 1 WLR 4712, a case under section 21A of the Housing Act 1988, as a case where the possible sanction, if late compliance were not permitted, was said to be disproportionate.

172. They submit that the statutory purpose of regulation 6(1) is to ensure that the property meets the applicable electrical standards and that the statutory purpose of regulations 6(3) (as substituted by regulation 7(4) for converted contracts) and 6(5) is to ensure that the contract-holder is notified that the property meets those standards. They submit that all these purposes are fully met by provision of the ECR, even if it is late. They submit that reading the legislation without retrospective effect creates "a wholly disproportionate sanction resulting in potentially disastrous financial consequences" (claimant's skeleton argument para 44).

(ii) Defendants' arguments

173. The defendants' position on Issue 2, by contrast, is that "from the time" has only prospective, and not retrospective, effect. The defendants argue that the effect of Regulation 6(7)(b) is that the landlord is to be treated as compliant only from the date on which a copy of the report is given to the contract-holder, and not in respect of any prior period.

174. The defendants argue that this is consistent with regulation 6 read as a whole. Regulation 6(1) provides that "The landlord must ensure that there is a valid electrical condition report in respect of the dwelling during each period of occupation". Regulation 6(6) provides that "A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation". Therefore, at any time when a landlord fails to comply with regulation 6(1), because there is no valid ECR during a period of occupation of the dwelling, that dwelling is to be treated as unfit for human habitation. Regulation 6(7) is made "for the purposes of paragraph (6)". It provides at (a) (which does not apply to these cases) that a landlord who has not complied with paragraph (1) is to be treated as in compliance with that paragraph "at any time when (i) the landlord has obtained an electrical condition report" which meets certain requirements. The defendants submit that "at any time when" means from the date the landlord has obtained a valid ECR. Its effect is that the dwelling is from that date no longer treated as unfit for human habitation by virtue of regulation 6(6) and it has no retrospective effect.

175. Moving on to the position in these cases, where the failure was to comply with regulation 6(3)(a), the defendants reason as follows. Regulation 6(3)(a) provides that "The landlord must ensure that the contract-holder is, before the end of the period of 14 days starting with the occupation date, given … a copy of the most recent electrical condition report". By regulation 7(4), in the case of converted contracts, this obligation is to ensure a copy of the most recent ECR is given within 14 days of the anniversary of the "conversion date". The defendants submit that, at any time when a landlord fails to comply with regulation 6(3)(a), because the most recent valid ECR has not been given to the contract-holder within the stated period, that dwelling is to be treated as unfit for human habitation by the operation of regulation 6(6). Regulation 6(7) then applies. Regulation 6(7)(b) provides that a landlord who has not complied with paragraphs (3)(a) or (4) "is to be treated as in compliance" with the provision in question "from the time the contract-holder is given a copy". The defendants submit that the effect of regulation 6(7)(b) is that the dwelling is no longer treated as unfit for

human habitation by virtue of non-compliance with regulation 6(3)(a) "from the time" the actions specified in regulation 6(7)(b) are completed. It has no retrospective effect.

176. Hence, the late service of the ECRs in the spring of 2024 did not have retrospective effect in the present cases. The defendants submit that the only effect was that each Claimant was "treated" as being compliant with regulation 6(3)(a) "from" those dates of service. It follows that the landlords did not become entitled to any of the rent that a contract-holder was not required to pay during the period of non-compliance or to recover any arrears accrued because a contract-holder had withheld rent.

177. The defendants argue that the retrospective effect suggested by the claimants would frustrate the purpose of regulation 6 (and the same issues arise for the purpose of regulation 5). It would mean that any degree of default by a landlord with any of these statutory requirements could be cured without any adverse consequences – even if the default was remedied only just before a trial of legal proceedings brought by the contract-holder in respect of the default (save, possibly, by the award of legal costs). It would make the regulation, in the words of Mr Bhose KC for the defendants, "all carrot and no stick". As long as the landlord put matters right in the end, even after a default of many years, even perhaps at the doors of a court, there would be no consequence to the landlord. But the contract-holder who had in the meantime withheld rent would, by contrast, suddenly be landed with an obligation to pay the whole of the past rent immediately and in full.

178. The defendants stress that the interest of the contract-holder is in receiving the ECR, not only eventually, but promptly. It is only when a contract-holder has received an ECR that they know that the landlord has obtained an ECR for their dwelling, and whether every electrical installation in the dwelling has been inspected and tested, and to the requisite standards. They are entitled to know whether the inspection has been subject to any operational limitations. They are entitled to know whether the ECR has identified or recommended investigative or remedial work to be carried out to the dwelling; and whether the ECR has recommended improvements. Only then can they assess, not only whether the landlord has complied with its duty under regulation 6(1) of the Fitness Regulations but, in real time, whether their home is, or may be, or may become, unfit for human habitation by reason of exposure to electricity or exposure to fire; and decide what action it might be appropriate for them to take, or for them to press the landlord to take. Late compliance is not the same as timely compliance for these purposes, and the consequences to the landlord should not be the same either.

179. The defendants point out that all the ECRs in these cases referred to operational limitations (e.g., in the case of Ms Jones, "couldn't get to all sockets due to furniture") or recommended improvements to the electrical installations (in the case of the common parts of Ms Mitchell's property). They argue that these were matters that they were entitled to know about straight away, so that they could act upon them.

(iii) Welsh Ministers' arguments

180. The Welsh Ministers support the defendants in saying the effect of compliance is not retrospective and does not revive a right to rent in respect of previous periods of non-compliance.

181. The Welsh Ministers argue that the claimants' contrary reading offends against propositions 1 and 2 in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, 2020) at paras 11.1 and 11.3, namely, (1) that Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner, and (2) the text is important and is the starting point.

182. The Welsh Ministers argue that the claimants have to re-write the provision in order to make good their argument, and there is no need for this. The only financial loss to a landlord will be in respect of contract-holders who have not paid their rent and, if that non-payment is due to a failure to comply with regulation 6(3), then effecting compliance can be done easily and quickly, thus minimising the loss of income.

183. The Welsh Ministers submit that although, in these cases, the retrospective effect of the claimants' compliance would involve going back three or four months, if the claimants' interpretation is correct then the retrospective effect could in other cases extend for up to five years. The claimants' argument would apply equally to a defaulting landlord who had failed to commission an ECR under the mirror provision under regulation 6(7)(a) and to private as well as social landlords. The claimants' interpretation would, in the submission of the Welsh Ministers, have perverse effects. A private landlord might refuse to commission an ECR for four years and, in an effort to force the landlord into action, the contract-holder would be entitled to stop paying rent for three years. If, after four years, the landlord did then commission and serve an ECR, on the claimants' case the landlord would be entitled to recover rent for the three years when the contract-holder was occupying a property which might well have been at risk of fire and other hazards from the electrical installations. The Welsh Ministers say that does not align with the purpose of the legislation.

Issue 2 - Decision

184. We prefer the submissions of the defendants and the Welsh Ministers to those of the claimants on Issue 2.

185. The starting point is the words of the regulation in question. Regulation 6(7) provides:

> "(7) For the purposes of paragraph (6), a landlord -
>
> > (a) who has not complied with paragraph (1) is to be treated as in compliance with that paragraph at any time when -
> >
> > > (i) the landlord has obtained an electrical condition report, and
> > >
> > > (ii) that report is valid.
> >
> > (b) who has not complied with paragraphs (3)(a) or (4) is to be treated as in compliance with the provision in question from the time the contract-holder is given a copy of the most recent valid electrical condition report;

> (c) who has not complied with paragraph (3)(b) or (5) is to be treated as in compliance with the provision in question from the time the contract-holder is given written confirmation of work."

186. These cases concern non-compliance with paragraph (3)(a) and the words "from the time" therefore appear in regulation 6(7)(b). The claimants did not comply with paragraph (3)(a) when they were by law required to. They then complied late. They are therefore "to be treated as in compliance with the provision in question from the time the contract-holder is given a copy of the most recent valid electrical condition report".

187. On the face of it, this means that they are treated as in compliance from that time and not before. There is nothing in the wording to suggest that compliance has any retrospective effect.

188. The natural and ordinary meaning of the words "from the time" in regulation 6(7) is that they are not retrospective. They appear in terms to look forwards and not backwards: "from the time", not "at all times" or "before and after the time".

189. A landlord who complies late "is to be treated as in compliance <u>from the time</u>" that there is compliance and is not to be treated as having been in compliance <u>before</u> that time. To say that "from the time" means "from and before the time" of compliance is to do considerable violence to the language.

190. We next turn to the claimants' submission that other housing cases, involving legislation with similar words, suggest that a retrospective reading might nevertheless be appropriate in this sort of case.

191. The claimants cite *Lindsey Trading Properties v Dallhold Estates (UK) Pty Ltd* (1995) 70 P. & C.R. 332 as a case under section 48 of the Landlord and Tenant Act 1987 where (as the claimants put it) late compliance still achieved the legislative purpose and both pre- and post-notice rent then became due.

192. However, the facts of that case were quite different and so was the question under consideration, because of differences in the applicable legislation. In that case, a tenant had failed to pay rent. A notice to pay the rent was served, to which section 48 of the 1987 Act applied. Section 48 required the tenant to be given an address for service and, since that had not been done, rent was not in fact payable. Because the tenant had not been given an address for service, in the words of section 48(3) of the 1987 Act (with emphasis added):

> "…any rent or service charge <u>otherwise due</u> from the tenant to the landlord shall (…) be treated for all purposes as not being due from the tenant to the landlord <u>at any time before the landlord does comply with that subsection</u>."

193. The notice to pay rent was served in August, and a notice to quit based upon it was served in October. In December, the tenant was given the necessary address for service in a way which made the landlord compliant for the purposes of section 48. After this, the landlord served a fresh notice claiming the arrears of rent. In subsequent proceedings, the tenant disputed that the old rent became due upon late provision of the

service address. Giving the leading judgment, Ralph Gibson LJ said that the rent was "otherwise due" (in the words of section 48) and, for this reason, the arrears did become due upon late provision of the service address. He said (at p 343):

> "All the rent in respect of which the notice of December 3, 1991, was served was "otherwise due from the tenant" on that date, i.e. it was due but for the effect of section 48(2). The letter of December 3 was a valid notice under section 48(1). This provision can be given no effect in derogation of the landlord's legal rights beyond that required by the terms of the enactment. The rent "otherwise due", therefore, is to be treated as not due for the tenant "at any time before the landlord does comply with" section 48(1); but such rent becomes due at the time when the landlord so complies, and continues due thereafter. There is no justification for any extension of the period of time over which the rent is treated as not due whether until the end of that day, or for a reasonable time, or until the next rent day. The cases cited for this purpose are, in my judgment, of no relevance. No question of construction of contractual obligations arises as to when the rent was "otherwise due from the tenant". The rent in respect of which the notice was served was due from the tenant when he received the notice."

194. There is no equivalent of the phrase "otherwise due" in the provisions with which we are concerned.

195. Ralph Gibson LJ concluded his decision on this point by saying (at p 346):

> "In so far as the notice inaccurately asserted that the rent "otherwise due" had been due on and from the quarter days listed, it did not mislead and could not reasonably have misled the tenant in any way. Furthermore, it did not and could not affect the clarity of the notice as to what the tenant was required to do or what the effect would be if the tenant did not comply with it. To treat this notice as invalid, therefore, would be to carry the need for strict compliance with the statutory requirement to a length beyond any useful purpose. The statutory purpose of the notice was fully satisfied. On this ground alone I would allow this appeal."

196. The claimants also relied on *Trecarrell House Ltd v Rouncefield* [2020] 1 WLR 4712, a case under section 21A of the Housing Act 1988. In that case, there was a statutory obligation on the landlord to check boilers for safety every 12 months, and to serve a copy of a gas safety record on tenants within 28 days of the check or (in the case of a new tenant) before the tenant began occupation. The landlord failed to provide the record to the tenant before occupation but did provide it to her, belatedly, 7 months into the tenancy. The landlord was also late in performing the next boiler check. Following both these instances of late compliance, the landlord sought possession. The tenant resisted the claim, on the basis that the possession notice had been served when the landlord was "in breach of a prescribed requirement" for the purposes of section 21A of the 1988 Act. Section 21A(1) provides:

> "A notice under subsection (1) or (4) of section 21 may not be given in relation to an assured shorthold tenancy of a dwelling-house in England at a time when the landlord is in breach of a prescribed requirement."

197. The Court of Appeal held (by a majority) that the "prescribed requirement" was only that the records be provided, not that they be provided on time. Consequently, there was no breach of a "prescribed requirement" when the possession notice was served, provided the necessary records had been given to the tenant before then.

198. However, this was because the statutory definition of "prescribed requirement" covered the fact of the record provision but expressly excluded the statutory deadline for it; see *Trecarrell House Ltd v Rouncefield* [2020] 1 WLR 4712 at 4716C, 4721H and 4722D-E per Patten LJ.

199. By contrast, there is no such distinction in regulation 6 of the Fitness Regulations, with which we are concerned.

200. Patten LJ did go on to discuss the effect on the statutory purpose of this conclusion. In doing so, he emphasised that failure to meet the deadlines was punishable as a criminal offence, which he described as "the primary sanction" (at para 24 of his judgment).

201. There is, however, no criminal sanction for non-compliance with the Fitness Regulations or the Act. Criminal justice is not a devolved matter and there are aspects of criminal law that are beyond the Senedd's legislative competence as a result of Schedule 7B para 4 of the Government of Wales Act 2006. Subject to those limitations, Welsh Ministers and the Senedd do have devolved power, which they regularly exercise, to create new criminal offences. However, no criminal sanctions for breach of the Act or its associated regulations have been created, either by Welsh Ministers or the Senedd. Therefore, the defendants and the Welsh Ministers are correct to say that, if regulation 6(7) does not mean what we have said it appears to mean, the consequences for a landlord who does not comply with the statutory deadlines are practically nil, even if the default continues for months or years. That appears to us to be contrary to the statutory purpose, which is not only to impose requirements (as to the provision of ECRs to tenants) but to enforce them with consequences (by providing that the tenant is not required to pay rent). To revive, with retrospective effect, the requirement to pay rent is to render the regulation toothless, so far as tenants are concerned.

202. In further discussion, Patten LJ considered the meaning of "at a time when" in section 21A of the 1988 Act in the context of it being a phrase "commonly used in housing legislation as part of a statutory inhibition of the landlord's right to serve a section 21 notice" (para 25); i.e. a possession notice. He observed that "Late delivery of the document does provide the tenant with the information he needs" and resisted the argument that late delivery altogether precluded service of a section 21 possession notice as "an unlikely result". But he again emphasised the express exclusion of the 28 day deadline from the definition of "prescribed requirement" (at para 30). He also referred to the draconian effect of the perpetual loss of the right to serve a section 21 possession notice, as (at paras 40-42) did King LJ.

203. In the present case, the consequence is not as draconian as the claimants suggest. It is limited to the amount of rent in respect of the period when no ECR was provided. A

compliant landlord will suffer no loss of rent at all. A diligent landlord will have no difficulty in complying on time, or, if failing to comply on time, in putting matters right quickly, as the claimants did in this case. The loss of rent in each case will invariably be precisely limited by the amount of rent, and suffered only in respect of the period of non-compliance. The loss of rent for a period of time is not comparable to the perpetual loss of a right to serve a section 21 notice of possession considered in *Trecarrell House Ltd v Rouncefield*. The large sums at risk for the claimants are in respect of very large numbers of contract-holders but are not, in individual cases, said to be large. Looking at the other side of the question, the consequence to the contract-holder of not having an ECR, and therefore not being assured that the property is safe (if it is safe), or informed about respects in which it is or may not be safe, might reasonably be considered significant by the legislators, who have passed these enactments accordingly.

204. We do not accept the claimants' submission that late provision of the ECR is good enough, and that it is disproportionate (and therefore implausible) to read regulation 6(7) as not allowing rent to be claimed retrospectively. We accept the submissions of the defendants about the real and practical importance to contract-holders of being given the information in the ECR straight away, and not months or years late. This is particularly given the fact that the contract-holder does not know that the property is safe until then and may discover, on receiving the ECR, that it is actually not safe or that further investigations or specific remedial action are suggested by the ECR.

205. The statutory purpose is, not only that dwellings should be fit for human habitation, but that there should be regular testing and reporting, including reporting to the contract-holders as the persons most affected by electrical hazards and other matters affecting or potentially affecting fitness for human habitation. The statutory purpose is, not only to give contract-holders rights when their property is objectively unfit for human habitation, but to give them also information rights so that they have assurance (when it is not unfit) and details of what is required (when it is, or may be, or is at risk of becoming, unfit). The statutory purpose is to incentivise landlords to honour these rights by linking compliance directly with their right to receive rent. We consider the construction we have adopted to be consonant with the statutory purpose. The claimants' construction, which we have rejected, is less consonant with the statutory purpose as a whole, relating, as it does, only to a part of it and freeing landlords of any risk to their rent if they do not comply with the information requirements of the Act and its associated regulations.

ISSUE 3

206. Issue 3 is about the extent to which the ECRs which contract-holders are entitled to be given have to cover the common parts or communal areas as well as the defendants' own accommodation.

Issue 3 - Law

207. Issue 3 arises because there is a dispute about the meaning of the word "dwelling" in this context.

208. Section 91 deals with the landlord's fitness for human habitation obligations (it is set out in para 22 above). Section 91(1) of the Act says that the landlord must ensure "that

the dwelling" is fit for human habitation. Section 91(2) provides that "the dwelling" for these purposes includes "if the dwelling forms part only of a building", the structure and exterior of the building "and the common parts". Section 91 is a fundamental provision which is incorporated as a term of all the relevant contracts (section 91(3)).

209. Section 92 deals with the landlord's obligation to keep the dwelling in repair (it is set out in para 23 above). Section 92(2) provides that, "if the dwelling forms part only of a building", the landlord must keep in repair (among other things) "the service installations in the dwelling". Service installations are defined in section 92(4) to include "an installation for the supply of… electricity… or for heating water". Section 92 is another fundamental provision (section 91(5)).

210. Section 94 is the provision empowering Welsh Ministers to make regulations in relation to the fitness for human habitation of "a dwelling" (it is set out in para 24 above).

211. Regulation 11 of the Supplementary Regulations provides that the contract-holder is not required to pay rent when "the dwelling" is unfit for human habitation (set out at para 26 above).

212. The Fitness Regulations provide that words and expressions in the Fitness Regulations "have the same meaning as they have in the Act" (regulation 2).

213. We have already considered regulation 6 of the Fitness Regulations, dealing with electrical safety, in relation to earlier issues; it is set out in full at paras 32 to 34 above. For Issue 3, what is relevant in regulation 6 is:

i) The obligation on the landlord to ensure there is a valid ECR "in respect of the dwelling": regulation 6(1).

ii) The obligation to provide a copy to the contract-holder: regulation 6(3).

iii) The provision that "A dwelling is to be treated as unfit for human habitation at a time when the landlord is not in compliance with a requirement imposed by this regulation": regulation 6(6).

iv) The definition of "electrical safety inspection" to mean the inspection and testing of every electrical service installation "in a dwelling": regulation 6(8).

v) The definition of "electrical service installation in a dwelling" to include (with emphasis added):

> "…where the dwelling forms part only of a building, an electrical service installation **which directly or indirectly serves the dwelling**, and which either -
>
> (a) forms part of any part of the building in which the landlord has an estate or interest, or
>
> (b) is owned by the landlord or is under the landlord's control"
>
> (regulation 6(8))

214. Section 246(3) of the Act provides that "Dwelling, in relation to an occupation contract, means the dwelling subject to the contract".

Issue 3 - Facts

215. Issue 3 is only relevant to Mrs Mitchell. None of the occupation contracts in the other cases involved any common parts or communal areas.

216. The "dwelling" in Mrs Mitchell's case is one of the Key Matters set out in her occupation contract and this refers to the dwelling as follows:

> "1.5 This contract relates to Flat 1, [followed by full address] ("the dwelling").
>
> 1.6 The dwelling consists of 2 bedroom Flat. The maximum number of people entitled to occupy the dwelling is 3."

217. In relation to Mrs Mitchell, it is accepted that her landlord (Coastal Housing Group Ltd) was responsible for obtaining ECRs in respect of relevant communal areas (para 21 of the agreed facts).

218. Coastal Housing carried out an electrical safety inspection (ESI) and obtained an ECR in respect of the communal areas of Mrs Mitchell's block of flats on 26 July 2019. A copy was sent to her by first-class post on 2 April 2024. It is accepted that it was given to her on or about 4 April 2024. This was somewhat later than the date on which she got the ECR for her own flat (which was on 14 March 2024; see para 73.i) above).

Issue 3 – Arguments

(i) Claimant's arguments

219. The claimants' position is encapsulated in the declarations they seek, in relation to Issue 3, from the court. These are as follows:

> "'Dwelling' for the purposes of regulation 6 of the Fitness Regulations is the 'dwelling' which is identified as a Key Matter in the occupation contract (as per section 246(3) of the Act). It does not bear the extended meaning in section 91(2) of the Act.
>
> Where a dwelling forms part of only of a building, any electrical safety inspection must inspect and test every electrical service installation in a dwelling which directly or indirectly serves the dwelling, and which either (a) forms part of any part of the building in which the landlord has an estate or interest, or is owned by the landlord or is under the landlord's control as out on regulation 6(8) of the Fitness Regulations.
>
> Accordingly, landlords are not required to give a copy of an electrical condition report for communal parts (as defined in section 252 of the Act) in order to satisfy the requirements in Regulation 6 of the Fitness Regulations."

220. The claimants argue that the starting point is the definition in Mrs Mitchell's occupation contract, pursuant to section 243(3) of the Act and as set out in the Key Matters section of her occupation contract, which refers only to "Flat 1".

221. They apply that to regulation 6 and argue that their duty is to provide an ECR for Flat 1 alone and not for any electrical sockets or any other electrical installation in the common parts.

222. They accept what is said in regulation 6(8) of the Fitness Regulations about dwellings which form only part of a building, in which case an electrical service installation "which directly or indirectly serves the dwelling" is included if it is part of the building or controlled by the landlord (see para 213(v) above). However, they argue that an electrical service installation in common parts is not covered by regulation 6 unless it is within the regulation 6(8) definition or within the definition of dwelling (limited to Flat 1 itself) in section 243 of the Act. They do not accept that electrical installations which do not "directly or indirectly" serve the dwelling (within the meaning of regulation 6(8)) require service of an ECR merely because they are located in common parts which are within the extended definition of "dwelling" in section 91(2) of the Act.

223. They give as an example (not, however, claiming that it is in any way similar to Mrs Mitchell's case) a complex development comprising shops, communal areas and individual residential flats, where there may theoretically be an electricity substation outside buildings from which, at some point, the electrical supply splits in order to supply electricity to the different locations. Each individual flat may have its own cable to direct the electricity. The claimants say that, in that case, the substation would (in the words of regulation 6(8)) be "indirectly" serving the dwelling and the cables would "directly" serve the dwelling. They say that regulation 6(8) must not be read so as extend the requirements in regulations 6(1) and 6(3) to give them an unnaturally wide meaning i.e. ECRs do not need to be given for, e.g., communal car parks, communal lounges and other communal parts (such as hallways and stairwells) where there is no electrical service installation there which serves the dwelling.

224. In the alternative, and in any event, the claimants argue that, even if they do need to provide an ECR for communal areas, the failure to give such an ECR does not engage the consequences under regulation 6(6) of the 2022 Fitness Regulations so that the property is not unfit for human habitation and there is no entitlement for the contract-holder to withhold rent.

225. They point out that some occupation contracts will have provisions relating to service charges which may be included in, or be in addition to, rent. Such charges, when dealing with tenancies and contracts granted by registered social landlords, usually (they say) attach to services or items being provided (including the supply of utilities) in the communal parts of a building. In Mrs Mitchell's case, under terms 3.7 to 3.9 of the occupation contract, she is to pay service charges for the services and items Coastal Housing Group Ltd provide. These are listed in Annex D to the contract as: Administration, Caretaker, CCTV Maintenance, CCTV Replacement, Cleaning, Communal Electricity, Communal Flooring Replacement, Communal Water Rate, Electricity Maintenance, Fire Alarm Maintenance, Fire Alarm Replacement, Firefighting Maintenance, Heat Charge, Lift Maintenance, Lift Replacement, Refuse Collection, Remote Door Entry Maintenance, Remote Door Entry Replacement, TV Aerial Maintenance and TV Aerial Replacement. Some of these are electrically

operated items (such as CCTV) and one of them is, in terms, "electricity maintenance". The claimants say that disputes concerning service charges are governed primarily by the Landlord and Tenant Act 1985 and determined primarily by the Leasehold Valuation Tribunal. They point out that nothing in the Act or regulations, or in the occupation contract, provides Mrs Mitchell with a right to withhold payment of service charges.

226. The claimants submit that there is no need to apply a uniform definition of "dwelling" across the whole of the Act. They argue that references to "dwelling" and to common parts are dealt with differently in different sections of the Act, referring, particularly, to section 91(1), section 91(2), the wording adopted by regulation 6(8), and the different wording again to be found in section 96(3).

(ii) Defendants' arguments

227. The defendants argue that "dwelling" for the purposes of regulation 6 of the Fitness Regulations is subject to the extended definition of "dwelling" provided by section 91(2) of the Act, and is not limited by the definition in section 246(3) to the demised premises subject to the occupation contract only. Hence, the defendants argue that "dwelling" for these purposes included, not only Flat 1, but also "the structure and exterior of the building and the common parts" added in by section 91(2).

228. Although Issue 3 arises in relation to compliance with the regulation 6 obligation about having a valid ECR during each period of occupation, the defendants suggest that the claimants' logic goes too far because there is no obvious reason why it would not apply to all references to "dwelling*"* within the Fitness Regulations. These include determining whether a dwelling is fit for human habitation (within the meaning of section 91(1)) by having regard to the 29 'matters and circumstances' listed in the Schedule to those regulations, which include entry by intruders, domestic hygiene, pests and refuse, explosions and structural collapse and falling elements. They also include the regulation 5 duty to ensure there are smoke and carbon monoxide alarms in the dwelling (regulation 5).

229. The defendants accept that regulation 2(1), which provides that words and expressions in the Fitness Regulations "have the same meaning as they have in the Act*"*, raises a question as to which of the two apparently competing definitions contained in the Act should prevail: section 246(3) or section 91(2).

230. The defendants submit that the provisions of the Act under which, and for whose purposes, the Fitness Regulations are made, show that the definitions in the Act do not compete or contradict one another. The Fitness Regulations were made pursuant to sections 94(1), (2)(b), (3) and 256(1) of the Act. Section 256 regulates the Welsh Ministers' general competence to make regulations under the Act and does not assist one way or another. Section 94 however is strongly relied upon by the defendants, emphasising the following passages in particular (with the defendants' emphasis):

> "(1) The Welsh Ministers must prescribe matters and circumstances to which regard must be had when determining, **for the purposes of section 91(1), whether a dwelling is fit for human habitation**.

> (2) In exercising the power in subsection (1), the Welsh Ministers may prescribe matters and circumstances –
>
> (…)
>
> (b) which may arise because of a failure to comply **with an obligation under section 92**.
>
> (3) The Welsh Ministers may by regulations –
>
> (a) impose requirements on landlords for the **purpose of preventing** any matters or circumstances which may cause **a dwelling to be unfit for human habitation** from arising;
>
> (b) prescribe that if requirements imposed under paragraph (a) are not complied with in respect of **a dwelling, the dwelling is to be treated as if it were unfit for human habitation**."

231. The defendants submit that the extended definition of "dwelling" derived from section 91(1) should apply to regulations 6(1) and (8), if not also to all the rest of the Fitness Regulations. They say that references to "dwelling" in section 94(1) must mean "dwelling" in the context of section 91(1). It follows that the section 91(1) definition also applies to regulation 3 and the Schedule to the Fitness Regulations, both of which are made for the express purpose of section 91(1). Section 91(1) must be read alongside section 91(2). Therefore, the defendants say, for the purposes of determining whether premises are unfit for habitation, "dwelling" includes "if the dwelling forms part only of a building, the structure and exterior of the building and common parts".

232. By section 94(2) the prescribed 'matters and circumstances' which cause unfitness may arise because of failures to comply with obligations under section 92. Those obligations include duties to repair the structure and exterior of the building (section 92(2)(a)), and also to repair and maintain a service installation which directly or indirectly serves the dwelling and which either (i) forms part of the building in which the landlord has an estate or interest or (ii) is owned by the landlord or is under its control (section 92(2)(b)). Therefore, the defendants submit that a failure to maintain service installations or parts of the building located outside the demised premises can render 'the dwelling' unfit for habitation.

233. The 'matters and circumstances' in the Schedule to the Fitness Regulations, prescribed under section 94(1) and (2), include matters which the defendants say are relevant to electrical installations, including lack of adequate lighting (para 13); exposure to electricity (para 23); and fire (para 24). The defendants submit that those are matters or circumstances which may occur in common parts, or areas of a building outside the demised premises, but which can have the effect of rendering the demised premises unfit.

234. Regulation 6 is made under section 94(3). Its purposes are to prevent "matters or circumstances which may cause a dwelling to be unfit for human habitation from arising" (section 94(3)(a)) and, if preventive requirements are not complied with, to prescribe that "the dwelling is to be treated as if it were unfit" (section 94(3)(b)). The

defendants submit that "matters and circumstances" in this context must refer to the "matters and circumstances" prescribed under section 94(1) and (2). For the reasons already given, the defendants submit that those "matters and circumstances" extend to the structure, exterior and common parts, and include various matters relating to electrics.

235. From this, the defendants argue that it would be "a wholly artificial and unwieldly distinction" (defendants' skeleton argument para 71) to separate the meaning of "dwelling*"* used in sections 94(1)-(2) from that used in section 94(3), and consequently the definition of "dwelling*"* arising under section 91(1) and regulation 3 from that used in regulation 6. It would mean that:

i) The prescribed "requirements" to prevent unfitness in relation to electrics were limited to the demised premises, and did not apply to the structure, exterior and common parts of the building.

ii) A landlord would have no obligation to obtain an ECR or action its findings and recommendations in common parts, even though those same common parts might themselves actually be unfit for habitation (or render the demised premises unfit) because of electrical hazards assessed in compliance with section 91(1), regulation 3 and the Schedule.

iii) This could mean that the contract-holder would be living in dangerous or unsatisfactory conditions and their rent would not be payable pursuant to regulation 11 of the Supplementary Regulations. But the defendants submit that, without an ECR, they would have no evidence or confirmation of this position, the resolution of the hazards might be overlooked or delayed, and the preventive objectives of regulation 6 would be undermined. The defendants argue that it makes no sense to exclude the structure, exterior and common parts from ECRs when hazards in those areas can impact upon the safety and comfort of contract-holders just as much as those within the demised premises.

236. The defendants submit that, by contrast, applying the extended definition of "dwelling*"* in section 91(2) leads to "workable and common-sense outcomes" (para 72 of the defendants' skeleton argument). They say that their analysis, based on sections 91 and 94, is mirrored in the fundamental term in section 91(1) that the landlord must ensure that the dwelling is fit for human habitation and in clauses 6.1 and 6.2 of Mrs Mitchell's occupation contract, which provide that the obligation on the landlord to ensure that "the dwelling" is fit for human habitation "includes, if the dwelling forms part only of a building, the structure and exterior of the building and the common parts" (clause 6.2). They submit that their analysis introduces symmetry between the landlord's duty to keep "service installations" in repair and proper working order in accordance with section 92(2)(b) of the Act, and the duty under regulation 6(1) to obtain an ECR which includes testing of "electrical service installations" as defined by Regulation 6(8). The definitions of "service installations" and "electrical service installations" are materially identical. The defendants argue that section 92(2)(b), read in conjunction with section 95(5), applies to common parts outside the demised premises and that the landlord's compliance with section 92(2)(b) therefore most likely requires periodic completion of electrical safety inspections in accordance with electrical safety standards within common parts in any event. They suggest that regulation 6(1) may not add much to that obligation.

237. The defendants say that there is no textual or any other basis to support the claimants' argument that the electrical service installation must "supply" the dwelling and be for its "benefit" (as Coastal Housing pleads in para 80 of their Particulars of Claim). The defendants say that the Fitness Regulations provide, in terms, that they will apply to any installation which "directly or indirectly serves the dwelling".

238. The defendants submit that there is, in fact, no tension between the extended definition of "dwelling" – for the purposes of repairing obligations and unfitness, including the preventive obligations imposed by regulation 6 – and the obligation to identify "the dwelling" in the written statement of the occupation contract pursuant to sections 26(a) and 32(2). They argue that that obligation does no more than require the address of the dwelling to be defined as a key term. They point to paragraphs 109 and 126 of the Explanatory Notes to the Act, and Term 1.5 of Ms Mitchell's occupation contract.

239. The Explanatory Notes were written after the Act received its Royal Assent. They were prepared by the Education and Public Services Group of the Welsh Government "to assist the reader of the Act" (para 1). The Explanatory Notes "should be read in conjunction with the Act but are not part of it" (para 1). Para 109 refers to the Key Matters as "property-specific information such as the amount of rent and the address" and para 126 also identifies the Key Matters as "the address of the dwelling", as well as the occupation date, the amount of rent, and the rental periods (such as weekly monthly). Clause 1 of Mrs Mitchell's occupation contract is headed "Key and Other Matters" and lists these as including Flat 1 being "the dwelling".

240. The defendants say that if they are correct that the extended definition of "dwelling" applies under regulation 6(1), non-compliance necessarily has the consequence considered under Issue 1A that rent is not payable. Hence, the defendants say that Mrs Mitchell's claim is for the period ending on 4 April 2024, when she was given the ECR for the common parts.

(iii) Welsh Ministers' arguments

241. The Welsh Ministers' position is that whether a particular installation "directly or indirectly serves a dwelling" within the meaning of regulation 6(8) of the Fitness Regulations is fact sensitive and may also involve an evaluative judgment. Therefore, an ECR should, in certain circumstances, include the inspection and testing of electrical installations which are located outside of a dwelling provided that they "directly or indirectly serve the dwelling" and the landlord has an interest in or control over the land in which the installation is situated.

242. The Welsh Ministers also argue that, even if, as a matter of judgment, an installation outside Flat 1 should have been included in the earlier ECR which was sent to Mrs Mitchell, that defect may not lead to a breach of regulation 6(1) or 6(3) or, therefore, engage regulation 6(6) so as to risk the right to rent because of the operation of regulation 11 of the Supplementary Regulations. This is because the Welsh Ministers submit that an ECR may be flawed or incomplete in any number of respects but such a flaw would not necessarily lead to the earlier ECR being regarded as a nullity or as a document which does not discharge the landlord's obligations under regulation 6(3) and, therefore, revive any right to rent which had previously been lost. They say that this question, also, should be regarded as fact sensitive.

243. The Welsh Ministers say that the claimants' proposed declarations – which purport to cover every case, without regard to these issues which are said to be fact-sensitive - go too far and should not be granted.

244. The Welsh Ministers do, however, agree with the claimants that, if an electrical installation does not fall within the wording of regulation 6(8) of the Fitness Regulations, it is not brought into the ESI and ECR régime by the extended definition of dwelling in section 91(2) of the Act.

Issue 3 - Decision

245. We are concerned by the theoretical and hypothetical nature of some of the arguments addressed to us and, consequently, by the suggestion that we should make declarations about the detailed operation of the Act and regulation 6 which are not securely anchored in the facts of any particular case.

246. This issue arises, as we have said, only in the case of Mrs Mitchell. It was not obvious to us what, if any, electrical installations outside her flat are actually in dispute which would not fall within the definition in regulation 6(8) of the Fitness Regulations (which all parties accept as being applicable) but which would fall within the extended definition of "dwelling" in section 91(2) of the Act.

247. It is common ground that some electrical installations outside Mrs Mitchell's flat were included in the ECR given to her on 4 April 2024 (following the ESI of the communal areas). The question will be to what extent these external electrical installations directly or indirectly served Flat 1. This question will need to be the subject of evidence and, if Coastal Housing Group Ltd are found to be in breach by not serving this ECR sooner, there will be consequences which we have explained under Issue 1 and Issue 2. What that extent is was not clear from the evidence presented to us, or from the arguments addressed to us. However, we were shown references to distribution boards, one or more of which presumably directly or indirectly served Flat 1 ("DB", on page 2 of 14 in the later ECR, which is Appendix 5 to Coastal Housing Group's Particulars of Claim). We were shown, in the same document, references to meter rooms and meter cupboards, one of which presumably directly or indirectly served Flat 1, although the claimants were not able to say which. However, none of the details were known to Counsel or explained in the evidence and so it was not possible to go much further than that in argument.

248. Moreover, it was not part of Mrs Mitchell's case that there was some electrical installation in the common parts which was *not* included even in the later ECR, and which ought to have been included if the definition in section 92(1) of the Act applied, but would not be included if it was only the definition in regulation 6(8) (" an electrical service installation which directly or indirectly serves the dwelling") that applied.

249. As long as some of the electrical installations in the later report directly or indirectly served Flat 1 (which seems to be accepted), Mrs Mitchell is able to hold her landlord to account for failing to comply with its obligations under regulation 6 by supplying her with a copy of the later ECR until 4 April 2024. It follows that Coastal Housing Group Ltd faces, in relation to Mrs Mitchell, the consequences of our decisions about issues 1 and 2 in relation to the late provision of the ECR covering communal areas, on 4 April 2024. The question of which, if any, of the electrical installations were outside

regulation 6(8) but within the extended definition in 92(1) adds nothing to the rights and obligations of the parties either way, because they were all in one ECR.

250. We do recognise that every case must be decided first on its facts, and that edge-cases in the law are best decided only when the facts of any particular case require that decision.

251. We therefore do not propose to make any declarations on Issue 3. The starting point must be the definition of dwelling in regulation 6 itself; that is, the definition in regulation 6(8). The definition in section 91(2) does appear to apply as well, because of what is said in regulation 2. We see force in the submission of the defendants that section 243 does not have to be read as conflicting with and, therefore, potentially excluding the operation of section 91(2) on the scope of regulation 6. However, we make no decision on the point because the facts of the case do not engage it.

ISSUE 4

252. The claimants raised Issue 4 because they were unsure of the answers to two questions:

i) What written confirmation of works needs to be given under regulations 6(3)(b) and 6(5) of the Fitness Regulations.

ii) How far back in time a landlord has to go under regulations 6(3)(b) and 6(5) in order to provide the written confirmation of works to which a contract-holder is entitled.

253. It turned out that all those parties who expressed a view on the first question were in agreement about it. This meant that there was no need for us to decide it. The claimants and the defendants agree that a Minor Electrical Installation Works Certificate is different from an Electrical Condition Report and regulation 6 does not apply to it. A Minor Electrical Installation Works Certificate is referred to in Chapter 64, paragraph 644.4.201, of the Wiring Regulations (BS 7671:2018), which is a national standard published by the Institution of Engineering and Technology (IET) and the British Standards Institution (BSI). It is described there as a form of certificate which may be given "where electrical installation work does not include the provision of a new circuit or replacement or a distribution board or consumer unit".

254. The claimants and the defendants agree that the answer to the first question is as follows:

> "A landlord is not required to give the contract-holder a Minor Electrical Installation Works Certificate (MEIWC) in order to comply with the requirements of regulation 6 of the Fitness Regulations (in particular, the requirements of regulation 6(1) and 6(3)).
>
> For converted contracts, under regulation 6 of the Fitness Regulations, a landlord must provide written confirmation of any investigatory or remedial work carried out on or in relation to an electrical service installation in the dwelling after the Relevant Date [as to which, see below]. This duty includes but is not

> limited to investigations or works which have arisen as a result of the most recent Electrical Condition Report."

255. There is no live dispute between any claimant or any defendant which requires the first question to be answered in these proceedings and we do not propose to make any declaration in relation to it.

256. The parties do not agree on the answer to the second question, and it is the answer to that question which will determine the Relevant Date to which we have referred in para 252.ii) above. The claimants say that the Relevant Date is 1 December **2023**. The defendants say it is 1 December **2022**.

Issue 4 - Law

257. Regulation 6(3)(b) of the Fitness Regulations provides (with emphasis added):

> "(3) The landlord must ensure that the contract-holder is, before the end of the period of 14 days **starting with the occupation date**, given—
>
> (…)
>
> (b) where investigatory or remedial work has been carried out on or in relation to an electrical service installation in the dwelling after the electrical safety inspection to which that report relates (and before the occupation date), written confirmation of work."

Regulation 7(4) provides that, where the occupation contract is a converted contract (see para 35 above), **"occupation date" in regulation 6(3)** means the day which is 12 months after the conversion date, i.e. 1 December 2023 (because the conversion date was 1 December 2022).

258. Regulation 6(5) of the Fitness Regulations provides (with emphasis added):

> "(5) Where investigatory or remedial work is carried out on or in relation to an electrical service installation in the dwelling **after the occupation date**, the landlord must ensure that the contract-holder is given written confirmation of work before the end of the period of 14 days starting with the day on which the landlord received the confirmation."

259. The wording of regulation 6(5) applies to new contract-holders and converted contract-holders alike. The defendants are converted contract-holders who had tenancies under the previous legislation which were converted into occupation contracts when the Act came into force (see para 21 above), but this makes no difference to the actual wording of regulation 6(5). This is in contrast to the express modification of regulation 6(3) referred to in para 35 and para 257 above.

260. Paragraph 31 of Schedule 12 of the Act provides:

> "*The occupation date*
>
> 31. The occupation date, in relation to a converted contract, is the day on which the contract-holder became entitled to occupy the dwelling under the tenancy or licence which became an occupation contract on the appointed day."

The "appointed day" was 1 December 2022. Therefore, paragraph 31 of Schedule 12 means, in effect:

> "*The occupation date*
>
> 31. The occupation date, in relation to a converted contract, is the day on which the contract-holder became entitled to occupy the dwelling under the tenancy or licence which became an occupation contract on [1 December 2022]."

261. The Fitness Regulations (as we have said above) provide that words and expressions in the Fitness Regulations "have the same meaning as they have in the Act" (regulation 2).

Issue 4 – Arguments

(i) Claimants' arguments

262. The claimants contend that "occupation date" in regulation 6(5) for converted contracts must mean 1 December 2023 (as it does in regulation 6(3)). They say that if "occupation date" has the meaning given by paragraph 31 of schedule 12 of the Act (the date on which the contract-holder "became entitled to occupy the dwelling under the tenancy or licence which [later] became an occupation contract"), this would lead to "an absurd result" where a landlord does not have to have a valid ECR under the 2022 Fitness Regulations for converted contracts but does have to give written confirmation of works (para 63 of the claimants' skeleton argument).

263. The claimants say, for example, that if "occupation date" means the date on which the contract-holder became entitled to occupy the dwelling under the original tenancy or licence, it is impossible for the claimants to comply. The occupation date for Mrs Mitchell's contract is, under that definition, 12 July 2010. The claimants say that they cannot comply with regulation 6(5) if this means they had to give written confirmation of works "within 14 days of receipt of that confirmation since 12 July 2010" (claimants' skeleton argument para 64).

264. It turned out that neither the defendants nor the Welsh Ministers argued for this interpretation, as will be seen when we come to their arguments.

265. As to regulation 6(3)(b), the claimants submit that this too must be limited to the period between the most recent ECR given under regulation 6(3)(a) and the occupation date. For converted contracts the occupation date is 1 December 2023. The claimants submit that regulation 6(3)(b) does not require the landlord to provide written confirmation of works between the date of last ECR prior to the regulations coming into force and the ECR given under regulation 6(3)(a).

266. In oral argument, the claimants noted that no party contended that the "occupation date" in regulation 6(5) was the date the contract-holders originally became tenants, e.g. 12 July 2010 in the case of Mrs Mitchell. However, they did not accept the interpretation of the Welsh Ministers and of the defendants (below) that it should be construed as the "appointed day" referred to in paragraph 31 of schedule 12 of the Act, namely, 1 December 2022. Rather, the claimants maintained their argument that it must be 1 December 2023. They said that regulation 6 has to be looked at as a whole, and regulation 6(5) has to be construed in the light of regulation 6(3)(b) which is, in the case of converted contract-holders, by virtue of the modification applied to them by regulation 7, in respect of an occupation date defined as 1 December 2023. They submitted that regulation 6(3)(b) refers (with emphasis added) to "investigatory or remedial work (…) carried out on or in relation to an electrical service installation in the dwelling after the electrical safety inspection (…) (and **before the occupation date**)" and regulation 6(5) refers to "investigatory or remedial work is carried out on or in relation to an electrical service installation in the dwelling **after the occupation date**". They fit together and should have the same definition of occupation date applied in each, which would (because of the express modification in regulation 6(3)) be 1 December 2023.

(ii) The Second and Third Interveners' arguments

267. The Second and Third Interveners agree that the conversion date was 1 December 2022 and, accordingly, the notification duties in regulations 6(3)(a) and (b) of the Fitness Regulations only arise with effect from 15 December 2023. However, they also say that only regulation 6(3) is modified by regulation 7(4) and there is no such express modification of "occupation date" for regulation 6(5) (or regulation 6(4), which does not raise any claim in these proceedings).

268. They accept that the "occupation date" when the landlords were required to comply with the notification duties in regulations 6(4) and 6(5) "would appear to be governed by paragraph 31 of Schedule 12" (para 31 of their written Application to Intervene dated 2 July 2024; for para 31 of Schedule 12 see para 260 above). They submit that, while the meaning of this is not altogether clear, it means either (A) the day the contract-holder first became entitled to occupy the dwelling under the original tenancy or licence, perhaps many years ago, or (B) the day on which they became entitled to occupy the dwelling under the converted contract (1 December 2022). They say construction (A) would impose an impossible duty under regulations 6(4) and 6(5), which did not come into force until 1 December 2022. They say that construction (B) would mean that the duty under regulations 6(4) and 6(5) (together with the consequences for breach already considered) would have arisen a whole year before the duties in regulations 6(3)(a) and (b) but with the same consequence for non-compliance; namely, the contract-holders were not required to pay rent during that period by virtue of regulation 11 of the Supplementary Regulations (para 32 of their written Application).

269. Consequently, they argue that either interpretation would impose "an inevitable and disproportionate burden on landlords which was clearly not intended by the Welsh Minister"; and suggest that this is as a result of "an oversight on the part of the Senedd draftsman" (para 33 of their written Application).

(iii) The position of the Welsh Ministers

270. The Welsh Ministers do not accept the suggestion of the other Interveners that there has been a drafting error.

271. They refer to the express alteration of the meaning of "occupation date" to 1 December 2023 in regulation 6(3) of the Fitness Regulations in the case of converted contracts (para 257 above).

272. They also refer to the express alteration of regulation 6(4) by regulation 7(5) (see para 35 above) to read:

> "(4) Where an electrical safety inspection is carried out after the contract-holder has been given a report in accordance with sub-paragraph (a) of paragraph (3) (as modified by regulation 7(4)), the landlord must ensure that the contract-holder is given a copy of the electrical condition report relating to the inspection before the end of the period of 14 days starting with the day on which the inspection was completed".

273. The Welsh Ministers submit (in para 26 of their written Response to the other Interveners dated 15 July 2024) that the effect of this is that:

> "…the substituted regulation 6(4) only applies in respect of electrical safety inspections undertaken after the landlord has already complied with (or should have complied with) its obligation to provide a copy of the pre-existing ECR on or before 14 December 2023. In the circumstances, it is clear that there is no drafting mistake in respect of the notification duty under regulation 6(4) in respect of converted contracts. Specific provision is made in respect of that notification duty as it applies to converted contracts under regulation 7(5) which is both clear and workable."

274. Since there is no claim by any defendant which engages this dispute in relation to regulation 6(4), we say no more about that.

275. Turning to the other Interveners' suggestion that there has been a drafting error in relation to regulation 6(5), the Welsh Ministers accept that regulation 7 makes no amendment to regulation 6(5) in respect of converted contracts but deny that there has been any error. They argue that the obligation under regulation 6(5) arises in respect of any qualifying works which are done after the Fitness Regulations come into force i.e. from 1 December 2022. They say there is nothing illogical in the Welsh Ministers concluding that converted contracts and new occupation contracts should both be subject to this duty from the date when the Fitness Regulations came into force. They argue that, by contrast to the obligations under regulations 6(1) and 6(3), which will require landlords to take steps in respect of each and every dwelling subject to a converted contract, the notification obligation under regulation 6(5) only arises in respect of dwellings where qualifying works take place. They suggest that it is understandable, therefore, that the Welsh Ministers concluded that the 12 month grace

period granted in respect of regulations 6(1) and 6(3) was not required for regulation 6(5) which imposes less of a burden on landlords.

276. The Welsh Ministers therefore adopt construction (B) (as we have described it in para 268 above) and deny, either that there is any reason to suspect a drafting error at all, or that the requirements of *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 for the adoption of a rectifying construction have been satisfied. In *Inco*, Lord Nicholls of Birkenhead said (at 592):

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. (…)
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature."

(iv) Defendants' arguments

277. The defendants agree with the Welsh Ministers that the true construction is construction (B), i.e. the "occupation date" in regulation 6(5) is the day on which the defendants became entitled to occupy their dwelling under the converted contract as contract-holders (1 December 2022) and not the day when they originally entered into occupation under the pre-Act legislation as tenants.

278. This means that they disagree with the submission of the claimants that the "occupation date" in regulation 6(5) must have been intended by the legislature to be 1 December 2023 when the contract is a converted contract, as expressly provided in the case of regulation 6(3).

279. The defendants agree that the Schedule 12 paragraph 31 definition of the "occupation date" is "not without difficulty" if applied to regulation 6(5) in the case of converted contracts (para 91 of the defendants' skeleton argument). They agree with the claimants and the Interveners that it cannot mean and does not mean the date upon which the contract-holder originally entered into occupation under the old legislation before the Act (i.e. in 2010 in the case of Mrs Mitchell).

280. They fix, however, on the reference in Schedule 12 paragraph 31 to the "appointed day", which is agreed to be 1 December 2022, and argue (in agreement with the Welsh Ministers) that this must be the relevant date for the purposes of regulation 6(5) if the occupation contract is a converted contract.

281. It follows that regulation 6(5) requires a landlord to give the contract-holder written confirmation of "investigatory or remedial work … to an electrical service installation in the dwelling" within 14 days of receipt of that confirmation, for any such work that is undertaken after 1 December 2022. That is the case whether the contract is a converted contract or not.

282. The defendants say there is no warrant for concluding that this must be an oversight on the part of the Welsh Ministers. Rather, regulations 6 and 7 of the Fitness Regulations have drawn a distinction in the case of converted contracts: there is no requirement to give any ECRs until 15 December 2023 (a general obligation, which may apply to very many dwellings, noting that the regulations apply to large stock-holding landlords), but there *is* a requirement to give an individual contract-holder confirmation of investigatory or remedial work carried out to their individual dwelling from 1 December 2022. They argue that this is a specific obligation, owed to an individual contract-holder, where the administrative burden on the landlord is slight and the reason for providing the contract-holder with written confirmation is obvious. They say that there is no reason why a converted contract-holder should be forced to wait longer than a new contract-holder would be for the regulation 6(5) information, and time therefore runs from the appointed day of 1 December 2022 and does not require a period of grace which would start time running only on 1 December 2023 in the case of converted contract-holders, as in the case of their ECR. The regulation 6(5) duty is free-standing and does not require there to have been an obligation to serve an ECR before it comes into effect.

283. They say that this construction also does the least violence to the statutory wording.

Issue 4 - Decision

284. We prefer the arguments of the defendants and of the Welsh Ministers to those of the claimants.

285. We start with the wording of the legislation.

286. It is an important fact that regulations 6(3) and 6(4) of the Fitness Regulations were amended in the case of converted contract-holders and regulation 6(5) was not.

287. Placing regulations 6(3), 6(4) and 6(5) next to each other, using the wording that applies to converted contract-holders by virtue of the amendments made by regulation 7, they read as follows:

> "(3) The landlord must ensure that the contract-holder is, before the end of the period of 14 days starting with [1 December 2023], given -
>
> (a) a copy of the most recent electrical condition report, and
>
> (b) where investigatory or remedial work has been carried out on or in relation to an electrical service installation in the dwelling after the electrical safety inspection to which that report relates (and before the occupation date), written confirmation of work.
>
> (4) Where an electrical safety inspection is carried out after the contract-holder has been given a report in accordance with sub-paragraph (a) of paragraph (3) (…), the landlord must ensure that the contract-holder is given a copy of the electrical condition report relating to the inspection before the end of the period of 14 days starting with the day on which the inspection was completed.
>
> (5) Where investigatory or remedial work is carried out on or in relation to an electrical service installation in the dwelling after the occupation date, the landlord must ensure that the contract-holder is given written confirmation of work before the end of the period of 14 days starting with the day on which the landlord received the confirmation."

288. Although the word "occupation date" is used in regulation 6(3) at the point where we have entered square brackets, in the case of converted contracts "occupation date" is given a special meaning by regulation 7(4) which means it is 12 months after the conversion date, and the operation of the other relevant legislation fixes that for all converted contracts as 1 December 2023, which is the date we have placed in square brackets accordingly. Therefore, there is no reason to construe "occupation date" in regulation 6(5) in the same way as in regulation 6(3): regulation 7 gives it a particular meaning in regulation 6(3) which it does not give to it in regulation 6(5).

289. There is no definition of "occupation date" for the purposes, specifically, of regulation 6(5) within the Fitness Regulations, and regulation 2 therefore suggests that the Act should provide the definition.

290. The definition in paragraph 31 of Schedule 12 (with the insertion of an uncontroversial date for "the appointed day" in this context) is:

> "*The occupation date*
>
> 31. The occupation date, in relation to a converted contract, is the day on which the contract-holder became entitled to occupy the dwelling under the tenancy or licence which became an occupation contract on [1 December 2022]."

291. All the parties agree, and we agree with them, that this does not mean that the "occupation date" in regulation 6(5) is a date before 1 December 2022. That would make no sense and would not be in conformity with the purpose or the scheme of the Act and the regulations.

292. This means that paragraph 31 of Schedule 12 is not apt to provide a definition for the purposes of regulation 6(5) by any form of literal interpretation.

293. However, paragraph 31 of Schedule 12 does suggest that the occupation date will not be a date later than 1 December 2022.

294. Returning to the wording of regulations 6(3) through to 6(5) set out in para 287 above:

    i) The obligation to give a converted contract-holder an ECR does not arise until 14 days after 1 December 2023: regulation 6(3)(a).

    ii) In respect of the inspection upon which the ECR supplied by 14 December 2023 is based, however, and where **investigatory or remedial work** has already been carried out, written confirmation of work must be given to the contract-holder at the same time: regulation 6(3)(b).

    iii) When an electrical safety inspection is carried out after this ECR has been provided, an ECR reflecting the latest inspection must be provided within 14 days: regulation 6(4). This will necessarily be after 1 December 2023.

    iv) "Where investigatory or remedial work is carried out on or in relation to an electrical service installation in the dwelling after the occupation date, the landlord must ensure that the contract-holder is given written confirmation of work before the end of the period of 14 days starting with the day on which the landlord received the confirmation": regulation 6(5).

295. The claimants frankly accept that, if regulation 6(5) only applies to investigatory or remedial work carried out after 1 December 2023, there has been a mistake in the drafting. In other words, that is not what the draftsman has said, or what the Welsh Ministers have said when making the regulation. Therefore, it is correct to say that the claimants' construction is not in accordance with the existing language.

296. It is clear that regulation 6(5) applies to investigatory or remedial work carried out after 1 December 2023, but we see no reason why it should not apply to such work carried out before that date. Regulation 6(5) only applies when such work has been carried out, whereas the obligation to supply an ECR was an across-the-board obligation in respect of every dwelling with a converted contract-holder and arose on the same date for every converted contract-holder who had the claimants as their landlord. The period of grace was extended in respect of ECRs in that context, but it by no means necessarily followed that a similar period of grace would or should be given, in order to make sense or achieve the statutory purpose, in respect of confirmation of investigatory or remedial work which might be done on a case by case basis. The wording – with its specific modifications in the case of contract-holders which were not applied to regulation 6(5) – suggests that the period of grace was not extended in this way.

297. Regulation 6 does not purport to be retrospective, and no-one invited us to construe it retrospectively. However, there is no reason not to construe it as applying from the appointed date, which is 1 December 2022, not 1 December 2023. Notwithstanding the earlier, specific modifications for converted contracts (notably, the period of grace added to regulation 6(3) for those contracts), the ordinary and natural reading of regulation 6(5) is that it starts to operate from the date the legislation comes into force (the appointed day, i.e. 1 December 2022) and no later. Therefore, "the occupation date" in regulation 6(5) is the date the regulations came into force (1 December 2022), or the date that occupation originally started (in accordance with paragraph 31 of Schedule 12), whichever is the later. For occupation that begins after 1 December 2022, the occupation date in regulation 6(5) is the date the occupation first begins. For occupation under a converted contract, the occupation date for the purposes of regulation 6(5) is the date the regulation comes into force, i.e. 1 December 2022.

298. We believe that this is the most natural reading of regulation 6(5) in its context. It applies a meaning which is in accordance both with the date the Fitness Regulations come into force and (but only if later) the date upon which occupation first commences. It is therefore appropriate to a regulation which is identically worded in respect of both converted contracts and new contracts. The claimants' interpretation, which places converted contract-holders in a worse position than new contract-holders who enter into occupation between 1 December 2022 and 1 December 2023, does not seem to us to be in any way consistent with the statutory purpose or the wording. The period of grace in respect of the first ECR to be given to existing tenants (converted contract-holders) is quite different, because it is specifically enacted. The fact that it is not enacted in relation to regulation 6(5) appears to us not to indicate a mistake but a clear statutory distinction. We agree with the distinction between the two situations drawn in argument, as we have summarised it above, at para 275 (from the Welsh Ministers) and para 282 (from the defendants).

299. It follows that we are not persuaded by the claimants' construction. We are not persuaded that there has been a mistake requiring correction. The requirements set out by Lord Nicolls of Birkenhead if a rectifying construction is to be adopted are not satisfied: see *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592, quoted at para 276 above.

ISSUE 5

300. Issue 5 is whether, as a result of our conclusions on the earlier issues, and if the defendants succeed in their counterclaims, the rights of the claimants and of the Second and Third Interveners under Article 1 Protocol 1 of the European Convention on Human Rights (as enacted in Schedule 1 of the Human Rights Act 1998) ("A1P1"), are engaged and breached.

301. A1P1 provides:

> "**Protection of property**
>
> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the

> conditions provided for by law and by the general principles of international law.
>
> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

(i) The position of the claimants and of the Second and Third Interveners on Issue 5

302. The claimants include four social landlords responsible for over 25,000 homes in Wales (see para 3 above). Two other social landlords (the Second and Third Interveners) applied for permission to intervene 16 days before the hearing, supporting the position of the claimants on issues we have already addressed, and raising what became Issue 5, which had not been pleaded by the claimants in their Particulars of Claim but which the claimants subsequently adopted as part of their case as well.

303. The claimants in claim number PT-2024-CDF-000024 (Coastal Housing Group Ltd and Tai Calon Community Housing Ltd) instructed leading and junior Counsel for the Second and Third Interveners to appear at the hearing on behalf of those two claimants (in addition to their existing leading Counsel and two junior Counsel), so that they could make oral submissions on Issue 5, which they did.

304. The claimants in claim number PT-2024-CDF-000024 (by counsel originally instructed on behalf of the Second and Third Interveners) also submitted a number of written submissions after the hearing, which resulted in further submissions and applications from other parties, including evidence from the Welsh Ministers, on Issue 5.

305. Since the Second and Third Interveners joined late, and were not original parties, the facts of their cases are not part of the Agreed Facts. Extensive reference to those facts was made in evidence filed by them, and in written and oral submissions, but it was apparent from the response, in particular, from the Welsh Ministers, that they were not agreed. These exchanges continued after the hearing dates on 18-19 July, and the final submission from the claimants' solicitors in claim number PT-2024-CDF-000024 (dated 1 August) stated:

> "…there are substantive issues raised within the further submissions – particularly given the lengthy submissions and new evidence relied upon by the Welsh Ministers (…) which our clients would wish to respond to."

306. The Second and Third Interveners (whose position was later adopted by the claimants) sought an order disapplying regulation 11 of the Supplementary Regulations (the Not Required to Pay provision, set out at para 26 above) as incompatible with their A1P1 rights. They put the relief they seek, in consequence of Issue 5, in four alternative ways (para 45 of the Application to Intervene dated 2 July 2024) as follows:

i) A declaration that regulation 11 of the Supplementary Regulations [i.e. the Renting Homes (Supplementary Provisions) (Wales) Regulations], and regulation 7 of the Renting Homes (Supported Standard Contracts)

(Supplementary Provisions) (Wales) Regulation 2022 [which is in identical terms] is to be read and given effect compatibly with the Second and Third Interveners' A1P1 rights by reading in the following underlined words:

> "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation except where the landlord has complied with regulation 6(1) [of the Fitness Regulations] and the only reason the property is treated as unfit for human habitation under regulation 6(6) is because the landlord has not complied with regulations 6(3), (4) (including as substituted by regulation 7(5)) or (5) [of the Fitness Regulations]."

After the hearing, the claimants in claim number PT-2024-CDF-000024, in a written submission from leading and junior counsel originally instructed by the Second and Third Interveners dated 22 July 2024, modified this proposed declaration and re-cast it in the following terms (with additional or amended matter in bold):

> "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation except where the landlord has complied with regulation 6(1) [of the Fitness Regulations], **has carried out any necessary investigatory or remedial work** and the only reason the property is treated as unfit for human habitation under regulation 6(6) is because **the landlord has not given the contract-holder a copy of the ECR or written notification of any investigatory or remedial work as required by** regulations 6(3), (4) (including as substituted by regulation 7(5)) or (5) [of the Fitness Regulations]."

ii) Alternatively, regulation 11 of the Supplementary Regulations is to be read as including the following underlined words:

> "The contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation except when that would be incompatible with the Convention rights of the landlord."

iii) Alternatively, a declaration that section 240(6) of the Act is to be read compatibly with the Second and Third Interveners' A1P1 rights.

iv) Alternatively, an order disapplying regulation 11 in part or whole.

307. It was, however, the position of the claimants (and of counsel for the Second and Third Interveners, who continued to speak for them while acting also for the claimants in claim number PT-2024-CDF-000024) that Issue 5 should not be resolved or decided

until the outcome of the counterclaims, particularly on the issue of unjust enrichment, is known. This was notwithstanding the fact that it was the Second and Third Interveners and the claimants in claim number PT-2024-CDF-000024 who pressed for this issue to be argued at the hearing.

308. Para 7(b) of the Claimants' Reply (in claim number PT-2024-CDF-000024) on the A1P1 Issues dated 22 July 2024 (after the hearing on 18-19 July 2024) says:

> "The Claimants maintain their submission (see their Note of 16 July 2024, para 3) that the A1P1 issue (as opposed to the other issues) should not be resolved without resolving the unjust enrichment counterclaims. While the Court could find that there is a breach of A1P1, it cannot *reject* the A1P1 argument on the assumption (as suggested by [defence counsel]) that the landlords will be entitled to retain any rent paid. If the landlords do have that remedy, it is a highly relevant factor and the interference with A1P1 rights will be less serious in those circumstances (even allowing for the additional rent payable to the DWP), and potentially easier to justify: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 [48]. If (which is not admitted) the interference is found to be justified on that assumption, and it later transpires that the landlords are not entitled to retain rent paid, the Court will have determined the A1P1 argument on a false factual premise."

(ii) The position of the Welsh Ministers on Issue 5

309. The Welsh Ministers contested the challenge to the regulations on A1P1 grounds by the Second and Third Interveners and the claimants, but only on the basis that the defendants should fail on Issue 1B and fail also in their Counterclaims (see paras 141 and 142 above).

310. The claimants and the Second and Third Interveners have, not surprisingly, stressed the narrowness of the Welsh Government's position, in not defending their legislation unconditionally.

311. The Welsh Ministers drew a sharp distinction between landlords who were in breach and who were alerted to breach by withholding of rent, and landlords who were not so alerted because rent was not initially withheld, although contract-holders might later try and reclaim it (the Welsh Ministers' position on Issue 1B and on the counterclaims being that the contract-holders should fail in any such attempt).

312. The defendants have, however, succeeded in Issue 1B and we have agreed not to decide the counterclaims at this stage, upon the joint application of all the parties other than the Welsh Ministers.

313. Depending on the outcome of the counterclaims, therefore (as to which we ourselves make no prediction, as we said in para 142 above), the Welsh Ministers initially appeared to concede the A1P1 claim, although it was opposed in its entirety by arguments we heard from the defendants and it is ultimately a matter for the court to decide.

314. On the basis of our decision on Issue 1B, and should the defendants in fact succeed in their counterclaims, the Welsh Ministers initially accepted that their legislation might be in breach of the A1P1 rights of landlords. They submitted (in para 24 of the Position Statement attached to their application to intervene dated 24 May 2024, which they maintained in their final submissions):

> "…construing the legislation so that landlords could be faced with providing accommodation for no return over a prolonged period of time when contract-holders had not made any complaint about a breach of regulation 6 and, indeed, might have a financial incentive to refrain from making a complaint, would disproportionately interfere with the A1P1 rights of landlords whilst frustrating the underlying purpose of the legislation which is to ensure that dwellings are free of hazards from defective electrical installations. Whereas the Welsh Ministers' interpret the legislation, read in light of the common law doctrine of unjust enrichment, as (a) enabling contract-holders to withhold rent in order to incentivise landlords to comply with safety requirements, but (b) not entitling contract-holders to reimbursement of rent actually paid during periods where the only complaint about the dwelling relates to a failure to serve an ECR, strikes a fair and proportionate balance between the Article 8 rights of contract-holders and the A1P1 rights of landlords."

315. After circulation of the judgment in draft, the Welsh Ministers refined this position in a written submission on 14 October 2024. They said that the Position Statement was filed when there was no suggestion that the regulations were incompatible with the Convention and Issue 5 was not yet in the case. They clarified that, notwithstanding what was said in para 24 of the Position Statement, they do not wish to concede, and do not concede, any breach of A1P1, regardless of our decision on Issue 1B and regardless of the outcome, whatever it may be, of the counterclaims. They referred to their written submissions dated 15 July 2024 (before the hearing) and 25 July 2024 (after the hearing) in this respect. Their written submissions of 15 July 2024 were, however, based on their Issue 1B arguments, which have not succeeded, saying (at para 22) "The combined effect of regulation 6 and regulation 11 is to permit a contract-holder to withhold rent <u>but not to allow the contract holder to reclaim rent already paid,</u> notwithstanding a historic breach of the notification duties" (with emphasis added). Their submissions at the hearing were based on the same distinction. Their written submissions of 25 July 2024 were as well, saying (at para 32) "that a contract-holder is exercising the right to withhold rent under regulation 11 is likely to come to [the] landlord's attention quickly thereby enabling and prompting any landlord to remedy the breach of regulation 6(3) expeditiously…"

316. Whilst we accept that the Welsh Ministers no longer wish to concede any breach of A1P1, the arguments addressed to us on behalf of the Welsh Ministers were not directed to the circumstance in which they now find themselves, which is that the contract-holders have succeeded on Issue 1B. Nor did they consider the implications of any future success the contract-holders might have on their counterclaims. Their submissions assumed that the contract-holders would fail both on Issue 1B and on their counterclaims, and para 24 of their Position Statement of 24 May 2024 was not

withdrawn until 14 October 2024. Their submissions on Issue 5 are, therefore, not entirely complete at the moment.

(iii) The position of the defendants on Issue 5

317. The defendants rejected all the Issue 5 arguments based on A1P1, regardless of the outcome of the counterclaims, and even if Issue 1B is decided (as it has now been decided) in their favour. They proposed counter-declarations, which are pleaded in their counterclaims.

Conclusion on Issue 5

318. The arguments of all the parties on Issue 5 were much more extensive than the summaries above. We listened attentively to them at the hearing and we carefully considered the written submissions, evidence and authorities on Issue 5 to which we were directed before, during and after the hearing by all the parties. We would have liked to have reached a conclusion on them, or at least to have expressed a provisional view on them.

319. The lateness of the intervention by the Second and Third Interveners, and the even later adoption of their substantive arguments on Issue 5 by the claimants, disrupted the orderly progression of the Issue 5 arguments and evidence. The other parties (the Welsh Ministers and the defendants) commendably attempted to marshal their response under acute pressures of time, but the claimants in claim number PT-2024-CDF-000024 objected to us considering those parts of the response submitted after the hearing, and objected to not being able to submit yet further material of their own in response to the response.

320. This is unsatisfactory but would not by itself have deterred us from deciding Issue 5. In the circumstances, we would have admitted all the late material submitted by the defendants and the Welsh Ministers, and we would not have permitted yet further submissions from the claimants in claim number PT-2024-CDF-000024.

321. But we have decided that it is for other reasons premature for us to reach a decision or even to indicate a provisional view on Issue 5.

322. The Welsh Ministers, who have a particular interest in Issue 5 because it is their legislation which is in question, advanced their arguments, as we have said, on the basis that the defendants should fail both on Issue 1B and on their counterclaims. The defendants have, however, succeeded on Issue 1B. If the defendants also succeed on their counterclaims, the Welsh Ministers in their Position Statement accepted that the legislation might be in breach of the landlord parties' A1P1 rights, but not what consequences should follow, whether by way of declaration from the court, or by way of modified secondary legislation. They have subsequently withdrawn the concession, but not completed their arguments (see para 316 above). The defendants, meanwhile, contend that the (original) concession of the Welsh Ministers was wrong, and even though the defendants have succeeded on Issue 1B, and hope to succeed on their counterclaims, the impugned provisions do not breach landlords' A1P1 rights and there is "no legal basis to read them down or accede to any of the claimants' suggested remedial steps" (para 21 of their final written submission dated 24 July 2024).

323. We agree with the claimants and the Second and Third Interveners that it would be wrong to decide Issue 5 on an assumption about the outcome of the counterclaims (para 308 above).

324. We see no benefit, and considerable potential disadvantage, in giving any indication of our current thinking, when so much may depend on the outcome of the counterclaims.

325. We think that the only proper course is to leave the decision on Issue 5 to be made when the outcome of the counterclaims has been determined. We are also concerned by the continuing dispute of fact which is apparent from the materials filed since the hearing, down to and including a letter from the solicitors to the claimants in claim number PT-2024-CDF-000024 and the Second and Third Interveners dated 1 August 2024. We are also disadvantaged by not having full argument from Welsh Ministers covering all the possible outcomes of the counterclaims.

326. Issue 5 requires a decision both of fact and of law. The legal submissions are incomplete without knowledge of the facts, and it is impossible to know the relevant facts until after a decision on the counterclaims.

327. We therefore say no more about Issue 5 and do not decide it.