

Use the BSA Explanatory Notes with Care!



Jonathan Selby KC

The BSA is not just a new piece of legislation; it is also novel. As a result, practitioners look for whatever guidance is available to help them understand its scope, meaning and application. The most well-known guidance is contained in the 408-page, official Explanatory Notes prepared by the Department for Levelling Up, Housing and Communities, the first page of which contains the following about “What these notes do”:

- *“These Explanatory Notes have been prepared ... in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament.*
- *These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.*
- *These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.”*

This statement suggests that the Explanatory Notes should be used with care. Recent cases suggest that they should be deployed with an even greater health warning.

The General Principle

In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [29], Lord Hodge emphasised that the words which Parliament has chosen to enact as an expression of the purpose of a piece of legislation are the primary source by which the meaning of the legislation is to be ascertained. Explanatory notes are external aids which can play only a secondary role in a statute’s interpretation.

As Lord Hodge stated at [30], explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions and may be used to understand the background to and context of a statute and the mischief at which it is aimed. Nevertheless, also at [30], Lord Hodge emphasised that explanatory notes do not displace the meanings conveyed by the words of a statute that, after consideration of that

context, are clear and unambiguous and which do not produce absurdity.

Accordingly, in *Triathlon Homes LLP v SVDP & Others* [2024] UKFTT 26 (PC), the FTT accepted that the Explanatory Notes to the BSA could not properly be used to identify any presumption about how a tribunal should exercise its discretion when determining whether it is just and equitable to make a Remediation Contribution Order (“RCO”) (this point was not challenged before the Court of Appeal).

BDW v Ardmore

In *BDW Trading Limited v Ardmore Construction Limited* [2025] 1 WLR 3101, HHJ Keyser KC had to consider an application for an information order under section 132 of the BSA. An issue arose as to whether the order could be made against associates, in addition to the company which owed the underlying liability: the Explanatory Notes to the BSA suggested that it could be but HHJ Keyser considered that the language of section 132 did not permit such a construction. As he stated at [18]:

“although the Explanatory Notes are an admissible guide to the interpretation of a statute, what matters is the interpretation of the statute, not that of the Explanatory Notes. The Explanatory Notes cannot override the statute. [...] It cannot be assumed that the Explanatory Notes correctly state the effect of the statute. In this instance, in my view, they do not.”

Thus BDW demonstrates that the Explanatory Notes to the BSA are not guaranteed to correctly state the law.

Adriatic Land

It will be remembered that the Explanatory Notes to the BSA expressly state that they have not been endorsed by Parliament, a point which was made abundantly clear in *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856, where the Court of Appeal had to consider the proper interpretation of paragraph 9 of Schedule 8 to the BSA: in particular whether the provision prevented a landlord from recovering service charges in respect of costs incurred before the BSA came into force. The relevant provisions of the Explanatory Notes suggested that such costs could not be.

At [31] to [34], Newey LJ considered the history of the Explanatory Notes and identified that none of the Notes that apply to sections 116 to 125 and Schedule 8 of the BSA were available during the passage of the Building Safety Bill (as the BSA then was) through Parliament: those Notes featured only in the version of the explanatory notes published after the BSA had already been enacted.

Accordingly, Newey LJ stated at [67]:

“Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding

them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.”

Thus, he concluded at [70] to [72] that the Explanatory Notes to the BSA “may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings”: the weight to be given to them should depend on the cogency of their reasoning.

Accordingly, because the relevant explanatory notes purported to state the position, and did not provide cogent reasoning for it, he considered at [76] that they could not be taken to provide a reliable guide to Parliament’s intentions.

He also stated at [77] that despite the fact that, in *URS v BDW* [2025] 2 WLR 1095, the Supreme Court attached significance to the Explanatory Notes to the BSA, they did so on the basis of a “misconception” and so the decision of the Supreme Court did not affect his approach.

Conclusion

Use the Explanatory Notes with care. Although they may be of some assistance when working with the BSA, it is clear that they cannot be taken as gospel. Rather, they should be treated like an academic commentary.

