

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**REF: CA-2025-001948**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**

**PROPERTY, TRUSTS AND PROBATE LIST (CHANCERY DIVISION)**

**HIS HONOUR JUDGE HODGE KC**

**SITTING AS A JUDGE OF THE HIGH COURT**

**BETWEEN:**

**WESTMINSTER CITY COUNCIL**

**Appellant**

**- and -**

**GEMS HOUSE RESIDENCES CHILTERN STREET LIMITED (1)**

**GEMS HOUSE CHILTERN STREET HEAD LEASE LIMITED (2)**

**Respondents**

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**APPELLANT'S REPLACEMENT SKELETON ARGUMENT**

**DATED 19 JANUARY 2026**

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*Page references to the appeal bundles in the style of "CB/12/123" are to the Core Bundle tab and page number and those in the style of "SB/12/123" are to the Supplementary Bundle.*

**Introduction**

1. This is a claim for a declaration that the Respondents are bound by, and an injunction to enforce, planning obligations contained in an agreement dated 11 April 2013 under s.106 of the Town and Country Planning Act 1990 ("Agreement") that require Flats 1.01 – 1.04, 2.01 – 2.04, 3.01 – 3.04 and 4.01 – 4.04, 76 Chiltern Street, London W1, also known as Flats 1 – 16, Gem House, not to be occupied otherwise than as affordable housing.
2. The claim turns on the true construction of the mortgagee exclusion at clause 10 of the Agreement, in particular sub-clause 10.1.1 (CB/13/174).

3. The question is whether the First Respondent is a “*person deriving title through any mortgagee of a Registered Social Provider*” within the meaning of subclause 10.1.1 of the Agreement. If so, the Respondents are free from the affordable housing obligations in the Agreement. If not, the Respondents accept that they are bound by the affordable housing obligations and an injunction should be granted enforcing them (unless the Respondents provide a suitable undertaking to the court).
4. By a judgment handed down on 22 July 2025, neutral citation [2025] EWHC 1789 (Ch), (“Judgment”), the trial judge, HHJ Hodge KC sitting as a High Court Judge (the “Judge”), accepted the Respondents’ case that the relevant exemption criteria meant: “*a third party which acquires title by way of a disposition from a mortgagee whose mortgage was granted by a registered social provider*”: Judgment, paras 111, 119 and 121 (**CB/7/99 and 102**) (“Date of Mortgage Construction”).
5. The Judge rejected the Appellant’s rival construction, for which a convenient tag is “Date of Disposition Construction”. The Appellant contends that he was wrong to do so.
6. While the above labels are convenient, they are an oversimplification. As will be explained below, the Respondents admit that the Date of Disposition Construction is correct for certain purposes, but not in relation to the requirement that the provider is registered.
7. The reason why this issue of temporal construction is critical is because the provider, Kinsman Housing Ltd, was de-registered some five months before the flats were transferred by its mortgagee, PGP Finance No.17 Ltd, to the First Respondent.
8. The Appellant appeals with permission granted by Arnold LJ on 13 October 2025 (**CB/8/104 – 105**).

### **The factual background**

9. Stripped to their core, the salient facts are as follows:
  - a. On 11 April 2013 the Appellant granted planning permission for a mixed use development on the site including sixty residential flats, with a s.106 agreement (the “Agreement”).

- b. The affordable housing obligations at para 11 of Schedule One to the Agreement provided for sixteen “Affordable Housing Units” to be provided on the site, comprising ten social rented units and six intermediate rented units.
- c. On 19 August 2015 the developers granted sixteen 125 year leases of the Affordable Housing Units to London District Housing Association Ltd (then a registered provider of social housing) for total premiums of £3m, subject to a third party legal charge over the leases in favour of PGP Securities No.17 Ltd.
- d. On 27 June 2016 London District Housing Association Ltd transferred the leases to Kinsman Housing Ltd (then a registered provider of social housing) and the third party legal charge was novated to Kinsman Housing Ltd.
- e. Following a series of regulatory decisions by the Regulator of Social Housing (“RSH”) starting on 28 November 2018, and including an enforcement notice published on 15 February 2023 and proposal to de-register published on 30 June 2023, Kinsman Housing Ltd was compulsorily de-registered by the RSH with effect from 7 September 2023.
- f. On 23 August 2023 the mortgagee, PGP Securities No.17 Ltd, served a default notice on the beneficial owner of the leases, PGP Finance No.17 Ltd.
- g. On 16 February 2024 PGP Securities No.17 Ltd exercised its power of sale triggered by the RSH’s proposal to de-register Kinsman Housing Ltd by transferring the leases to the First Respondent for £12.6m.

See the Judgment at paras 5 – 12 (**CB/7/65 – 66**).

- 10. The claim was filed on 30 April 2024 (but due to a delay by the court, not sealed until 2 July 2024). On the same date, an application for an interim injunction against the First Respondent was issued.
- 11. On 30 October 2024 Edwin Johnson J granted an interim injunction against the First Respondent prohibiting it from using the Affordable Housing Units otherwise than as affordable housing until trial or further order (**SB/17/133 – 135**).

12. The issues for trial were set out in Re-Amended Particulars of Claim dated 22 January 2025 and a Re-Amended Defence dated 27 January 2025 (**CB/11 – 12/112 – 162**). There were three witnesses at trial: Joannan McDermott and Heather Clarke for the Appellant, and Andreas Xenofontos for the Respondents, none of whom was cross-examined (Judgment, paras 32 – 36, **CB/7/ 73 – 75**).

13. By a letter dated 29 April 2025 the Respondents’ solicitors Mishcon de Reya LLP confirmed that:

“... it is agreed between the parties that an injunction under section 106(5) of the Town and Country Planning Act 1990 is the remedy conferred by statute on local planning authorities for enforcing planning obligations and upholding public interest. For that reason, our clients confirmed that if they fail on the construction argument, our clients will accept that an injunction should follow or that they will offer suitable undertakings to the Court. Accordingly, the ‘just and convenient’ question is no longer an issue at trial. The only remaining issue for trial is the Issue for Construction.”

See further the appeal chronology (**CB/5/57 – 59**).

### **The relevant provisions**

14. The Agreement was negotiated between Howard Kennedy LLP on behalf of the developers and Bi-borough Legal Services on behalf of the Claimant. It is “a sophisticated and complex document, entered into with the benefit of skilled professional advice on both sides”: Judgment, para 100 (**CB/7/96**).

15. The affordable housing obligations are at para 11 of Schedule One to the Agreement (**CB/13/176 – 177**).

16. Clause 10 is the mortgagee exclusion clause (**CB/13/174 – 175**). The relevant words of subclause 10.1.1, which apply when the mortgagee exercises its power of sale, (re-arranged without distorting their meaning) are as follows:

*“any person deriving title through any mortgagee of a Registered Social Provider”*

17. The phrase “Registered Social Provider” is defined at clause 1.1 of the Agreement as “a registered provider of social housing as defined in Part 2 of the Housing and Regeneration Act 2008 or who is approved by the Council ...” (CB/13/170).

18. This has two limbs:

- a. The statutory definition set out at s.80(2) in Part 2 of the Housing and Regeneration Act 2008 (“HRA 2008”) is (re-arranging the order of words): “*a person listed in the register of providers of social housing*”. S.116(4) provides: “Once entered in the register under this section a body remains registered unless and until removed under section 118 or 119”. Ss.118 and 119 HRA 2008 provide respectively for compulsory and voluntary de-registration.
- b. Paras 11.1 – 11.2 of Schedule One provide further detail in relation to such approval as follows: “other Social Provider as the Director of Housing shall have approved in writing beforehand for this transaction”, “this transaction” being a reference back to “transfer on a long lease of at least ninety nine years” (CB/13/176 – 177). Reading the second part of the clause 1.1 definition together with paras 11.1 – 11.2 of Schedule One, this means (again, re-arranged for simplicity): “*a provider of social housing approved by the Council’s Director of Housing in writing beforehand for transfer of the Affordable Housing Units on a long lease*”.

19. Substituting in the different elements of the above definitions, the combined wording of the relevant provisions of subclause 10.1.1 becomes:

*“any person deriving title through any mortgagee of a person listed in the register of providers of social housing or a provider of social housing approved by the Council’s Director of Housing in writing beforehand for transfer of the Affordable Housing Units on a long lease”*

20. The bespoke approval of an unregistered social housing provider would be very much the exception to the norm of using a registered provider to deliver the affordable housing units: Judgment, para 101 (CB/7/96). At no time did the Claimant approve an unregistered provider for the purposes of this development.

## **Principles of construction**

21. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a parsing of the wording of the particular clause. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. *Wood v Capita Insurance Services Ltd* [2017] AC 1173, para 10 (Lord Hodge).
22. The importance of the natural meaning of the language of the provision which is to be construed was emphasised in *Arnold v Britton* [2015] AC 1619, paras 17, 20 and 32 (Lord Neuberger) and in *Wood v Capita*, para 13 (Lord Hodge) specifically in relation to sophisticated and complex agreements, negotiated and prepared with the assistance of skilled professional advice.
23. The importance of construing an individual clause in the light of the contractual scheme as a whole (not losing sight of the wood for the trees) was emphasised in *Re Sigma Finance Corp* [2010] 1 All ER 571, para 12 (Lord Mance). To similar effect, in *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2017] AC 73, Lord Hodge stated at para 7: "An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract."
24. Business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended: *Wood v Capita*, para 28. Lord Hodge's under-determination point, i.e. business common sense is usually insufficient to ascertain the deal the parties shook hands on, means that there is a risk of the court rewriting the parties' bargain if it relies too heavily on business common sense.
25. In *BMA Special Opportunity Hib Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416, para 24 Aikens LJ provided a helpful pithy summary: (i) commercial common sense is not to be elevated to an overriding criterion of construction; (ii) the parties should not be subjected to the individual judge's own notions of what might have been the sensible

solution to the parties' conundrum; and (iii) still less should the issue of construction be determined by what seems like "commercial common sense" from the point of view of one of the parties to the contract.

26. At para 33, Aikens LJ concluded that there was no lack of commercial common sense in the parties settling on a compromise between what each party wanted; this is "the essence of 'commercial common sense'".

### **The test on appeal**

27. The construction of a binding contract is a question of law: *National Commercial Bank Jamaica Ltd v NCB Staff Association* [2024] UKPC 2, para 26 (Lord Hodge). Therefore, on appeal, the appeal court reaches its own view as to the "true construction" of the contract: see e.g. *Re Sigma Finance*, para 34 (Lord Mance).

### **Grounds of appeal (also supplied separately)**

28. The grounds of appeal are as follows:

- a. The learned judge was wrong in law to construe the words "*any person deriving title through any mortgagee of a Registered Social Provider*" in subclause 10.1.1 of the Agreement as meaning "*a third party which acquires title by way of a disposition from a mortgagee whose mortgage was granted by a registered social provider*";
- b. On the true construction of subclause 10.1.1, read together with the applicable definitions, and in particular on the true construction of the key phrase, "*any person deriving title through any mortgagee of a person listed in the register of providers of social housing*", the criteria set out therein, including the criterion that the mortgagor is a person listed in the register of providers of social housing, must be satisfied at the date of the disposition from the mortgagee to the third party claiming the exemption, having regard to:
  - (i) The natural and ordinary meaning of the language;
  - (ii) The relevant context, including the other provisions of clause 10, the time at which the exemption is applied and the fact that the Agreement

- is a public document published on the planning register and local land charges register;
- (iii) The aims and scheme of the affordable housing provisions of the Agreement as a whole, viewed in the context of the statutory scheme of Part 2 HRA 2008; and
  - (iv) The commercial consequences of the rival constructions;
- c. Insofar as the learned judge made a finding at paragraph 110 of the judgment below that no lender would be prepared to lend to a registered provider of the Affordable Housing Units on the basis of the Appellant's construction of the Agreement, this was not based on any evidence; and
- d. Accordingly, the learned judge was wrong to hold that the First Respondent was a person deriving title through any mortgagee of a Registered Social Provider within the meaning of subclause 10.1.1 of the Agreement; and was wrong to dismiss the claim on that basis.

### **The Appellant's case as to the true construction of the Agreement**

#### **(i) Natural and ordinary meaning**

29. The Appellant's case is that the words "*any mortgagee of a person listed in the register of providers of social housing or a provider of social housing approved by the Council's Director of Housing in writing beforehand for transfer of the Affordable Housing Units on a long lease*" naturally read as a straightforward factual description.

30. This description has two components: (i) the legal relationship of a mortgage between the mortgagee and another party, and (ii) the status of that other party as a provider either listed in the register or approved by the Appellant for these purposes in advance.

31. It is common ground that the first component of the criteria, a subsisting mortgage, has to be satisfied at the date of the disposition: Judgment, para 105 (CB/7/97). For example, if a Registered Social Provider releases the property to its mortgagee, who then sells it as absolute owner to a third party, the third party does not qualify for the exemption. Thus, it is common ground that this component of the applicable criteria is ambulatory. But the Respondents contend that the second component, the status of the mortgagor, is fixed at

the date of the mortgage. There is no indication in the language that different time frames apply to the different components, which form part of one seamless phrase.

32. It must follow that the Respondents admit that the words “mortgagee of a person” in subclause 10.1.1 refer to a current relationship of mortgagor and mortgagee at the date of the disposition. Yet they also submit that the same words in the same breath refer to an historical transaction, the original grant of the mortgage. This presents a formidable logical problem for the Respondents’ case.
33. The Judge traced through the consequence of the Date of Mortgage Construction at para 119 of the Judgment, concluding that the First Respondent is entitled to the exemption because on 19 August 2015, the date the mortgage was granted to PGP Securities No.17 Ltd, the grantor London District Housing Association Ltd was a registered provider (CB/7/102). Therefore, the First Respondent “derived title from a mortgagee of a Registered Social Provider” on the basis that the mortgagee fitted this description over eight years prior to the transfer dated 16 February 2024.
34. The Appellant submits, to the contrary, that the key phrase, “*any person deriving title through any mortgagee of a person listed in the register of providers of social housing*”, naturally reads as a factual description of the mortgagee “through” whom the third party derives title and its mortgagor, as at the time of the disposition.
35. The natural and ordinary meaning of words is examined by considering ordinary usage. It may assist, in taking a fresh look at the issue of natural meaning, to consider a similar but simpler phrase: “*any person deriving title through any mortgagee of a five-star hotel*”. If a five-star hotel grants a mortgage but is later re-graded to four stars, some years after which its mortgagee enforces the security by selling the hotel to a buyer, the analogous question is whether, as a matter of ordinary usage, the buyer derives title from a mortgagee of a five-star hotel. The Appellant submits that the answer is “no”: the buyer derives title from a mortgagee of a four-star hotel.

## **(ii) Context**

36. There are four particular aspects of the context that support the Date of Disposition Construction and detract from the Date of Mortgage Construction as a natural reading of the relevant contractual wording.
37. First, the adjacent subclause 10.1.2 uses the phrase (similarly rearranged): “*any person deriving title through any mortgagee of a person to whom a Registered Social Provider grants a lease or transfer*” (CB/13/175). The effect of this phrase is to fix or “frank” the mortgage as exempt from the outset, based on the status of the grantor as at the date of an historical transaction, the grant of the lease or transfer which is subject to the mortgage.
38. In a sophisticated contract negotiated by skilled legal professionals, it would be surprising if the parties used different words to express essentially the same concept in neighbouring subclauses. Why did they not say in 10.1.1 “*any person deriving title through any mortgagee to whom a Registered Social Provider grants a mortgage*”? To a reasonable reader, the contrast in language reinforces the Date of Disposition Construction.
39. Secondly, a similar contrast in language is present within subclause 10.1.1 itself, once one substitutes in the various elements of the definition of “Registered Social Provider” to produce combined wording. The special case, “*any person deriving title through any mortgagee of ... a provider of social housing approved by the Council’s Director of Housing in writing beforehand for transfer of the Affordable Housing Units on a long lease*”, like subclause 10.1.2, expressly refers to the facts as at the date of the grant of the lease which is subject to the mortgage. This language contrasts with the general case, “*any person deriving title through any mortgagee of any mortgagee of a person listed in the register of providers of social housing*”, which makes no express reference to any historical transaction.
40. Thirdly, the time at which the exemption is applied is significant. It can only be applied after the mortgagee has disposed of title to the third party. This vantage point forms part of the context which a reasonable reader would take into account when interpreting the subclause.

41. The Southern Rhodesian tobacco case *Gallaher Ltd v Commissioners of Customs and Excise* [1971] AC 43 concerned a statutory exemption from import duty. A majority of the House of Lords concluded that the exemption criteria had to be satisfied after importation, when customs officers applied them. Lord Hodson at 62B – C: “I think that some additional support to what I have called the natural construction is supplied by the meaning I have already given to the word ‘consigned,’ for it will not be until importation to this country that it will be readily ascertainable whether the goods qualify as ‘consigned to the United Kingdom.’” Lord Wilberforce at 70E: “In my view, the key to the construction of the participle ‘consigned’ is to be found in the time at which the inquiry as to whether the goods are consigned to the United Kingdom from a place in the Commonwealth area falls to be made, i.e., when the transit is over and the goods become chargeable to customs duty after they have arrived.”
42. Whilst each contract falls to be construed on its own facts, the above reasoning provides a general insight into the temporal construction of legal provisions. See, to similar effect, Lewison LJ in *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984, at para 28: “The vantage point from which this question is asked is the date of the reinvestment.” (The relevant contractual criteria in that case were: “the ratings of the Class A1 Notes have not been downgraded below their Initial Ratings”: para 15.)
43. Fourthly, a s.106 agreement is a public document published on the planning register and local land charges register, which is designed to be read by members of the public generally. It is not addressed to a specialist audience of property lawyers who might read the subclause through the prism of “root of title”, a concept of land law that moreover relates only to unregistered conveyancing.

### **(iii) The scheme of the Agreement**

44. The affordable housing provisions of the Agreement pursue the following main aims:

- a. The overarching aim is to secure that affordable housing is provided on-site as part of the development and maintained as affordable housing for successive occupants in perpetuity, in accordance with the Appellant's planning policies;<sup>1</sup>
- b. As an exception to the above, to provide for the affordable housing obligations to cease where the affordable housing tenant exercises their statutory Right to Acquire the dwelling under s.180 HRA 2008;
- c. Absent bespoke approval from the Appellant, the affordable housing is to be delivered by a registered (and therefore regulated) provider;
- d. To encourage sufficient commercial lending for a registered provider to acquire the long leases of the Affordable Housing Units. The Agreement achieves this by permitting the lender upon a default by a registered provider to realise its security by selling the social housing assets at open market value; and
- e. To provide for several safety valves in the event that there is insufficient commercial lending to enable a registered provider to acquire the long leases of the Affordable Housing Units on the standard terms of the Agreement, to enable the housing provision to go ahead on varied terms.

45. In order to understand the scheme of the Agreement in its totality, it is necessary to view it in the context of the legislative scheme of regulation of registered providers of social housing in Part 2 HRA 2008. The statutory scheme is summarised by the Judge at paras 21 – 22 of the Judgment (**CB/7/70 – 71**).

46. The statutory context of Kinsman Housing Ltd's de-registration, briefly summarised by the Judge at para 21 of the Judgment, was as follows. Compulsory de-registration is provided for by s.118 HRA 2008. A private registered provider may be compulsory de-registered by the regulator among other grounds if it is no longer eligible for registration. The conditions of eligibility for voluntary registration are set out in s.112 HRA 2008. Condition 2 is that the body satisfies relevant criteria set by the regulator as to its financial situation, its constitution and other arrangements for its management. At all material times the criteria

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<sup>1</sup> Reg. 122 of the Community Infrastructure Levy Regulations 2010 requires that s.106 planning obligations are necessary to make the development acceptable in planning terms, if they are to be a reason for the grant of planning permission – thus s.106 agreements owe their existence to planning policies.

set by the regulator in respect of Condition 2 included requirements to the effect that the applicant must be able to demonstrate that it is neither under the control of, nor subject to influence which could prejudice its independence from, any other person or organisation other than where the applicant is a subsidiary of a registered social landlord; and the applicant must be able to demonstrate that it is operating, or will operate, on a sound and proper financial basis.

47. The scheme of the Agreement as it applies to an ordinary mortgage default, viewed in the context of the statutory scheme of Part 2 HRA 2008, is as follows:
- a. There is a continuing obligation on the developers' successors in title to make the affordable housing available through a registered provider: see para 11.3 of Schedule One and the definitions of "Affordable Housing" and "Registered Social Provider" at clause 1.1 (**CB/13/165, 170 and 177**).
  - b. The effect of compliance with the above is that the provider of the Affordable Housing Units is regulated under Part 2 HRA 2008 on a continuing basis. At the time of the Agreement the regulator was the Homes and Communities Agency ("HCA"); the current regulator is the Regulator of Social Housing ("RSH"). (For convenience, the regulator will be referred to throughout as the "RSH"; where there is any material difference in the legislation that applied at the time of the Agreement, this will be highlighted.)
  - c. The RSH must perform its functions with a view to achieving (so far as possible) the economic regulation objective and the consumer regulation objective; the former includes: "(a) to ensure that registered providers of social housing are financially viable and properly managed, and perform their functions efficiently and economically, (b) to support the provision of social housing sufficient to meet reasonable demands (including by encouraging and promoting private investment in social housing)": s.92K(2) HRA 2008.
  - d. Upon a mortgage default, the lender or a receiver appointed by the lender has the right to sell the Affordable Housing Units at open market value: subclause 10.1.1 (**CB/13/174**).

- e. But before exercising the power of sale or appointing a receiver, the lender must first notify the RSH of its intention to enforce its security: s.108(2) of the Housing and Planning Act 2016 (“HPA 2016”).<sup>2</sup>
- f. This triggers the statutory moratorium, a initial period of 28 days, which is extendable, during which a disposal of the registered provider’s land requires the regulator’s prior consent: ss.145(2)(e), 146 and 148(2) HRA 2008; the purpose of the statutory moratorium is to provide an opportunity for the RSH to seek a solution to the provider’s viability problem and/or the disposal of the affordable housing to another registered provider: *Guidance Note 19: Insolvency and Moratorium Powers*, 29 February 2024.
- g. For this purpose, the RSH has powers to appoint an interim manager, make proposals which become binding on all relevant parties if agreed by secured creditors and/or appoint a manager to implement proposals agreed with secured creditors: ss.151 – 158 HRA 2008. With effect from 5 July 2018 a bespoke legislative scheme for housing administration orders under Chapter 5 of Part 4 of HPA 2016 was introduced, but this is not relevant to the construction of the Agreement. In practice, the statutory moratorium usually does its job: see the Judgment at paras 24 – 25 (**CB/7/71**).

48. The application of the statutory moratorium is a well-known feature of the landscape, which developers and local planning authorities negotiating s.106 agreements are aware of, as the Judge accepted at paras 19 – 21 of the Judgment (see in particular the excerpts from *Inside Housing* article from 2008 there cited) (**CB/7/69 – 70**). Its function within the scheme of the Agreement is to provide a safety net, the purpose of which is to seek to avoid the loss of the social housing assets in consequence of a mortgage default. When negotiating a mortgagee exclusion clause in a s.106 agreement containing affordable housing provisions, the developer and local planning authority may either include a contractual moratorium on the exercise of the provider’s mortgagee’s power of sale (and the power to appoint a receiver) or they can rely on the statutory moratorium, in either case as a safety net to seek to avoid the loss of the social housing assets in consequence of a mortgage default.

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<sup>2</sup> ex. s.144 HRA 2008 and The Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010

49. The scheme of the Agreement also contains several safety valve provisions in the event that there is insufficient commercial lending to enable a registered provider to acquire the long leases of the Affordable Housing Units on the standard terms of the Agreement:

- a. The discretion of the Appellant's Director of Housing to approve an unregistered provider of social housing, pursuant to paras 11.1 – 11.2 of Schedule One (CB/13/176 – 177). The grant of such approval removes the requirement of compliance with regulation under Part 2 HRA 2008 and releases the brake of the statutory moratorium on the enforcement of the security and thus would be likely to be more attractive to lenders.
- b. The right of the developers to request relaxation, variation or deletion of the affordable housing obligations in paras 11.3 – 11.5, in the event that no provider has taken a long lease after a period of twelve months from the Affordable Housing Units being ready for occupation, pursuant to para 11.6 of Schedule One (CB/13/177).

50. The Agreement, viewed in the context of the statutory scheme of Part 2 HRA 2008, thus provides a cohesive scheme which strikes a nuanced balance between its various aims, which may sometimes be in tension.

51. The Appellant submits that the Date of Disposition Construction is in keeping with the scheme of the Agreement as a whole: the affordable housing is ordinarily to be provided by a registered provider of social housing and, if and so long as this is done, the lender is entitled upon a default to realise its security by selling the long leases at open market value, subject to the safety net of the statutory moratorium. If there is insufficient commercial lending for a registered provider to acquire the long leases of the Affordable Housing Units on the standard terms of the Agreement, the Agreement contains several safety valve provisions to ensure the housing provision goes ahead on varied terms and the developers receive the premiums for the grant of the long leases.

52. On the other hand, the Date of Mortgage Construction of subclause 10.1.1 creates a lacuna, in that it removes the safety net of the statutory moratorium in the case of a de-registration default. On the Respondents' construction, in the case of a mortgage default comprising a proposal by the RSH to de-register the provider, the lender does not have to trigger the

statutory moratorium before enforcing its security. When the provider is on the road to de-registration, the lender can sit back and wait until after the provider has been de-registered, at which point the statutory moratorium no longer applies. Thus, in the case of a de-registration default, there is no safety net to prevent the social housing assets being permanently lost to the private sector; their fate is taken out of the RSH's hands.

**(iv) Commercial consequences**

53. At trial, in addition to making the general point that the Date of Mortgage Construction created a lacuna (see the Judgment at paras 65 – 66 (**CB/7/87 – 88**)), in oral submissions the Appellant referred the Judge to the documentation evidencing the transactions and regulatory decisions preceding the transfer to the First Respondent as stated in the Re-Amended Particulars of Claim. The Respondents submitted strongly that the court should not take them into account. They were wrong to do so. At the lowest knowledge of how events have transpired can assist in the exercise of considering what commercial consequences were properly capable of being envisaged at the time the contract was made: *Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd* [2022] EWHC 2372 (TCC), para 76 (Eyre J). The facts or alleged facts of the transactions post-dating the contract are not facts by reference to which the contract is to be construed but they may be of some importance: *Wood v Capita*, para 7 (Lord Hodge).
54. The transactional documents are thus relevant to an assessment of the commercial risk as at the date of the Agreement. Further, when the court assesses commercial risk, it is not required to find on the balance of probabilities so to speak that “the enemy bombers are approaching before sounding the air raid warning”: see (in a different risk assessment context) *In re H (Minors)* [1996] AC 563, 572H – 573B (Lord Browne-Wilkinson).
55. In the present case, Kinsman Housing Ltd was de-registered because of the contractual arrangements it entered into with the beneficial owner, PGP Finance No.17 LP, when it acquired the Affordable Housing Units, and Kinsman Housing Ltd's subsequent failure or inability to exit those arrangements. These arrangements comprised a declaration of trust and property management agreement dated 27 July 2016 (**SB/7/50 – 67, 8/68 – 70**). They did not comply with the Governance and Financial Viability Standard 2015 (**SB/4/31 – 35**). As the RSH stated in its regulatory notice of 28 November 2018: “The documents underpinning the arrangements make clear that Kinsman must act on the instructions of

and in the interests of the investor, a third party. ... There is no evidence that the beneficial owner recognises and will take into account the organisation's objectives and regulatory responsibilities in issuing instructions under the deed of trust and the management agreement.” (SB/9/71ff at 75)

56. As their names suggest, PGP Securities No.17 Ltd (the mortgagee) and PGP Finance No.17 LP (the beneficial owner) are linked entities. They were both controlled by Terry McMillan (SB/1/4 – 10, 3/26 – 30, 11/87ff list of subsidiaries at 11/107 – 109). The loan agreement dated 22 October 2014 was made between these linked entities: PGP Securities No.17 Ltd as lender and PGP Finance No.17 LP as borrower (SB/2/11 – 25). In combination with the third party legal charge dated 19 August 2015 executed by London District Housing Association Ltd as mortgagor and novated to Kinsman Housing Ltd (SB/5/36 – 45, 6/46 – 49), the loan agreement contained provisions which enabled Mr McMillan to make a c.£10m profit upon Kinsman Housing Ltd's de-registration (see clauses 1.1, 7.1 – 7.4 and Schedule 3 of the loan agreement, SB/2/11 – 14, 20 – 23).<sup>3</sup> There is no evidence that PGP Securities No. 17 Ltd notified the RSH of its intention to enforce its security (Judgment, para 11, CB/7/66), and it had every reason not to.<sup>4</sup>

57. The apparent “loophole scheme” disclosed by the transactional documents and regulatory decisions provides a perhaps extreme illustration, but an illustration nonetheless, of the commercial risks for the Appellant of the lacuna created by the Respondents' construction. Namely, if the mortgagee and the provider collude to bring about the provider's de-registration, by not engaging with or notifying the RSH of its intention to enforce its security, the mortgagee can avoid any scrutiny of its arrangements with the provider by the RSH. Once the provider has been de-registered, the RSH's regulatory powers over the provider fall away and the mortgagee is free to sell the leases on the open market. In this manner, the mortgagee and provider can profit from the loss of the social housing assets in a way that “flies under the radar” of the RSH.

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<sup>3</sup> There was evidence at trial of the passing rents of the Affordable Housing Units as at 2024, £15k per month i.e. £180k p.a. (SB/16/132). Applying a 5% yield produces a capital value c.£3.6m, cf. the sale price of the long leases to the First Defendant £12.6m (CB/11/138 para 94; 12/156 para 58). An additional £1.4m was paid by the Second Defendant for the head lease, granted for a premium of £80k.

<sup>4</sup> Camden LBC alleged that Mr McMillan attempted to implement a similar scheme at John Kirk House, WC1 in *London Borough of Camden v PGP Securities No. 9 Ltd* [2024] EWHC 3577 (Ch): see at paras 14 – 37.

58. In short, the obligation imposed by s.108(2) HPA 2016, that the lender must notify the RSH prior to enforcement of its security over the social housing assets, serves not only as a brake on the enforcement of the security, but also as a deterrent to dishonest or abusive practices. This obligation only applies for so long as the provider is registered.
59. Social housing assets are a public resource that is much needed in central London, but their value can also be measured in money. If the Appellant wished to acquire comparable affordable housing units in a similar location to replace those lost at the site, it can readily be seen that they would cost IRO £10m in excess of social housing value.
60. The Respondents make four main submissions about the commercial consequences of the Date of Disposition Construction, which are summarised below, together with the Appellant's responses:
- a. *It would create a perverse incentive, in a case of a mortgage default consisting in a proposal by the RSH to de-register the provider, for the lender to enforce its security as soon as possible.* This submission misses the point that enforcement by the lender triggers the statutory moratorium, which operates as a safety net to save the social housing assets.
  - b. *The lender would be exposed to the risk of being restricted to selling the Affordable Housing Units to another registered provider and thus recovering only social housing value.* The lender's remedy is, once the provider is on the road to de-registration, to engage with and notify the RSH of its intention to enforce its security, at which point the RSH would be seized of both the enforcement of regulatory standards against the provider and the exercise of its powers to seek to prevent the loss of the social housing assets. The RSH would seek to secure the overall solution which best achieved its regulatory objectives.
  - c. *The Respondents describe this as the lender being "at the mercy of the regulator".* This is merely a rhetorical way of stating that, if the RSH does not find a solution to save the social housing assets which is agreeable to the lender, in order to realise full market value, the lender would require the RSH to exercise its discretion to postpone de-registration of the provider until after the lender has enforced its security. Having regard to the provisions of s.92K HRA 2008, there is good reason to think that the RSH would exercise its discretion in the lender's favour.

- d. *No commercial lender would lend on the basis of the Date of Disposition Construction.* There is not a shred of evidence to support this assertion. The Date of Disposition Construction is, even on the basis of the Judgment, a possible interpretation of the mortgagee exclusion clause; and it was apparent to the Respondents' conveyancing solicitors, Protopapas LLP, prior to the purchase: see the Re-Amended Particulars of Claim at para 92A and the Re-Amended Defence at para 55A (**CB/11/137 – 138 and 12/156**). Yet there is no evidence that commercial lending was unavailable once construction of the Affordable Housing Units had been completed. In any event, the relevant question is whether a commercial developer would enter into the Agreement on the basis of the Date of Disposition Construction. The Agreement contains several safety valve provisions to cater for the risk that there is insufficient commercial lending for a registered provider to acquire the Affordable Housing Units on the standard terms of the Agreement, which protect the developers' interests, i.e. they ensure that the developers receive the premiums for the grant of the long leases.

### **The Judgment**

61. The analysis section of the Judgment begins at para 97 (**CB/7/95ff**). It is respectfully submitted that the Judgment is affected by the following errors:
- a. Although the Judge "recognised" a number of relevant principles of construction at paras 99 – 100, he did not go on to apply them properly. The thrust of the Judgment is to treat the elimination of any financial risk to a commercial lender providing finance for the acquisition of the affordable housing by a registered provider as an overriding consideration in the construction of the mortgagee exclusion clause, rather than basing the court's construction on a careful analysis of the language and scheme of the Agreement as a whole in the context of the statutory scheme of Part 2 HRA 2008.
  - b. The primary reason given by the Judge for accepting the Respondents' construction and rejecting the Appellant's construction was that, whilst both were possible interpretations, the former was in the Judge's view consistent with the rationale and purpose of the mortgagee exclusion clause whilst the latter was not: Judgment, paras 97, 109 – 110 and 112 (**CB/7/95 and 98 – 99**). The Judge identified this

“rationale and purpose” with the “primary aim” or “primary objective” of this particular subclause. It was an error to single out the primary aim of subclause 10.1.1 and to construe the subclause in the light of this aim in isolation. The relevant question is which construction is more consistent with the aims and scheme of the Agreement viewed as a whole (*Re Sigma Finance*). The Judge lost sight of the wood for the trees.

- c. Further, it is a leap of logic to say that, because the primary aim of subclause 10.1.1 is to encourage sufficient commercial lending for a registered provider to acquire the long leases of the Affordable Housing Units and this is an important aim of the Agreement, the parties intended this aim to be an overriding aim, to be achieved regardless of the cost to the achievement of the other aims of the Agreement, in particular the overarching aim (to which it is ancillary) of securing on-site affordable housing for successive occupants in perpetuity. On an objective approach to the intentions of the developers and the Appellant as local planning authority, it can be seen that they did not treat any of the main aims of the Agreement as absolute or paramount; the scheme of the Agreement strikes a nuanced balance between them.
- d. The Judge was wrong at para 104 (**CB/7/97**) to discount the relevance of *Gallaher* – the speeches of Lords Hodson and Wilberforce provide a general insight into the temporal construction of legal provisions. Adapting Lewison LJ’s phrase in *Napier Park*, the vantage point from which the question is asked is the date of the disposition from the mortgagee. This is a significant factor in the temporal construction of subclause 10.1.1.
- e. The Judge recognised at para 105 of the Judgment (**CB/7/97**), perhaps inconsistently with his primary reasoning, that: “The paramount exercise is to focus intensively on the ordinary and natural meaning”. However, in rejecting the Appellant’s submissions on ordinary and natural meaning at paras 109 and 111 – 112 of the Judgment, the Judge adopted the Respondents’ submissions set out previously at paras 76 – 77 (**CB/7/98 – 99 and 90**), which were based on a “root of title” approach to the meaning of subclause 10.1.1. This is a wrong approach: the natural and ordinary meaning of words is examined by considering ordinary usage, not by reference to land law concepts in unregistered conveyancing as they might

be understood by a specialist audience of property lawyers. The Judge did not consider any relevant examples of ordinary usage.

- f. The Judge failed properly to examine the significance of the contrasting language of subclause 10.1.2. At para 109 of the Judgment he said this: “I agree that the parties could have more clearly identified the point in time at which the status of the registered social provider is to be determined by the use of different wording (as they did in clause 10.1.2); but they chose not to do so.” (CB/7/98) It appears that the judge was here conflating two different situations. On the one hand, pointing to different forms of words which would have put the other side’s interpretation beyond doubt is rarely helpful: *Napier Park*, para 38 (Lewison LJ). The Judge referred to this guidance at para 31 of the Judgment and applied it correctly at paras 102 – 103 in relation to the selection of other s.106 agreements at different sites relied on by the Defendants in oral submissions (CB/7/73 and 96 – 97). On the other hand, a contrast in language within the Agreement itself is of obvious relevance to the natural meaning of subclause 10.1.1. (If an illustration of this point is needed see e.g. *Haining v Warrington Borough Council* [2014] PTSR 811, paras 27 (third point) – 28 (Lord Dyson MR)).
- g. The statement at para 110 of the Judgment, “No lender would be prepared to run the risk of subsequent deregistration imperilling the value of their security” was not based on any evidence, but on an assertion made by the Respondents in submissions (CB/7/99 cf. paras 32 – 35 at 73 – 75). It clearly goes too far, and may be an overemphatic way of expressing what is stated at para 115 below: the risk “might well deter mortgagees from lending at all” (CB/7/100). To the contrary, the business of lending is to take more or less calculated risks. In any event, the relevant question is not directly whether a lender would be prepared to lend on those terms but whether a commercial developer would be prepared to enter into the Agreement. As submitted above, the Agreement contains several safety valve provisions to cater for the risk that there is insufficient commercial lending for a registered provider to acquire the Affordable Housing Units on the standard terms of the Agreement, which provide for those standard terms to be varied. These provisions provide other routes to ensuring that the developers receive the premiums for the grant of the long leases of the Affordable Housing Units, and so take the pressure off the standard terms of the mortgagee exclusion clause i.e. the key phrase “*any person deriving*

*title through any mortgagee of a person listed in the register of providers of social housing” to achieve this outcome.*

- h. In agreeing at para 113 of the Judgment with the Respondents’ submission that the Appellant’s construction was “counter-intuitive”, because it puts any mortgagee “at the mercy” of the actions of the registered provider and the regulator (**CB/7/99 – 100**), first, the Judge failed to take into account that the mortgagee will not be at the mercy of the registered provider’s actions at all, since it can rely on a suitably drafted default clause; and secondly, the Judge failed to examine how the RSH was likely to act, having regard to the statutory scheme of Part 2 HRA 2008. Rather than carrying out a careful analysis of the level of commercial risk this might present to a lender, and despite having recited earlier at paras 39 and 99 of the Judgment the guidance given by Aikens LJ (**CB/7/76 and 95 – 96**), the Judge here fell into the trap of subjecting the parties to his own “intuition” of what might have been the sensible solution to the parties’ conundrum. Respectfully, an intuition based on attractively presented rhetoric is not a substitute for careful analysis.
- i. Further, in holding at para 113 that: “There is nothing in the language of clause 10.1.1 that requires a court of construction to conclude that the qualifying characteristics of the mortgagor and the mortgagee are ambulatory in their effect”, the Judge did not explain how this conclusion was consistent with the common ground, recorded at para 105 of the Judgment, that first component of the criteria, a subsisting mortgage, has to be satisfied at the date of the disposition (see paras 30 – 31 above) (**CB/7/99 – 100 and 97**).
- j. In the critical analysis of the commercial consequences of the Appellant’s construction at paras 114 – 115 of the Judgment (**CB/7/100**), the Judge surprisingly failed to examine the statutory scheme of Part 2 HRA 2008 at all, in particular the statutory moratorium and the lender’s remedy of engaging with and notifying the RSH of its intention to enforce the security, enabling the RSH to seek to secure the overall solution which best achieved its regulatory objectives. He also singularly failed to analyse or take into account the adverse consequences of the Respondents’ construction from the Appellant’s perspective, illustrated by the facts of this case. The Judge thereby failed properly to examine whether the Date of Disposition Construction might have amounted to a compromise between what the developers

and the Appellant would have wanted; i.e. in Aikens LJ's words "the essence of 'commercial common sense'".

- k. The reliance the Judge placed at para 116 of the Judgment (**CB/7/100 – 101**) on the Appellant's discretion to approve an unregistered provider was misplaced. This discretion allows the Appellant to dispense with the standard requirement that the provider is registered with and regulated by the RSH, in particular if the alternative is the social housing provision at the site not going ahead. *Pace* the Judge, having a fallback option to ensure the social housing is provided is a perfectly rational justification for the differential treatment.
- l. The Respondents' submissions led the Judge into error at para 117 of the Judgment (**CB/7/101**). It is not possible to obtain a mortgage on a social rented tenancy or an intermediate rented tenancy, which are assured or assured shorthold tenancies. Subclause 10.1.2 of the Agreement addresses a situation in which the Affordable Housing Units have already ceased to be Affordable Housing because the tenant has exercised the statutory Right to Acquire and accordingly the registered provider has granted an exempted lease or transfer to the tenant. This is a standard exception to affordable housing obligations, which flows from the statutory Right to Acquire. The material exclusion for the tenant is at subclause 10.1.4;<sup>5</sup> the corresponding exclusion for the tenant's mortgagee is at subclause 10.1.2 (**CB/13/174 – 175**). It is, as was submitted below, a case of different words used in these subclauses that work in different ways.
- m. The apparent anomaly the Judge identified at para 118 of the Judgment (**CB/7/101**) is not an anomaly at all. Pursuant to s.108(2) HPA 2016 and s.145 HRA 2008, the statutory moratorium is triggered in advance of the first step the lender takes to enforce its security over the leases. In the case of a sale by a receiver, that first step is the appointment of the receiver by the mortgagee. The statutory moratorium is not automatically triggered again within 3 years (s.147(1)-(2) HRA 2008). Therefore, the "Date of Appointment Construction" of these provisions, i.e. the provider must be registered at the date of the appointment of the receiver, dovetails

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<sup>5</sup> The preserved Right to Buy under s.171A Housing Act 1985, the exercise of which is provided for at subclause 10.1.5, does not apply to this site.

with the statutory moratorium. This is entirely in keeping with the scheme of the Agreement.

**Conclusion**

62. For the above reasons, it is submitted that the Date of Disposition Construction is the correct one and it follows the First Respondent is not a “*person deriving title through any mortgagee of a Registered Social Provider*” within the meaning of subclause 10.1.1 of the Agreement. Accordingly, the appeal should be allowed.

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*Page references added 19 January 2026*