

IN THE COURT OF APPEAL (CIVIL DIVISION)

CA-2025-001948

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

His Honour Judge Hodge KC

(Sitting as a Judge of the High Court)

BETWEEN: -

WESTMINSTER CITY COUNCIL

Appellant

and

(1) GEMS HOUSE RESIDENCES CHILTERN STREET LIMITED

(2) GEMS HOUSE CHILTERN STREET HEAD LEASE LIMITED

Respondents

RESPONDENTS' APPEAL SKELETON ARGUMENT

References to the core bundle are in the format [CB/tab/page]

References to the supplemental bundle are in the format [SB/tab/page]

(I) Introduction

1. This appeal turns on a narrow question of interpretation of a single provision in an agreement made under s. 106 of the Town and Country Planning Act 1990 (“**TCPA**”) dated 11 April 2013 (“**the s.106 Agreement**”) [CB/13/163-295]. The particular question is whether the Respondents are bound by a covenant restricting the use of sixteen flats on Chiltern Street as “*Affordable Housing*”, or whether they are excluded from its effect because the First Respondent acquired title from a mortgagee of its predecessor in title. That question is unique to the particular s.106 Agreement in issue, not least since the evidence below was that the Claimant negotiated different wording in different agreements concluded around the same time (in some cases setting out in clear terms what the parties intended on those agreements).
2. Since the Respondents accepted that, if they lost on interpretation, an injunction should be granted, that was the only question before the trial judge, His Honour Judge Hodge KC (sitting as a High Court Judge) (“**the Judge**”) on 24 and 25 June 2025. He handed

down his judgment on 22 July 2025 ([2025] EWHC 1789 (Ch)) (“**the Judgment**”), in which he accepted (without hesitation – see §97 of the Judgment [CB/7/95]) the correctness of the Respondents’ submissions on interpretation. He dismissed the claim.

3. As was the case below, it is important to emphasise that the proceedings are not concerned with any scheme to avoid the provision of social housing. The dispute arose from the purchase for value of an investment property on the basis of professional advice that the Leases were unaffected by the affordable housing restriction, given that they were acquired by the First Respondent from a mortgagee of (as the Judge held) “a *Registered Social Provider*” within the meaning of the disputed contractual provision. Though the Appellant’s amended pleadings below raised allegations about the conduct of third parties, the Respondents in their evidence made clear that they had no knowledge of the so-called “McMillan scheme” and that they were innocent purchasers. The Judge rightly made no findings about the “McMillan scheme” and it is of no relevance to the question of interpretation of the s. 106 Agreement.

(2) Facts

4. The claim arose in the context of a conveyance of various 125-year leases of flats within a building known as 76 Chiltern Street, London W1 (“**the Leases**”, “**the Flats**” and “**the Building**”). The Building is the subject of the s. 106 Agreement between the Appellant as the local planning authority, the entities which developed the Building (“**the Developer**”) and their mortgagee. The s. 106 Agreement at clause 5.2 [CB/13/172] contained a covenant by the Developer to observe and perform the undertakings, covenants and restrictions set out in Schedule One. The effect of paragraph 11 of that schedule [CB/13/176-177] was that the units in the Building designated as “*Affordable Housing Units*” (“**AHUs**”) could not be occupied other than for “*Affordable Housing*” as defined.
5. On 19 August 2015, the Developer granted the 16 Leases to London District Housing Association (“**LDHA**”), a registered social housing provider. The grant of the Leases to LDHA was apparently paid for by a company called PGP Finance No. 17 LP, which borrowed the funds from another company called PGP Securities No. 17 Limited (“**Securities No. 17**”), in return for which LDHA mortgaged the Leases in favour of Securities No. 17 by way of securing the loan. The mortgage was created by a deed dated 19 August 2015 (“**the 2015 Mortgage**”) [SB/5/36-45].
6. On 27 July 2016, LDHA transferred the Leases to Kinsman Housing Limited (“**KHL**”), another registered social housing provider (“**RSP**”). The charge created by the 2015

Mortgage was novated by a deed of novation dated 27 July 2016 between LDHA, KHL and Securities No. 17 (“**the Deed of Novation**”) [SB/6/46-49], pursuant to which LDHA transferred its rights and obligations under the 2015 Mortgage to KHL. On 9 August 2017, the Developer granted a 999-year intermediate lease to Chiltern 999 Limited – (“**the Headlease**”).

7. On 8 August 2023, the social housing regulator published a decision to de-register KHL. The result of that was that KHL’s mortgagee, Securities No. 17, in the purported exercise of its power of sale under the terms of the 2015 Mortgage, sold the Leases to the First Respondent by a transfer dated 16 February 2024. The Appellant’s pleaded case necessarily proceeded on the basis that the power of sale was effective and that title to the Leases was transferred to the First Respondent – otherwise its claim to enforce the s. 106 Agreement could not stand. The Headlease was assigned to the Second Respondent on the same day and, in any event, those dispositions were both completed by registration at HM Land Registry so that the Respondents have good title. The issue is whether the restrictive covenant binds them.

(3) The s. 106 Agreement

8. Clause 1.1 of the s.106 Agreement [CB/13/164-170] contains the following relevant definitions:

““Affordable Housing” - subsidised housing available through a Registered Social Provider (or other social provider as the Director of Housing shall have approved in writing beforehand for this transaction) to persons who cannot afford to rent or buy dwellings generally available on the open market;

...

"Affordable Housing Units" - That part of the Development comprising sixteen residential units made up of ten Social Rented Units (being 3 x one bedroom, 2 x two bedroom, 5 x three bedroom) and six Intermediate Rented Units (being 2 x one bedroom, 2 x two bedroom, 2 x three bedroom) within the Development and all as shown as Affordable Housing Units on the Floor Plans annexed to this Agreement.

...

"Registered Social Provider" - 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 (such approval not to be unreasonably withheld or delayed)”

9. By clause 5.2, the Developer covenanted [CB/13/172]:

“to observe and perform and cause there to be observed and performed the undertakings covenants and restrictions as contained in Schedule One of this Agreement”

10. The relevant covenants and restrictions, for these purposes, are those in paragraph 11 of Schedule One [CB/13/176-177], the broad effect of which was to ensure that

“Affordable Housing Units” would be used and occupied only for the purposes of “Affordable Housing”.

11. The provision in issue in this appeal is clause 10 of the s. 106 Agreement [**CB/13/174-175**], which sets out exclusions to the operation of clause 5.2 and Schedule One. The immediately relevant provision is clause 10.1.1 but it is important to set it out in its context:

“10.1 The obligations contained in Schedule One of this Agreement shall not be binding upon nor enforceable against:

10.1.1 any mortgagee of a Registered Social Provider or any receiver appointed by such mortgagee or any person deriving title through any such mortgagee or receiver;

10.1.2 any mortgagee of a residential tenant or person to whom a Registered Social Provider grants a lease or transfer or any receiver appointed by such mortgagee or any person deriving title through any such mortgagee or receiver;

10.1.3 any statutory undertaker or other person who acquires any part of the Property or interest therein for the purposes of the supply of electricity gas water drainage telecommunications services or public transport services;

10.1.4 any tenant who has exercised the right to acquire pursuant to the Housing Act 1996 or any statutory provision for the time being in force (or any equivalent contractual right) in respect of a particular Affordable Housing Unit or any successor in title thereto;

10.1.5 any tenant who has exercised any statutory right to buy (or any equivalent contractual right) in respect of a particular Affordable Housing Unit or any successor in title thereto ...”

(3) Applicable legal principles

12. There is no substantial dispute about the applicable legal principles.
13. Ss. 106(3) to (5) of the TCPA provide:

“(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

- (a) against the person entering into the obligation; and
(b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

(5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.”

14. An agreement under s. 106 of the TCPA is a contractual instrument like any other and to which the standard principles of contractual interpretation apply: **Norfolk Homes Ltd v North Norfolk DC** [2021] PTSR 863, per Holgate J at [70]. A well-known

summary of those principles was set out by Lord Neuberger in **Arnold v Britton** [2015] A.C. 1619 at [15], as follows.

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of the parties’ intentions.”

15. That expression of the principles remains good, despite the Supreme Court since having revisited them¹. A more recent summary (cited by the editors of *Chitty on Contracts* (34th ed.) at 16-053) was that of Popplewell J in **Lukoil Asia Pacific PTE Ltd v Ocean Tankers (Pte) Ltd** [2018] 1 Lloyd’s Rep 654 at [8]. The approach to contractual interpretation involves an iterative approach, so that “if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other” (as explained by Popplewell J in **Lukoil Asia Pacific PTE Ltd v Ocean Tankers (PTE) Ltd**, above.

16. However, in **Arnold v Britton**, Lord Neuberger made clear at [17] that

“considerations of commercial common sense and surrounding circumstances... should not be invoked to undervalue the importance of the language of the provision which is to be construed” and at [19] that “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”.

17. In other words, as Lord Neuberger explained, “commercial common sense is not to be invoked retrospectively”. He added 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”. At [20], he held that a court should be slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.

18. Popplewell J explained in **Lukoil** that the unitary exercise of interpretation involves

¹ In, for example, **Wood v Capita Insurance Services Ltd** [2017] A.C. 1173 and **Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd** [2023] 1 W.L.R. 575.

“striking a balance between the indications given by the language and the implications of the competing constructions”, where “each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated”.

19. As Lewison LJ emphasised in **Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV** [2014] EWCA Civ 984 at [32] and [33]:

“32. The iterative process thus described is not confined to textual analysis and comparison. It extends also to placing the rival interpretations within their commercial setting and investigating (or at any rate evaluating) their commercial consequences. That is not to say that in a case like this the commercial setting should be derived from considerations outside the four corners of the contractual documents...”

“33. Thus we must seek to discern the commercial intention, and the commercial consequences from the terms of the contract itself; and that feeds into the process of deciding whether a particular word or phrase is in reality clear and unambiguous. It follows in my judgment that, where possible, the court should test any interpretation against the commercial consequences. That is part of the iterative exercise of interpretation. It is not merely a safety valve in cases of absurdity. So much is, in my judgment, also made clear by the decision of the Supreme Court in **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900. In that case Lord Clarke said at [20]:

“It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme that it was unintended, the court must give effect to that meaning.”

(4) The approach of the Judge

20. The Judge correctly directed himself as to the approach to take. At §98 [CB/7/95], he explained that clause 10.1.1 “must be construed in the context of the whole of clause 10.1, and the s. 106 agreement more generally; and against the background of the then prevailing planning policies and objectives, and the applicable regulatory regime governing social housing”. His starting point was the words themselves (§99 [CB/7/95-96]). The Judge held (§109 [CB/7/98]) that the meaning of the disputed provision was “open-ended, in the sense that it is capable of either of the two competing meanings advanced in this litigation”.
21. He then correctly directed himself that “if there are two possible constructions of the agreement, the court is entitled to prefer the construction which is more consistent with ‘commercial common sense’”. The Judge made clear that “commercial common sense” had to be objectively ascertainable from the s. 106 Agreement itself and the admissible background. He recognised that, in a carefully negotiated commercial agreement, there was a tension between the parties’ competing aims and that, through interpretation, the parties were not to be subjected to his own notions of what might have been the sensible solution to those competing aims.
22. In line with authority, he proceeded to consider which was the correct interpretation

“by looking to the commercial consequences of the two alternative constructions, and deciding which of those constructions is the more consistent with the rationale and purpose of the mortgagee exclusion clause”. As the Judge put it, the question was, “which, objectively, is the better fit?”

23. Having analysed the wider context of the contractual language, he held at §112 [SB/7/99] that the Respondents’ construction “is the only reading that fits with the underlying primary objective of facilitating a registered provider to raise sufficient funding to enable it to acquire and develop the long leases of the affordable housing units which are mandated by the s. 106 agreement”. There was no dispute below about the rationale and purpose of the exclusion clause. As the Judge said at §97 [CB/7/95], it was identified in the Appellant’s skeleton argument at paragraph 76(d) as follows:

“The primary aim of subclause 10.1.1 was to encourage sufficient commercial lending for a registered provider to acquire the long leases of the affordable housing units. It achieved this by permitting the lender upon a default to realise its security by selling the social housing assets at open market value.”

24. The Judge correctly considered that the undisputed aim of the clause was better achieved by the Respondents’ construction of clause 10.1.1. That was reinforced by his consideration of the consequences of the parties competing constructions (analysed below), which weighed in favour of the Respondents’ interpretation being correct.

(5) The relevance of the statutory moratorium

25. The Appellant’s case below and on this appeal relies heavily on the interaction between the s. 106 Agreement and the statutory scheme for regulating social housing under the Housing and Regeneration Act 2008 (“**the HRA 2008**”). It is submitted that the Appellant mischaracterises the purpose of the statutory moratorium.
26. The relevant provisions are those which were in force on the date of the s. 106 Agreement: 11 April 2013 (which was in substance the same as the scheme in force today). Those were set out in the Housing and Regeneration Act 2008 (“**the HRA 2008**”). Chapter 3 deals with registration and deregistration of providers and chapter 4 with (among other things) deals with the insolvency of a registered provider. The moratorium was triggered by the giving of a notice to the regulator that a specified step had been taken. Those steps included enforcement steps taken by a mortgagee. A purported disposal of property in breach of the moratorium was void.
27. The moratorium lasted only 28 days, unless extended. It could only be extended with the consent of secured creditors. When a moratorium was triggered, the regulator

could appoint an interim administrator of the RSP. It could also make proposals, but those became binding on secured creditors and the RSP only if the proposals were agreed by secured creditors.

28. Accordingly, the institution of a moratorium might at most introduce a 28-day delay in the enforcement of security by a mortgagee of an RSP. Unless that mortgagee agreed to proposals made by the regulator, it was powerless to prevent a disposal by a mortgagee.
29. The Appellant submits at §52 of its skeleton argument [**CB/3/31**] that the Respondents' construction "*creates a lacuna, in that it removes the safety net of the statutory moratorium in the case of a de-registration default*". The supposed lacuna is as follows.
 - (1) On the Appellant's case, the mortgagee of an RSP which is threatened with deregistration by the regulator (where that is an event of default under the mortgage) is incentivised by the possibility of losing its exemption from the Schedule One restrictions upon deregistration to take immediate steps to enforce its security.
 - (2) Those immediate steps taken before registration would trigger the moratorium, allowing the regulator a 28-day period to attempt to bring the provider and its secured creditors to the table in order to negotiate for the transfer of the provider's land to another.
 - (3) On the Respondents' case, however, if a mortgagee's security is left just as enforceable after deregistration as before, then it has no incentive to take immediate steps to enforce its security and so to trigger a moratorium.
30. The Appellant's case rests on a fundamental mischaracterisation of the nature and purpose of the statutory moratorium. The moratorium exists as part of the statutory machinery applicable where a registered provider is facing *insolvency* and not deregistration. Sections. 143A to 159 are grouped under the title "*insolvency etc.*". It was in that case – distinct from deregistration – that the moratorium was to provide a 28-day reprieve for a possible solution to be found. Where the regulator had decided to deregister a provider, there would be no need for a moratorium: the time for seeking solutions would already have passed.
31. The provisions covering deregistration are contained in a different chapter of the HRA 2008. Ss. 118 and 119 deal with compulsory and voluntary deregistration. The right of

the regulator to remove a provider from the register arose under s. 118 as it was then in force where the regulator thought the provider no longer eligible for registration, or that it had ceased to carry out activities, or that it had ceased to exist. It was required to give only 14 days' notice of deregistration and was not required to give notice to secured creditors. S. 119 as it was then in force allowed a private registered provider to ask the regulator to remove it from the register under certain circumstances but, again, did not require notice to be given to secured creditors.

32. It follows that a provider might be deregistered without a secured creditor even being made aware in advance of the regulator's intention to do so. Even if a secured creditor became aware of that intention and served a default notice triggering the 28-day moratorium, the provider might be deregistered before the expiry of the moratorium. The Judge was accordingly right to hold at §113 [CB/7/99-100] that the Appellant's construction was counter-intuitive, "*because it puts any mortgagee at the mercy of the actions of third parties over which it has absolutely no control: the conduct of the registered social housing provider, and the response of the regulator*".
33. The Appellant's suggestion that the s. 106 Agreement should be construed so that it encourages the mortgagee of an RSP to serve a default notice triggering a moratorium when deregistration is threatened is therefore misconceived. A moratorium *might* be initiated where *both* the terms of the mortgage stipulated that the service of a notice of intention to deregister was an event of default under the mortgage² *and* the mortgagee decided to serve a default notice or otherwise to steps to enforce its security on the basis of that default. Parliament's decision not to impose a moratorium where a notice of intention to register was given, does not provide a proper basis for construing the s. 106 Agreement as the Appellant contends.

(6) Submissions on construction

34. The question is whether the First Respondent falls within the scope of the words "*any mortgagee of a Registered Social Provider... or any person deriving title through any such mortgagee...*".

² The Appellant assumes that a mortgage granted by an RSP would invariably include a provision that the giving of notice to deregister would be an event of default: what it calls a "*deregistration default*" at §52. But that might well not be the case: it would depend on what the parties to the mortgage negotiated.

(i) Natural and ordinary meaning

35. The Respondents maintain that the natural and ordinary meaning of the phrase “*any mortgagee of a Registered Social Provider*” is any mortgagee to whom a mortgage was granted by an RSP. At the point in time at which the mortgage is granted by an RSP, their mortgagee has become a “*mortgagee of a Registered Social Provider*”. Regardless of whether they are subsequently deregistered, any person to whom they convey the property is “*any person deriving title through any such mortgagee*” – i.e. from any mortgagee covered by that definition, even if subsequently deregistered. That is because the title derives from the mortgage (which creates the mortgagee’s title to sell in the first place), which was granted by an RSP to the mortgagee of that RSP. Even if an RSP is later deregistered, their mortgagee remains a mortgagee *granted* a mortgage by an RSP.
36. The Appellant at §31 of its skeleton [CB/3/24-25] suggests that it is common ground that the existence of a legal relationship of a mortgage between the mortgagee and another party is “*ambulatory*”, so that “*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.*” It is not entirely clear where this goes. If an RSP conveys its estate in land to a mortgagee, then the mortgagee becomes a successor in title to the RSP as owner of the land. The onward conveyance to a third party would not in any sense be by a mortgagee, but that is not a “*formidable logical problem for the Respondents’ case*” as the Appellant contends. The clause plainly contemplates a disposal by a mortgagee in the course of enforcing its security (i.e. whilst it is a mortgagee), and not because (for whatever reason) it had been conveyed its mortgagor’s estate in the mortgaged land so as to become proprietor in its own right.

(ii) Other textual indicators

37. The correctness of the Respondents’ construction is supported by the immediate textual context of clause 10.1 [CB/13/174-175] which uses notably wide language: the parties exempted from the Schedule One restrictions are *any mortgagee* and *any person deriving through any such mortgagee*.
38. Further:
- (1) In clause 10.1.1, the parties also agreed that “*any receiver appointed by [any mortgagee of a Registered Social Provider] or any person deriving title through any such... receiver*” would be exempt from the Schedule One restrictions. That shows that the parties necessarily contemplated that the exemption should be fixed by reference to the status of the provider on the date of appointment of the receiver.

The parties cannot sensibly have intended that an appointed receiver would become subject to the restriction just because the mortgagor of the appointing mortgagee had been deregistered. That was accepted by the Appellant below. But, given that the Appellant's reliance on the statutory moratorium is misconceived, there is no logical basis for the parties intending that a mortgagee should lose the benefit of the exemption simply because its mortgagor had been deregistered. It should not make a difference whether a sale of mortgaged property after deregistration of an RSP was by a receiver or by a mortgagee.

- (2) It would create a perverse incentive if it were otherwise. A mortgagee need not take any steps to enforce their security: ***Silven Properties Ltd v Royal Bank of Scotland plc*** [2004] 1 WLR 997 (CA), per Lightman J at [13]. A receiver, however, is under a positive duty to do so: ***Silven Properties Ltd v Royal Bank of Scotland***, at [23]. A mortgagee which might otherwise be content to 'wait and see' rather than to take steps to enforce its security would on the Appellant's case be incentivised to appoint a receiver at the earliest point so as to 'lock in' the benefit of the exemption, thus guaranteeing that enforcement steps would be taken.
- (3) Clause 10.1.2 excludes "*any mortgagee of a residential tenant or person to whom a Registered Social Provider grants a lease or transfer*". Again, the parties contemplated the exemption being engaged by the grant of the particular interest by the RSP: the granting of a lease or transfer. The parties cannot have intended, as was accepted below, that the mortgagee of such a tenant would cease to benefit from the exemption just because the landlord provider was deregistered. As the Judge held at §117, there is no principled good reason why a mortgagee entitled to the benefit of the mortgagee exclusion in clause 10.1.1 should be in any different position from the mortgagee of a residential tenant of an affordable housing unit:

"it would be illogical to permit a mortgagee of a residential tenant, to whom a registered social provider has granted a lease, to sell free from any affordable housing obligations and restrictions, even though that provider has since been deregistered, but not a mortgagee whose mortgage was granted by a registered social provider which has since been deregistered".

- (4) It is significant that in clause 10.1.2 the parties used the same language to identify the mortgagee: "*any mortgagee of a residential tenant*". The parties cannot sensibly have intended that the mortgagee of a residential tenant would lose the benefit of the exemption simply because the tenant in question ceased to reside at the

property. The use of the words “*any mortgagee of*” tied the application of the exemption to the identity of the mortgagor on the date of the grant. There is no reason to suppose that the same ‘fixing’ of the exemption clause on the date of grant was not intended to apply as much to a mortgagee of an RSP under clause 10.1.1.

39. It follows that, in every other case in clause 10.1, the parties tied the application of the exemption to the status of the grantor at the time at which the interest was granted. That is a strong pointer towards the status of a “*mortgagee of a Registered Social Provider*” becoming determined by reference to the date of the grant. Indeed, other than its submissions relating to the statutory moratorium, the Appellant has suggested no reason why a mortgagee of a registered social provider should be able to enforce its security free from the Schedule One restrictions up to the point of deregistration but lose that freedom thereafter.
40. It is also relevant that the parties defined “*Registered Social Provider*” widely, so as to include a provider of social housing “*who is approved by the Council (such approval not to be unreasonably withheld or delayed)*”. Once approved by the Appellant, that provider would remain at all times within the definition of “*Registered Social Provider*” – there would be no scope for it to lose that status by being deregistered under the HRA 2008. The mortgagee of such an entity would thus enjoy the benefit of the exemption from the Schedule One restrictions from the moment of grant of the mortgage and throughout the term. It is unclear why it should be any difference for the mortgagee of a registered provider and, absent a good reason why that should be the case, it is submitted that the context of clause 10.1 reinforces rather than undermines the Respondents’ case.

(iii) The overall purpose

41. The s. 106 Agreement as whole set out a scheme for ensuring that the Developer made provision for affordable housing units in the development. The exemption clause was consistent with that aim.
42. As agreed below, its purpose was to ensure that a registered provider would be able to raise money on the market for the purposes of acquiring long leases of the AHUs. It achieved that by ensuring that a mortgage lender would be able to enforce the security granted over the leases of the AHUs in return for advancing those funds at their open market value – i.e. free from the restrictive covenant requiring them only to be occupied

as “Affordable Housing”.

43. That purpose would be undermined if a lender lost the benefit of the exemption because its mortgagor had been deregistered. The Judge noted at §88 [CB/7/92] the Respondents’ submission that such a risk might deter mortgagees from lending at all. At §110 [CB/7/99], he held that it was necessary to tie the application of the exemption clause to the status of the mortgagor at the date of the mortgage “*if mortgagees are to be encouraged to lend to registered providers, so as to enable them to acquire and develop the affordable housing in the first place*”. The Judge’s view that “*no lender would be prepared to run the risk of subsequent deregistration imperilling the value of their security*” was a sound observation and a reasonable inference to draw.
44. The availability of the exemption to mortgagees is not just important from the point of view of a mortgagee. Where a mortgagee of an RSP (or deregistered provider) seeks to dispose of charged assets, it might well seek to do so to another RSP. RSPs might well lack the liquidity to purchase the asset from a mortgagee without themselves raising finance. The availability of the exemption from the Schedule One restrictions to the mortgagee of a successor in title RSP therefore increases the possibility of a disposal to another RSP being achieved.

(iv) The admissible background

45. Properly analysed, the statutory scheme for regulating social housing does not support the Appellant’s case on construction. Indeed, it is consistent with the Respondents’ case. There is nothing in the admissible background material which detracts from the Respondents’ case.

(v) Consequences

46. To the extent that there is ambiguity in the meaning of clause 10.1.1 of the s. 106 Agreement [CB/13/174-175], it is not resolved in the Appellant’s favour by weighing up the consequences of the competing constructions as part of the iterative process of contractual interpretation to be undertaken.
47. The Judge, having carried out a linguistic and textual analysis, held that the clause was in that sense ambiguous. He then went on to weigh up the consequences. He summarised the Respondents’ submissions on those consequences at §§88-89 and 93 [CB/7/92-94], and his own reasoning is set out at §§110-115 [CB/7/99-100]. He correctly held that those consequences, when weighed up, favoured the Respondents’ approach. To this

can be added the point made above that a mortgagee on the Appellant's case would be incentivised to appoint a receiver at the earliest time, even where a mortgagee might otherwise have been prepared to delay enforcement.

48. The Appellant suggests that on the facts of the case, it was possible for Securities No. 17 to wait until KHL had been deregistered and then to enforce its security free from the effect of the Schedule One restrictions. However, that is unobjectionable.
49. On the Appellant's approach, Securities No. 17 could have served a default notice before registration, declined to consent to the extension of the moratorium, declined to consent to any proposals made by the regulator, wait for the 28-day moratorium period to come to an end and then (provided KHL had not by then been deregistered) enforce its security free from the Schedule One restrictions. In other words, the triggering of the moratorium prior to deregistration would not have resulted in a different outcome.
50. On the other hand, as submitted above and as recognised by the Judge, on the Appellant's case the mortgagee is left at the mercy of the regulator and the mortgagor. It might lose the right to enforce its security free from the Schedule One restriction through no fault of its own. Given that the HRA 2008 as in force on the date of the s. 106 Agreement did not require the regulator to give notice of intention to deregister to mortgagees, there was no guarantee of a default notice being served in time.
51. Furthermore, if a mortgage was granted to an RSP which did not stipulate that the giving of a notice of intention to default was an event of default, but that deregistration was, the mortgagee would not even have been entitled to serve a notice triggering the moratorium prior to deregistration. That consequence, and the implications for prospective lenders to registered social providers, were rightly recognised by the Judge at §113 [**CB/7/99**].
52. The Appellant at §60 [**CB/3/34-39**] attempts to address the objectionable consequences flowing from its construction and which were accepted the Judge below but fails to provide sufficient answer those objections:
 - (1) The Appellant seeks to address the 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, by submitting that enforcement by the lender triggers the statutory moratorium, which operates as a "*safety net*" to save the social housing assets. However, the moratorium provisions in force on the

date of the s. 106 Agreement were not intended to be, and were not, a safety net. A lender interested only in selling the mortgaged property was always in a position to do so after 28 days, unless they agreed to the extension of the moratorium or to proposals made by the regulator. So, on the Appellant's case, the moratorium was neutral: it did not enable the regulator to prevent disposal by the mortgagee after the 28-day moratorium period.

- (2) The Appellant cannot answer the objection that, on its case, a lender would be exposed to the risk of being restricted to selling the AHUs to another registered provider and thus only recovering the social housing value of the security that might well leave it under-secured and out of pocket after sale. The HRA 2008 provides no “remedy” to a mortgagee of a mortgagor facing deregistration, as suggested by the Appellant. The serving of a default notice is a step towards enforcement and not a means of engaging the regulator's powers under the statutory scheme to enforce regulatory standards against the provider. The deregistration process under the HRA 2008 is commenced by the regulator, after it has already decided to deregister a provider and has independent powers of enforcement and may choose not to react to a default notice.
- (3) The Appellant provides no answer to the suggestion that its construction leaves lenders at the mercy of the regulator and simply reinforces that conclusion by suggesting the regulator might allow time to enforce.
- (4) In response to the objection that its construction would disincentivise lending, the Appellant submits that the s. 106 Agreement contains other “*safety value provisions*” but that would require *either* the watering down of the restrictions in the s. 106 Agreement *or* the willingness of an unregistered provider with the approval of the Council to take leases of the AHUs. As the Judge held, the Appellant's construction would disincentivise lenders from lending to *registered* social providers.

(7) The specific criticisms of the Judgment

53. The Appellant in its skeleton argument sets out 13 discrete criticisms of the Judge's reasoning in separate sub-paragraphs under paragraph 60 [CB/3/34-39]. They do not disclose any sound basis for contending that the Judge erred in his construction of the disputed provision. The Respondents' position is that the Judge was right for the reasons that he gave. Submissions in response to the Appellant's specific criticisms will be made at the hearing, to the extent required.

54. The Respondents submit that the appeal should be dismissed.

DAVID ELVIN, K.C.

TOM MORRIS

Landmark Chambers,
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2 December 2025