APPENDICIES TO THE REBUTTAL PROOF OF EVIDENCE OF RICHARD ST JOHN WILLIAMS IN SUPPORT OF AN APPLICATION SUBMITTED TO THREE RIVERS DISTRICT COUNCIL, ON BEHALF OF THE RICHBOROUGH ESTATES PARTNERSHIP LLP, FOR OUTLINE PLANNING PERMISSION FOR THE PROPOSED DEVELOPMENT OF LAND TO THE NORTH OF LITTLE GREEN LANE, CROXLEY GREEN, WD3 3SP

PINS APPEAL REF: 6004972

CONTENTS

Appendix 1

Westminster City Council v Gems House Residences Chiltern Street Ltd [2025] EWHC 1789 (Ch) (22 July 2025)

Neutral Citation Number: [2025] EWHC 1789 (Ch)

Case No: PT-2024-000381

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: Tuesday, 22 July 2025

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

- -

Between:

Westminster City Council

Claimant

- and -

(1) Gems House Residences Chiltern Street Limited
(2) Gems House Chiltern Street Head Lease Limited

Defendants

- -
- -

Mr Matt Hutchings KC and **Mr Michael Feeney** (instructed by **Bi-borough Legal Services**) for the **Claimant**
Mr David Elvin KC and **Mr Tom Morris** (instructed by **Mishcon de Reya LLP**) for the **Defendants**

Hearing dates: 24-25 June 2025
Date draft judgment circulated: 15 July 2025
Date judgment handed down: 22 July 2025

Approved Judgment

HIS HONOUR JUDGE HODGE KC

This judgment was handed down remotely at 10.00am on Tuesday, 22 July 2025 by uploading it to CE-File, by circulation to the parties or their representatives by e-mail, and by release to the National Archives.

....

CONTRACT *– Interpretation – Agreement under s.106 of the Town and Country Planning Act 1990 – Whether first defendant bound by planning obligations in s.106 Agreement requiring residential flats not to be used otherwise than as affordable housing units – Whether first defendant a person deriving title through a mortgagee of a Registered Social Provider entitling it to the benefit of a mortgagee exclusion clause in the s. 106 agreement – Whether status of 'Registered Social Provider' to be determined as at the date of grant of mortgage or as at the later date of disposal of flats by mortgagee to first defendant*

The following cases are referred to in the judgment:

Arnold v Britton [2015] UKSC 36, [2015] AC 1619
BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd [2013] EWCA Civ 416
Commissioners of Customs and Excise v Gallaher Ltd [1971] AC 43
Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57, [2017] AC 73
Lowe v The Governors of Sutton's Hospital in Charterhouse [2024] EWHC 646 (Ch), [2024] L&TR 17
Lukoil Asia Pacific PTE Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune') [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654
Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV [2014] EWCA Civ 984
Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265 (QB), [2021] PTSR 863
R (Greenfields (IOW) Limited) v Isle of Wight Council [2025] EWCA 488
R (Robert Hitchins Ltd) v Worcestershire County Council [2016] JPL 373
Re Sigma Finance Corporation [2009] UKSC 23, [2010] 1 All ER 571
Trump International Golf Club Limited v Scottish Ministers [2015] UKSC 74, [2016] 1 WLR 85
Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173

His Honour Judge Hodge KC:

I: Introduction

1. This case raises one short issue concerning the true interpretation of an agreement imposing planning obligations under s. 106 of the Town and Country Planning Act 1990: is the first defendant entitled to claim the benefit of a mortgagee exclusion clause in the s. 106 agreement as a person deriving title through a mortgagee of a *'Registered Social Provider'*? It arises in the context of the question whether the first defendant is bound by planning obligations in a s.106 agreement which require that 16 residential flats within a newly built residential development at 76 Chiltern Street, London W1 shall not be used otherwise than as affordable housing units. The resolution of this issue depends upon whether the status of the mortgagor as a *'Registered Social Provider'* (as defined) falls to be determined as at the date the mortgage was created or the later date when the mortgagee sold the leases of all 16 flats to the first defendant.

2. The claimant, Westminster City Council, is the local planning authority for the administrative area in which the Chiltern Street development is situated. It is represented by Mr Matt Hutchings KC, leading Mr Michael Feeney (of counsel). The first and second defendants are the leasehold and head leasehold owners respectively of the 16 affordable housing units within the development. They are represented by Mr David Elvin KC, leading Mr Tom Morris (also of counsel).

3. By a claim form, issued on 30 April 2024, the claimant seeks a declaration that the defendants are bound by, and an injunction to enforce, planning obligations contained within the s. 106 agreement that require the 16 flats not to be occupied otherwise than as affordable housing. By a notice of discontinuance, dated 30 September 2024, the claimant discontinued certain aspects of its originally pleaded claim.

4. There is some urgency in delivering this judgment. By an Order made on 30 October 2024, Edwin Johnson J granted an interim injunction against the first defendant, until trial or further order, preventing it from occupying, letting, or otherwise disposing of the affordable housing units otherwise than as subsidised housing for persons who cannot afford to rent or buy dwellings generally available on the open market. In accordance with authority, the claimant, as the local planning authority, gave no cross-undertaking in damages. The defendants therefore applied for an expedited trial of this claim. That application was not opposed by the claimant. On 23 January 2025, Mr David Halpern KC (sitting as a deputy High Court judge) granted the defendants' application for an expedited trial. Case management directions were given at a hearing before Deputy Master Collaço Moraes on 14 February 2025. The case management order records a concession by the defendants that if they lose at trial on the point of construction of the s. 106 agreement, they will not oppose the grant of an injunction if they do not give an undertaking to the court on the same terms. Naturally, the defendants hope to defeat this claim, and secure their release from the injunction which presently binds the first defendant. In light of the urgency, this judgment will be less full than might otherwise have been the case. Against the background that, if the claimant prevails on the short point of contractual interpretation that is before the court, the defendants will not resist the existing injunction being made permanent, the short issue between the parties is whether, as a

matter of contractual interpretation, the affordable housing obligations in the s. 106 agreement are binding on the first defendant.

II: Background

5. On 11 April 2013, the claimant granted full planning permission for a mixed-use, new-build development, to include 60 residential flats, at 22-28 Paddington Street and 74-76 Chiltern Street, London W1, subject to conditions. Simultaneously with the grant of this planning permission, and as agreed in principle before it was issued, an agreement was entered into pursuant to s. 106 of the Town and Country Planning Act 1990. The parties to this agreement were the claimant (as the local planning authority), the freehold owners, and developers of the property, Paddington Street GP Ltd and Paddington Street Nominee Ltd (both Jersey registered companies), and their mortgagee, Barclays Bank plc. The terms of the s.106 agreement had been negotiated between the claimant's legal department and Howard Kennedy LLP on behalf of the developer. The s. 106 agreement was duly registered as a local land charge. I will return to the material terms of the s. 106 agreement later in this judgment.

6. The claimant's original particulars of claim raised many allegations of fact concerning the conduct of the defendants' predecessors in title and various (allegedly) connected companies to which the defendants object that they are in no position to respond. Faced (as the defendants say) with the threat of striking out, the claimant deleted substantial parts of its original particulars of claim and served a notice of partial discontinuance. Since the claimant no longer relies upon such allegations (which included a case of illegality), I can take subsequent events fairly shortly.

7. By a loan agreement made on 22 October 2014 between two (allegedly) connected entities, PGP Securities No. 17 Ltd (**Securities**), as lender, and PGP Finance No. 17 LP (**Finance**), as borrower, Securities agreed to advance to Finance the total sum of £3m to enable London District Housing Association Ltd (**London District**) to purchase the 16 affordable housing units within the development. On the same day, London District and Finance entered into a property management agreement and a separate declaration of trust. On 19 August 2015, the developer granted 16 separate 125 year leases of the affordable housing units to London District. At that time, London District was a registered provider of social housing. The leases all contained a tenant's covenant to use the demised premises as an affordable housing unit in accordance with the s. 106 agreement. Also on 19 August 2015, London District granted a third party legal charge over all the leases in favour of Securities.

8. On 27 July 2016, London District transferred the legal title to all 16 leases to Kinsman Housing Ltd (**Kinsman**). At that time, Kinsman was a registered provider of social housing. By a deed of novation, also made on 27 July 2016, between Securities, Finance (the beneficial owner of the affordable housing units), London District, and Kinsman, all of London District's rights, obligations and liabilities under the legal charge were novated to Kinsman. On the same day, Kinsman and Finance entered into a corresponding property management agreement and separate declaration of trust.

9. On 9 August 2017, the developer granted a 999 year intermediate lease of the affordable housing units to Chiltern 999 Ltd (another company allegedly connected with the ultimate owner and controller of Securities and Finance) for a premium of £80,000.

10. Following earlier regulatory notices published by the Regulator of Social Housing (the **regulator**) on 28 November 2018, 13 March 2019, and 15 February 2023, on 30 June 2023 the regulator published a further regulatory notice stating that it was proposing to exercise its power de-register Kinsman from the register of social housing providers. On 16 August 2023, the regulator published a further regulatory notice stating that it had made the decision to de-register Kinsman on the basis that it remained in breach of the Governance & Financial Viability Standard 2015. The regulator had assessed that Kinsman had failed to demonstrate that it could sustain its viability on an ongoing basis and, as a result, that it no longer continued to meet the eligibility criteria for continuing registration as a social housing provider. This decision had apparently been communicated by the regulator by way of a letter dated 8 August 2023, confirming the compulsory deregistration of Kinsman. Kinsman brought no appeal against the decision to de-register it; and it was de-registered on 7 September 2023. Kinsman thereupon became an unregistered provider of social housing.

11. The notice of the regulator's intention to de-register Kinsman qualified as an event of default under clause 7.1 (i) of the loan agreement and, consequently, an event of default under the third party legal charge. Securities gave notice of this default to Finance (with a copy to Kinsman) by letter dated 23 August 2023. The claimant emphasises that there is no evidence that Securities at any time gave notice to the regulator that it intended to enforce its legal charge over the affordable housing units (as it was required to do by statute). The defendants point out that there is no evidence of this either way.

12. By a transfer dated 16 February 2024, made in the purported exercise of its power of sale under the legal charge, Securities assigned the 16 leases of the affordable housing units to the first defendant, subject to the occupational assured shorthold tenancies, for the sum of £12.6m. On the same day, Chiltern 999 Ltd assigned the head lease to the second defendant for £1.4m. Both transfers were registered at HM Land Registry with effect from 14 March 2024.

III: *The s. 106 Agreement*

13. The s. 106 agreement was entered into pursuant to s. 106 of the Town and Country Planning Act 1990. This provides for planning obligations to be enforceable to the extent mentioned in s. 106 (3). By s. 106 (1) (a), such obligations may include obligations *"restricting the development or the use of the land in any specified way"*. S. 106 (3) – (5) provide as follows:

> *(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. The third recital to the s. 106 agreement records that:

The Council considers it expedient in the interests of the proper planning of its area and having regard to the provisions of its local plan policies that provision should be made in this Agreement for regulating or facilitating the Development and/or use of the Property in the manner set out in this Agreement

15. Clause 1 (headed *'Interpretation'*) includes 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)*

16. Clause 2.2 of the s. 106 agreement provides as follows:

Subject to Clause 9 below the obligations in this Agreement shall be binding on the Developer together with the agents and the successors in title and assigns of each and those deriving title under them Provided That no person shall be liable for any breach of any covenant or obligation contained in this Agreement after it has parted with all of its

> *interest in the Property save in relation to any antecedent breach prior to parting with such interest.*

By clause 5.2, the developer covenants with the claimant

> *To observe and perform and cause there to be observed and performed the undertakings covenants and restrictions contained in Schedule One of this Agreement.*

17. For present purposes, the relevant undertakings, covenants, and restrictions are those contained in paragraph 11 of Schedule One (headed '*Affordable Housing*'). Nothing turns on their precise terms. Their broad effect is to ensure that the *'Affordable Housing Units'* will be used and occupied only for the purposes of *'Affordable Housing'*. This accords with the requirements of the development plan in force at the time of the planning permission, which identifies the provision of affordable housing as a key strategic and local planning objective. It is, however, necessary for me to set out the terms of paragraph 11.1 because of the light they throw upon the earlier definition of '*Registered Social Provider*'. This reads:

> *11.1 Not to occupy any of the Market Housing Units until the Affordable Housing Units have been completed and made ready for occupation and for transfer on a long lease of at least ninety nine years to a Registered Social Provider or other Social Provider as the Director of Housing shall have approved in writing beforehand for this transaction*

The concluding part of this sub-paragraph clearly contemplates that the claimant's director of housing might give a prior, bespoke approval to an unregistered social provider for the purposes of this specific development. In the event, this was not done in the present case. Relying on Mr McDermott's unchallenged evidence that, from the claimant's perspective, it is of vital importance for affordable housing to be managed by a registered provider, in the course of his oral submissions, Mr Hutchings emphasised that the bespoke approval of an unregistered social housing provider would be very much the exception to the norm of using a registered provider to provide the affordable housing units; and he submitted that *'the tail should not be allowed to wag the dog'* when approaching issues of interpretation. Nevertheless, it is noteworthy that the claimant clearly contemplated the giving of such bespoke approval. I consider that any interpretation of the s. 106 agreement must be able to accommodate this exception from the norm; and that the implications of any proposed competing constructions must be tested against this alternative, albeit exceptional, scenario.

18. It is, I think, common ground – and if it is not, I so hold – that the reference in clause 2.2 of the s. 106 agreement to clause 9 was obviously intended to refer to clause 10 (headed *'Enforceability of Obligations'*). So far as material, clause 10 provides as follows:

> *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 …

19. Mr Hutchings points out that mortgagee exclusion clauses are a well-established feature of s.106 agreements which include affordable housing obligations. Their primary purpose is to encourage sufficient commercial lending for a registered provider to acquire the long leases of the affordable housing units. Mr Hutchings referred me to an *Inside Housing* article, dated 15 August 2008, and entitled *Security Blanket*, by Patricia Umunna and Shelley Chadda, who were solicitors at Winckworth Sherwood LLP. He said that this article provides an objective insight into how the market viewed mortgage exclusion clauses in 2008, during the global financial crisis. Mr Hutchings accepts that this was all a matter for negotiation between the parties. The article describes the opposing interests of the developer's lending bank and the local planning authority when negotiating mortgagee exclusion clauses, as follows:

The preference of any lending bank would be for an agreement to contain an unqualified exclusion clause, so that the bank can be certain that if the social landlord defaults, it can recover the money it has lent by realising its security for the best possible value without delay … The preference of any local authority would be for an agreement not to have any exclusion clause at all. Local authorities are concerned to ensure that affordable housing stock, partly funded by public money, is preserved by imposing restrictions in an agreement on the mortgagee's power to dispose of the property on default.

Mr Elvin notes that if one takes anything from this article, it is the recognised tension between the secured lender, which wants to be as free as possible to enforce its security, and the local planning authority, which wishes to restrict the mortgagee's ability to sell free from all affordable housing restrictions.

20. The article notes that it was becoming common for exclusion clauses to impose a contractual moratorium of between three months and two years on the lender's ability to sell affordable housing units on the open market. The authors go on to address the question whether the local authority can rely on any other protection for the preservation of social housing stock. They observe that:

> *Before the mortgagee of a social landlord can enforce its security, there is a 28-day moratorium while the Housing Corporation* [now the regulator] *decides what to do with the distressed landlord, including considering the possibility of a transfer of engagements to an alternative social landlord.*
>
> *The moratorium can, and is likely to be, extended and does provide protection for the public purse and social housing stock, as has been shown in the case of Ujima Housing Association.*
>
> *One could argue that a further delay imposed by an agreement is unnecessary.*
>
> *The Law Society has drawn up a model section 106 agreement that provides a delay of three months in the exclusion clause before a lender can enforce a sale of the mortgaged property without any restriction on the open market.*
>
> *This has been supported by the Council of Mortgage Lenders and has generally been accepted by lending banks.*
>
> *But the debate is certain to continue, given the current economic climate.*

21. It is common ground that the statutory regulation of social housing providers forms part of the admissible background against which the subject s. 106 agreement falls to be construed. This system of regulation is contained within Part 2 of the Housing and Regeneration Act 2008 (the **HRA**). It includes provision for a publicly accessible register of providers of social housing. The regulator's powers include the compulsory deregistration of a private registered provider if it has failed to meet prescribed regulatory standards. As I have already explained, this was Kinsman's eventual fate.

22. S. 108 (2) of the Housing and Planning Act 2016 (the **HPA**) provides that a person may not take any steps to enforce a security over the property of a private registered provider unless written notice of its intention to do so has been given to the regulator by or on behalf of the person intending to enforce the security, and either a period of 28 days has elapsed since the notice was given, or the regulator has waived this notice requirement (which requires the consent of the Secretary of State). The giving of such a notice (or waiver of the notice requirement) triggers a moratorium under s. 145 of the HRA. This lasts for 28 days, subject to any extension (which requires the consent of the secured creditor). During the moratorium, any disposal of the registered provider's land requires the regulator's consent, subject to certain specified exceptions. The purpose of the moratorium is to create a period of time for the regulator to seek to find a solution to a provider's viability problems, in order to protect the social housing assets and the interests of the provider's tenants. This may

involve the regulator appointing an interim manager, making proposals, appointing a manager to implement proposals agreed with creditors, or applying for a housing administration order. In April 2013, when the s. 106 agreement was entered into, the legislative scheme governing moratoriums was materially similar (by virtue of the Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010), save that the bespoke legislative scheme for housing administration orders under the 2016 Act was only brought into force on 5 July 2018.

23. Mr Hutchings emphasises that, in the absence of any contractual moratorium, reliance on the statutory moratorium to protect social housing assets will only work if the housing provider is a registered provider at the time when the lender comes to enforce its security.

24. Mr Hutchings referred me to an article entitled *Safe as Houses? Insolvency in the social housing sector*, dated 1 October 2024, by Nicholas Levy, a partner and co-head of dispute resolution at Trowers & Hamlins LLP. This explains the background and operation to the special administration regime that relates to registered providers of social housing as follows:

> *These bodies are crucially important to the provision of affordable housing in the UK. They are subject to oversight by the Regulator of Social Housing. The sector has historically been very stable, with only a few incidences of registered providers suffering financial adversity. However, no sector is immune from the vagaries of the economy or poor strategic or operational judgments.*
>
> *Part of this risk is mitigated by the variety of tools that the Regulator has long had to oversee and intervene in operations that do not meet its standards. There has also long been a tool that gives the Regulator a chance to find a solution if a registered provider or one of its creditors takes a step towards a formal insolvency process. This is currently found in section 143 onwards in the Housing and Regeneration Act 2008 …*
>
> *… it is nonetheless notable that there has not been a single housing administration, despite the fact that the legislation has now been in place for some 8 years. This fact takes us back to the premise at the outset of this article, namely that the sector has been a stable one. All key stakeholders are keen to see this continue.*

25. Mr Hutchings draws two conclusions from what he describes as this *'helpful overview'*. First, that the provision of affordable housing is a highly regulated sector. Second, that the moratorium usually *"does its job"*.

26. During the course of oral submissions, Mr Morris took me to alternative forms of s. 106 agreement that the claimant had entered into, both shortly before, and shortly after, it entered into the subject s. 106 agreement. He did so, not as an aid to the true construction of the subject s. 106 agreement (since he accepts that these other agreements form no part of the admissible background), but simply to illustrate how the claimant might have chosen to regulate the continuing availability of affordable housing units at the Chiltern Street development in an alternative way. For his part,

Mr Hutchings accepts that the subject s. 106 agreement could have been drafted differently.

27. One such agreement (from May 2011) provides that the affordable housing restrictions

> *... shall not be binding on any mortgagee of any Registered Provider who seeks to dispose of the Affordable Housing Units or any part thereof (as to such part) pursuant to its power of sale exercised pursuant to default of the terms of the mortgage or any receiver appointed by such mortgagee of any Registered Provider or any receiver so appointed or any person deriving title from them shall first for a period of three (3) months from the date of default use its reasonable endeavours to dispose of the Affordable Housing Units (or part thereof) to another Registered Provider to be used for Affordable Housing and only at the end of the said period can the Affordable Housing Units (or part thereof) be disposed of on the open market and the restriction in this Agreement on use only as Affordable Housing will not then be binding in relation to the Affordable Housing Units (or the part thereof) provided further that the Council shall be notified of the said default within five Working Days and shall be notified at the end of the said three month period of marketing*

Whilst this provision is clearly not happily drafted, omitting certain crucial wording, it demonstrates that it was possible for the claimant to negotiate the terms of a contractual moratorium which might (a) last longer than 28 days, and (b) impose additional restrictions on any mortgagee seeking to enforce its security. Indeed, it would have been possible to extend such a moratorium to any nominated, but unregistered, social housing provider.

28. A similar, but better drafted, provision can be found in a s. 106 agreement entered into by the claimant in February 2014. This stipulates that the affordable housing restrictions shall not be binding:

> *... on any mortgagee of any Registered Provider who seeks to dispose of the Affordable Rented Housing Units or any part thereof (as to such part) pursuant to its power of sale exercised pursuant to default of the terms of the mortgage or any receiver appointed by such mortgagee of any Registered Provider PROVIDED THAT the mortgagee or any receiver so appointed or any person deriving title from them shall first for a period of three months from the date of default use its reasonable endeavours to dispose of the Affordable Rented Housing Units (or part thereof) to another Registered Provider to be used for Affordable Rented Housing and only at the end of the said period can the Affordable Rented Housing Units (or part thereof) be disposed of on the open market and the restriction in this Agreement on use only as Affordable Rented Housing will not then be binding in relation to such Affordable Housing Units (or the part thereof) PROVIDED FURTHER THAT the Council shall be notified of the said default within five Working Days and shall be notified at the end of the said three month period of marketing*

29. The defendants submit that it is noteworthy that in alternative s. 106 agreements which were concluded at around the same time as the subject s. 106 agreement, the claimant negotiated wording which gave express contractual effect to a moratorium. Mr Morris refers to these provisions as operating as a form of *'cascade'*, giving a mortgagee three months to use its reasonable endeavours to dispose of the affordable housing units to another registered provider so that they might continue to be used as affordable housing. Only at the end of this period might the mortgagee dispose of the affordable housing units on the open market free from the restrictions in the s. 106 agreement on use only as affordable housing. The defendants point out that if that had been the intention of the parties, it would have been open to the claimant to have required the inclusion of similar wording in the subject s. 106 agreement, thereby ensuring that the 16 leases of affordable housing units could not be sold by any mortgagee on the open market free from the affordable housing restrictions until any moratorium had run its course. However, the defendants say that it would have made no difference if the claimant had done so. In all of these s. 106 agreements, it is clear that the parties intended that any mortgagee should be free to sell its interest in the affordable housing units *after* the end of the applicable moratorium period free from the affordable housing restrictions. The defendants say that even allowing for the statutory effect of the moratorium in the present case, the parties clearly intended that any mortgagee of a registered social provider should be able to sell its interest free from the relevant restrictions if no satisfactory solution to the provider's difficulties had been found before the end of the moratorium period. The defendants also point out that the fact that an agreement may not have worked out as well as one of the parties had intended is no basis for taking what Mr Morris described as the *'crow-bar of commercial common sense'* to the actual language used in the agreement.

30. The May 2011 s. 106 agreement, and a further s. 106 agreement entered into by the claimant in March 2012, also contain an extended definition of *'Registered Provider'*. This is in similar terms to the definition in the subject s. 106 agreement, but with the addition of the words *"and has not been removed from the register pursuant to"* the applicable statutory provision. Had this form of drafting been adopted in the s. 106 agreement, the parties' legal representatives would have been denied their fees for litigating the issue this court has to decide; and I would not be crafting this reserved judgment.

31. I consider that it is rarely helpful for a court of construction to be referred to different forms of words which, had they been adopted, might have put the true interpretation of an agreement beyond doubt. Whilst weighing the effect of alternative competing constructions, the task of the court is to construe the document which the parties ultimately did agree. If its meaning were clearly expressed, there would be no issue of construction for the court to determine. As will appear, authoritative support for this approach is to be found in the judgment of Lewison LJ in *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984, at paragraph 38.

IV: *The trial*

32. The trial took place on Tuesday 24 and Wednesday 25 June 2025, concluding before the short adjournment. The claimants rely on two witness statements, from:

(1) Mr Jonathan McDermott, dated 8 April 2025. He has been the service manager of the claimant's intermediate housing service since 2012. So far as material to this claim, he gives evidence about the background to the s. 106 agreement; the claimant's planning policies concerning the provision of affordable housing, both at the time when planning permission for this development was granted, and also when this claim was brought; the vital importance, from the claimant's perspective, for affordable housing provided pursuant to s. 106 agreements to be managed by a registered provider so as to ensure that this is managed appropriately and its use is protected in perpetuity; the deregistration of the registered provider; and the current situation concerning the relevant affordable housing units. Mr McDermott concludes thus (at paragraph 26):

> *The claimant therefore brings this claim and seeks a final injunction to protect the vulnerable tenants and their family members residing in Flats 1-8 and 11-16 from eviction and to ensure that the 16 affordable housing units are not lost to the private rental market in one of the most expensive boroughs in the country. It is of the utmost importance to the claimant to protect the affordable housing stock in Westminster in line with relevant legislation and policy.*

(2) Ms Heather Clarke, dated 8 April 2025. She is the claimant's Director of Housing Needs – Allocations; and she gives evidence dealing with the circumstances of the current residents of the affordable housing units.

33. The defendants rely upon a single witness statement, dated 11 April 2025, from Mr Andreas Xenofontos. He is the Group Legal Counsel for Turanco Investment Limited. This is the ultimate holding, and controlling, entity of a group of companies holding assets primarily in the real estate sector in the United Kingdom and Germany, including the defendant entities. He gives brief evidence concerning the defendants' purchase of the development; its very limited knowledge of, and limited prior relationship and dealings with, the sellers, and their controller, Mr McMillan; and the current status of the affordable housing units within the development, and their passing rents.

34. Mr Xenofontos explains that through their management team, and their then solicitors, the defendants were aware, before purchasing the properties, of the terms of the s.106 agreement; but, through due diligence undertaken by its former solicitors, they took all necessary steps to satisfy themselves that the mortgagee exclusion clause in the s.106 agreement was engaged, so that the affordable housing restriction would not be binding upon them. Had anyone been aware that the properties would be subject to the s. 106 agreement, the defendants would not have completed their purchase. They were bought at a full market price so that they could be redeveloped and let on the open market at an appropriate rent. The defendants' holding entity is not a social housing provider, nor does it intend to become one. It proceeded with the purchase of these properties in good faith, relying on legal advice it had received that they were not subject to any restrictions under the s. 106 agreement upon the use of the properties as social housing. The defendants purchased the properties in good faith; and they maintain that they are innocent parties who wish to deal with their property free from the s. 106 obligations. Neither Mr Xenofontos, nor any other agent of the defendants, is able to say anything about the circumstances surrounding the

negotiation and completion of the s. 106 agreement, or the relevant factual matrix against which it falls to be construed.

35. Mr Xenofontos explains that the current passing rent generated from all of the 14 affordable housing units that are currently let out to social housing tenants is £158,592 per annum (excluding service charges). Six of those flats are currently in arrears (of rent and/or heating charges). Mr Xenofontos understands that it is the first defendant's intention (if it is able to recover possession of the 16 flats and let them out on the open market free of the affordable housing units restrictions) to refurbish the flats, at an approximate budgeted cost of about £4 million. It is anticipated that the refurbishment will take around nine months. After that, the first defendant anticipates that the letting of the flats – all at open market rents – will generate a passing rent of approximately £1.5 million per annum.

36. No live evidence was given before me. There was therefore no challenge to any of the written evidence. But the corollary of this is that the only evidence before the court is that contained within the witness statements, and the publicly available, and other, disclosed documents. During the course of his oral submissions, Mr Hutchings asserted that on any disposal of affordable housing units by a mortgagee, the local planning authority would check whether the current mortgagor was then on the official register of social housing providers. That is not something that is mentioned in either of the claimant's witness statements. It may (as Mr Hutchings asserts) be a *'common sense'*, or *'obvious'*, step to take for a local authority housing, or planning, officer to check the register of social housing providers to see whether a person deriving title from a mortgagee is entitled to claim the benefit of the mortgagee exclusion clause after the mortgagee has exercised its power of sale. But there is no evidence before the court that this is what is actually done. In the present case, as Mr Elvin pointed out, it was the social tenants of the affordable housing units who first alerted the claimant to their disposal to the defendants.

V: Principles of contractual interpretation

37. There was no real issue between the parties as to the applicable principles of contractual interpretation. Mr Hutchings began by taking me to the headnote to *Re Sigma Finance Corporation* [2009] UKSC 23, [2010] 1 All ER 571 at page 269 E-H:

> *The resolution of an issue of interpretation in a case such as the instant case was an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences. In the ascertainment of the meaning that the deed would convey to a reasonable person with the relevant background knowledge, an understanding of its overall scheme and a reading of individual sentences and phrases which placed them in the context of that overall scheme was of much greater importance than its infelicities. The conclusion of the Court of Appeal elevated a subsidiary provision for the interim discharge of debts 'so far as possible' to a level of predominance which it had not been designed to have in a context where, if given that predominance, it conflicted with the basic scheme of the deed. The provision by cl 7.6 for discharge of short term liabilities as they fell due appeared in a context where the underlying assumption was that all secured liabilities could be covered and no issue of priority*

> *could arise. To treat it, in the different context of insolvency, as creating effective priority for such short term liabilities as happened to fall due during the realisation period involved the risk of changing fundamentally the apparent financial structure of the relationship. The task of the reasonable person in understanding the meaning and application of the last sentence of cl 7.6 was greatly facilitated by the existence of a clear basic scheme from which it was improbable that the parties would have wished to depart.*

Mr Hutchings emphasises, by reference to the judgment of Lord Mance (at paragraph 12), the need to read the key provisions of any agreement in the context of the overall contractual scheme created by the relevant document.

38. I was taken to the usual passages in the standard authorities on contractual interpretation: *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at paragraphs 15-20 and 35-37 per Lord Neuberger PSC; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 per Lord Hodge JSC at paragraphs 10-13. Of particular resonance are the words of Lord Hodge in *Wood v Capita* at paragraph 28:

> *Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, 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.*

39. Mr Hutchings relies upon the observations of Aikens LJ at paragraph 24 of *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416, which can be distilled down to the following propositions:

(1) The court's task is to discern the intention of the parties, objectively speaking, from the words used in the commercial document, in the relevant context, and against the factual background in which the document was created.

(2) The starting point is the wording of the document itself, and the principle that the commercial parties who agreed the wording intended the words used to mean what they say in setting out the parties' respective rights and obligations.

(3) If there are two possible constructions of the document, a court is entitled to prefer the construction which is more consistent with '*business common sense'*, if this can be ascertained.

(4) However, *'commercial common sense'* is not to be elevated to an overriding criterion of construction; and 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. Still less should the issue of construction be determined by what seems like *'commercial common sense'* from the point of view of only one of the parties to the contract.

At paragraph 33, Aikens LJ concludes that there is no lack of commercial common sense in the parties settling on a compromise position, which he considers to be *"the essence of 'commercial common sense'."*

40. Mr Hutchings stresses the importance of adhering to the natural and ordinary meaning of the words of the relevant document; and warns that the court should be very slow to reject this meaning merely because it may have proved to be an imprudent bargain for one of the parties to have entered into. He submits that the subject s. 106 agreement is a sophisticated and complex document, entered into with the benefit of skilled professional advice on both sides, which should be interpreted according to its terms. He also emphasises that clear words are required to remove, through a subsidiary provision, part of the benefit which it appears was the purpose of the contract to provide. He cites observations of Lord Toulson JSC at paragraph 35 of *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016 UKSC 57, [2017] AC 73 as follows:

> *… Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words …*

41. Mr Elvin points to Popplewell J's synthesis of the principles applicable to the construction of commercial documents at paragraph 8 of his judgment in *Lukoil Asia Pacific PTE Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune')* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654, as follows:

> *The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. 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 the objective meaning of the language used. 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. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*

42. Founding himself upon observations of Lord Neuberger in *Arnold v Britton* at paragraph 20, Mr Elvin also emphasises 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 the wisdom of hindsight. Mr Elvin also points out that it is not necessary for the court to make findings of fact about post-contractual events in order to be able to weigh up competing constructions in the light of commercial common sense. He refers to the following statement of Lewison LJ at paragraph 33 of his judgment in *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata CLO 2 BV* [2014] EWCA Civ 984:

> *... we must seek to discern the commercial intention, and the commercial consequences from the terms of the contract itself; and that feeds in to 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.*

43. It is common ground that the usual principles of contractual interpretation essentially apply to s.106 agreements. Mr Hutchings relies upon observations of Richards LJ, speaking on behalf of the Court of Appeal, at paragraphs 28-29 of his judgment in *R (Robert Hitchins Ltd) v Worcestershire County Council* [2016] JPL 373. Mr Elvin relies upon observations of Holgate J at paragraphs 70 and 75 of his judgment in *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB), [2021] PTSR 863 as authority for the proposition that a s. 106 agreement is a contractual instrument like any other, to which the standard principles of contractual interpretation apply. Mr Elvin draws my attention to paragraphs 41-42 of the judgment, where Holgate J makes it clear that subsequent conduct is irrelevant to the construction of a s.106 agreement; and to the emphasis placed by both parties upon *"the importance of interpreting s. 106 obligations, like planning permissions, as public documents which are comprehensible to the public, landowners and developers alike"*. Mr Elvin also refers me to paragraph 70, where Holgate J makes it clear that *"the suggested distinction between principles of interpretation applied to contractual documents and planning documents is fallacious"*. The Supreme Court (in *Trump International Golf Club Limited v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85) had previously stated that there is no such distinction:

> *Instead, the public nature of planning documents operates so as to <u>restrict</u> the operation of general principles in two respects: (i) the extent to which the court may take into account the factual background as regards 'the shared knowledge' of the contracting parties (or, indeed, the knowledge of the covenantor in relation to a unilateral undertaking), and (ii) the limited scope for the use of extrinsic material, given the constraints on public access to such material. There is nothing in the decision in <u>Trump</u> to indicate that the public nature of planning documents justifies a broader, or more 'liberal', approach to interpretation than is applied generally, or in relation to agreements.*

At paragraph 91 of his judgment, Holgate J also makes the following point:

> *The Supreme Court did not lay down any interpretative principle that planning documents, whether a s.106 agreement or a subsequent s.73 permission, should be read so as to prevent landowners and developers from avoiding or side-stepping obligations which they have previously entered into. Ms Dehon* [for the local planning authority] *did not point to any authority which supports any anti-avoidance principle or presumption in the construction of planning documents.*

44. In his reply, Mr Hutchings emphasises that the *Norfolk Homes* case involved a straightforward (and impermissible) attempt to rely upon subsequent conduct as an aid to the construction of an earlier document.

45. Mr Elvin also refers me to *R (Greenfields (IOW) Limited v Isle of Wight Council* [2025] EWCA 488 as a recent illustration of the importance of compliance with the statutory requirement to place a copy of a proposed, or finalised, s. 106 agreement on the planning register. The Court of Appeal held that the failure by the local planning authority to place a proposed s. 106 agreement on the planning register resulted in the unlawfulness of the authority's later decision to grant planning permission: see paragraph 70. I was taken to paragraphs 56, 58, 60 and 67 in the leading judgment of Lewis LJ. He emphasises that one of the purposes of publishing a s. 106 agreement on the planning register is *"to enable members of the public to know the terms of a proposed or agreed planning obligation"*. Mr Elvin submits that this emphasises the importance of the public-facing nature of the planning register.

VI: <u>*The competing constructions*</u>

(a) The claimant

46. The claimant's case on construction is helpfully summarised in its re-amended statement of case. At paragraph 2 of the re-amended particulars of claim, the claimant notes that:

> *The defendants allege that they are not bound by the planning obligations requiring the affordable housing units not to be occupied otherwise than as affordable housing, because the first defendant is a person deriving title through a mortgagee of a registered social provider entitled to the benefit of the mortgagee exclusion clause in the s. 106 agreement. This is disputed by the claimant, for the reasons stated below.*

47. The claimant's submissions on interpretation are set out at paragraphs 111-120, as follows:

> *111. On the proper interpretation of the s. 106 agreement in context, in order to come within exclusion clause 10.1.1, a person (**Person A**) must derive title through another person (**Person B**) who is a mortgagee of a registered social provider <u>at the time of the disposal</u> from Person B to Person A.*
>
> *112. The phrase 'any mortgagee of a Registered Social Provider' must be given a temporal meaning, in that when seeking to apply the exclusion*

clause, one has to ask 'when?' in relation to the requirement or test that the predecessor in title was a mortgagee of a registered provider. It would be nonsense to apply the exclusion to a person who had been, but long ago ceased to be, a mortgagee of a registered provider. The defendants appear to accept this point in principle, by submitting that the crucial point in time is the date of default under the loan agreement and legal charge.

113. However, the natural meaning of the wording is to apply the test at the time of the disposal under which the first defendant derived title. It is natural to say that the first defendant derived title through a mortgagee of an unregistered provider.

114. The requirement in the s. 106 agreement that the provider of the affordable housing be a registered provider is an important provision contributing towards the overall aim of securing the provision of affordable housing at the affordable housing units for successive occupants in perpetuity in accordance with the planning policies. The registration requirement ensures that the provider of the affordable housing is subject to the standards issued by the regulator and subject to regulation by the regulator, thus minimising the risk of loss of the social housing assets due to incompetence or dishonest or abusive practices.

115. Another aspect of the registration requirement is that, if Securities had sought to enforce its security by selling the affordable housing units while Kinsman was still a registered provider, this would have required notice to be given to the regulator under s. 108 of the HPA (ex. s. 144 of the HRA), triggering the statutory moratorium under s. 145 of the HRA. The purpose of the statutory moratorium is to create a period of time for the regulator to seek a solution to a provider's viability problem, in order to protect the social housing assets and the interests of the provider's tenants.

116. Mortgagees can protect themselves against the risk of deregistration, by including within their finance documentation provision for the power of sale to be triggered by adverse regulatory notices. The loan agreement included such a provision at clause 7.1(i).

117. On the facts of the present case (which are typical), over two months elapsed between the regulator's proposal to deregister Kinsman dated 30 June 2023 and its deregistration on 7 September 2023, which was on the cards over six months earlier, when the enforcement notice dated 15 February 2023 was given. Securities had ample warning to prepare for and exercise its power of sale before 7 September 2023, had it wished to. By waiting until after Kinsman had been deregistered before seeking to exercise its power of sale, Securities evaded the statutory moratorium.

118. As illustrated by the facts of this case, the defendant's interpretation of the s. 106 agreement creates a lacuna in the protection

> *of the social housing assets which is contrary to the aims of the s. 106 agreement (see para 37 above).*
>
> *119. Furthermore, clear words are required to remove, through a subsidiary provision, part of the benefit which it was the purpose of the s. 106 agreement to provide. The words of clause 10.1.1 do not clearly provide for a mortgagee of a deregistered provider or persons deriving title through a mortgagee of a deregistered provider to be excluded.*
>
> *120. For the reasons stated above, the first defendant does not come within the terms of exclusion clause 10.1.1.*

48. In the course of his oral submissions, Mr Hutchings emphasises two points:

(1) Whilst the court goes through an iterative process of interpretation, this does not mean that it should discount the natural meaning of the words actually used in the document. Not all possible interpretations should be treated as equal.

(2) The court should exercise considerable caution before departing from the natural meaning of the words of a contract of the nature of the subject s. 106 agreement on account of its commercial consequences. One reason for this is the subjectivity, and therefore the unpredictability, of the interpretations to which commercial considerations may give rise. Echoing observations of Aikens LJ in the *BMA* case, Mr Hutchings cautions the court against both elevating commercial common sense to an overriding criterion of construction, and subjecting the parties to the individual judge's own notions of what might prove to be the sensible solution to any conundrum. He also urges the court not to determine the issue of construction by applying what might seems like *'commercial common sense'* from the point of view of only one of the parties to the contract. Mr Hutchings points to the need for caution, emphasising that the competing interests of the parties are no clear guide to the point where, at the end of their negotiation, they might ultimately choose to draw the line. *'Commercial common sense'* my often reflect nothing more than a better commercial outcome for one of the parties to the contract. The court should be particularly sceptical about accepting arguments founded upon *'commercial common sense'* in the case of a complicated contract, such as this s. 106 agreement, which has been drawn up by skilled professionals on both sides.

49. The claimant develops its submissions in its skeleton argument. It begins by analysing the text of clause 10.1.1. Its case is that:

(1) In its ordinary and natural meaning, the term *'mortgagee of a Registered Social Provider'* simply means a mortgagee whose mortgagor is a registered social provider.

(2) The words *'such mortgagee'* within the phrase *'any person deriving title through any such mortgagee'* naturally refer to the circumstances of the mortgagee at the time of the disposition of title to the person claiming the exemption.

(3) It is common ground that, as at the date of the Transfer, Kinsman was not a *'Registered Social Provider'* as defined. It had been deregistered some five months earlier.

(4) It follows from the above that, as at the date of the transfer, Securities was not a *'mortgagee of a Registered Social Provider'*.

(5) It is therefore natural to say that the first defendant derived title through a mortgagee of an **unregistered** provider of social housing.

50. The claimant says that the defendants' central submission - that *'any mortgagee of a Registered Social Provider'* is synonymous with *'any mortgagee of a person which was a Registered Social Provider when it granted the mortgage'* - is simply wrong as a matter of the ordinary and natural meaning of the words used in the s. 106 agreement. It amounts to an attempt to re-write the s. 106 agreement. The claimant says that this submission should be rejected for the following textual reasons:

(1) The natural meaning of the phrase *'any mortgagee of a Registered Social Provider'* does not refer specifically to the time the mortgage is granted but, rather, like the status of a registered provider of social housing, on which it is primarily dependent, it is ambulatory.

(2) If a mortgage is granted by a registered social provider but the next day the properties are transferred to a private owner subject to the mortgage, and the private owner holds the properties for a period of a year, at the end of that year it would not be a natural use of language to describe the mortgagee as a *'mortgagee of a Registered Social Provider'*.

(3) The defendants' interpretation appears to have the surprising consequence that, even if Kinsman had never been a registered provider of social housing, nevertheless Securities was, and remained, potentially for the term of the affordable housing leases, a *'mortgagee of a Registered Social Provider'*. This is because, on the defendants' case, its qualification as an excluded person was fixed upon the grant of its legal charge on 19 August 2015.

(4) When the parties intended the qualification of a person as an excluded person to be fixed by reference to historical circumstances as at the date of a transaction, they knew how to express this concept. The very next subclause (10.1.2) uses the phrase *'any ... person to whom a Registered Social Provider grants a lease'*. This focuses the reasonable reader's attention upon the status of the landlord at the date the lease was granted. The status of the landlord at the date the mortgage was created is not a relevant consideration. The difference in language is telling.

(5) The remaining wording of subclause 10.1.1 provides the immediate context. The phrase *'any person deriving title through any such mortgagee'*, in particular the use of the present participle (*'deriving'*), indicates that the relevant time at which to inquire whether the contractual criteria are met is when the first defendant derives title from Securities.

51. In the course of his oral submissions, Mr Hutchings points out that, with the benefit of hindsight, it is usually possible to say that the use of different words would have put a disputed issue of construction beyond doubt. Such an approach is rarely helpful. He points to paragraph 38 of Lewison LJ's judgment in *Napier Park*. Noting that both sides, whilst disavowing the argument *"if that is what the phrase means, why did the draftsman not say it?"*, have pointed to different forms of words which would have

put the other side's interpretation beyond doubt, Lewison LJ makes it clear that he does not find that exercise helpful. The court has to construe the words the parties have actually used in their agreement, not other words that they might have used. The claimant says that the wording actually used in clause 10.1.1 favours its construction, whilst the defendants' interpretation involves reading in words that are not actually there. Mr Hutchings also says that the defendants' reliance upon the terms of clause 10.1.2 is misplaced because it is founded on the premise that both this subclause and clause 10.1.1 are intended to work in the same way. However, this inference cannot be discerned from the language of the two sub-clauses, which are expressed in different ways.

52. The claimant submits that its case is supported by considerations of commercial common sense. There is no dispute that the class of those entitled to the benefit of the mortgagee exception clause is not limitless; nor is there any dispute about the substantive criteria that limit it. The question is: what is the relevant time at which to inquire whether those criteria are met? Mr Hutchings's oral submissions focus upon two points: First, how the scheme created by the s. 106 agreement is administered by local authority housing, or planning, officers. This is a matter upon which I have already touched when reviewing the witness evidence. The second is the purpose of the requirement that the mortgagor should (in most cases) be a registered provider of social housing.

53. The claimant says that one of the applicable criteria is that the excluded person derives title from the mortgagee, which can only be ascertained (at the earliest) at the point in time when title is disposed of. This is a strong pointer that the relevant time at which to inquire whether all the criteria are met is the date of the disposition of title. There is no textual indication to the contrary. This results in a simple test, which is straightforward for officers of the local planning authority to administer. The registrar publishes a list of registered providers (pursuant to s. 111 (2) of the HRA 2008), which is updated monthly. Although he has to recognise that there is no evidence to this effect, Mr Hutchings asserts that the local authority's planning officers simply check that list following any exercise by a mortgagee of its power of sale.

54. Mr Hutchings submits that the question whether a person is the mortgagee of a registered social provider naturally falls to be applied at the time when the exception falls to be applied. He says that it would be nonsense to apply the exception to a person which was once a mortgagee of a registered social provider, but which has now ceased to be such. There is no indication in the text of the exception that any different time-frame applies to the two applicable criteria: whether a person derives title through a mortgagee, and whether, at that point in time, the mortgagor is then listed in the register of social housing providers. One should not be inquiring whether the mortgagor was a registered social provider at some date earlier than the disposal that triggers the inquiry. The status of registration is ambulatory; and the obvious time to pose the question whether the mortgagor is registered is at the time when the exception falls to be applied, and thus at the time of the relevant disposal by the mortgagee.

55. Mr Hutchings relies, by way of analogy, upon two authorities which, he says, illustrate how the courts have dealt with similar issues in other cases in the past. The first is *Commissioners of Customs and Excise v Gallaher Ltd* [1971] AC 43, a decision of the House of Lords. This concerned the application of import duties on

tobacco imported from Southern Rhodesia following that country's unilateral declaration of independence in November 1965. The UK responded by making Orders in Council, excluding Southern Rhodesia from the Commonwealth preference area. In order to qualify for Commonwealth preference, goods had to be grown, produced or manufactured in that area, and consigned to the United Kingdom from a place in that area. The majority of the House of Lords held that the relevant date for determining whether the goods continued to qualify for Commonwealth preference was once their transit was over, and they had arrived in the United Kingdom and become chargeable to import duty. At page 62B-D, Lord Hodson (one of the majority) said:

> *… 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.'*
>
> *On this footing the customs officials have only to ascertain the place of growth and whether that place is on the list of Commonwealth preference areas when the liability to pay the duty attaches and likewise with regard to consignment. They do not have to inquire in addition whether at the time of growth and at the time of consignment that place was on the current list.*

Lord Diplock (with whom Lord Donovan agreed) reasoned (within a passage at pages 69B-70F) that:

> *The words 'grown,' 'produced,' 'manufactured' and 'consigned' are participles describing the characteristics possessed by goods at the moment at which duty becomes chargeable or payable … 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.*

56. Mr Hutchings notes that the defendants' argument is that the mortgagee's qualification as an excluded person is *'franked'* at the date of the mortgage and thereafter fixed, potentially for the term of the long lease of each affordable housing unit. However, given that a provider of social housing is able to move on and off the register maintained by the regulator, he submits that it would be artificial to *'stop the clock'* at the point of the grant of the mortgage. Mr Hutchings also relies, again by way of analogy, upon the reasoning of Adam Johnson J in *Lowe v The Governors of Sutton's Hospital in Charterhouse* [2024] EWHC 646 (Ch), [2024] L&TR 17 (at paragraphs 53 – 59), holding that the wording of the threshold test in s. 215B (1) of the Housing Act 2004 that *'a tenancy deposit has been received by a landlord in connection with a shorthold tenancy'* is sufficiently pliable to cover the situation of a deposit paid in respect of a tenancy which was not originally a shorthold tenancy, but has later become one. Since the prescribed information requirements had been complied with in connection with the original tenancy, the landlord fell to be treated as having also complied with them in connection with any later shorthold tenancies in the same chain. At paragraph 59, the judge said this:

> *The gist of Mr Lowe's argument as I understand it is that one must stop the clock at the point of receipt – here, January 2010 – and nothing that occurs thereafter is relevant to determining what the receipt was in connection with. But that is quite artificial, as the judge pointed out, given what he described as the 'ambulatory' nature of the regime of assured tenancies under the Housing Act 1988, which means that tenancies can move in and out of assured status and into shorthold status ... In such an environment, it makes no sense to take such a restrictive approach, and as the judge put it, to 'ossify the treatment of the statutory scheme in its application to a particular tenancy'. I respectfully agree, and therefore also agree with the judge's conclusion that Mr Lowe's deposit, although originally paid in connection with his January 2010 contractual tenancy, can properly be regarded as having been received in connection with either the shorthold tenancy which arose by operation of law in October 2010, or that which arose in January 2011 when the period of the new statutory periodic tenancy commenced. In either case, the prescribed information was provided within the relevant time limit, because it was provided in September 2010, before either of the tenancies commenced and thus before the deposit was received in connection with either of them.*

57. Leaving aside the atypical case of the bespoke approval of an unregistered provider, Mr Hutchings submits that the mortgagee exclusion clause affords an incentive for a lender to provide finance which enables the delivery of affordable housing at the development by a registered provider over a period of time. In that context, he says it makes little sense to ossify the treatment of the contractual scheme by reference to an historical date. This would not give proper effect to the purpose of the requirement that the mortgagor is a registered provider. Clause 10.1.1 might have exempted *'any mortgagee of the Affordable Housing Units'*. That would have given the secured lender the '*free pass'* which the defendants say it was the purpose of the mortgagee exclusion clause to provide. But that is not what clause 10.1.1 says. Mr Hutchings also points out that the defendants' *'ossified'* interpretation would not always operate to the benefit of a mortgage lender. He invites the court to consider the case of a new registered provider being set up as a subsidiary of a larger registered provider to manage the affordable housing at a particular development. He further invites the court to assume that, in error, the leases of the affordable housing units, and the charge over them, were granted before the subsidiary was listed on the register of social housing providers, with the registration being completed shortly afterwards. In such circumstances, Mr Hutchings suggest that there is no commercial reason why the lender should not thereafter qualify as *'any mortgagee of a Registered Social Provider'*.

58. Mr Hutchings further submits that the claimant's proposed interpretation is also supported by the wider planning and regulatory context which underpins the s. 106 agreement. The relevant provisions pursue a number of aims:

(1) The overall aim of the affordable housing obligations in the s. 106 agreement is to secure the provision of affordable housing on-site as part of the development, and its maintenance as affordable housing for successive occupants in perpetuity, in

accordance with the claimant's planning policies. This will have been well-known to the developer; and it was, and is, well-known in the development sector generally.

(2) The requirement that (absent bespoke approval from the claimant), the affordable housing is to be delivered by a registered provider is an important requirement contributing towards this overall aim. The one-off obligation, under paragraph 11.2 of Schedule One, was to grant the long leases of the affordable housing units to a registered provider. The continuing obligation under paragraph 11.3 is not to occupy the units other than for affordable housing available through a registered provider. Registered providers of social housing are highly regulated. This ensures that the provider of the affordable housing is subject to the standards issued, and subject to regulation, by the regulator, minimising the risk of loss of the social housing assets due to mismanagement or dishonest or abusive practices.

(3) This requirement also means that any step taken by the provider's mortgagee to enforce its security over the affordable housing units will trigger the 28 day statutory moratorium under s.145 of the HRA. This moratorium will provide an opportunity for the regulator to seek to find a solution to the provider's viability problems, in order to protect the social housing assets and the interests of the provider's tenants. It thus represents a safety net in the event of any threat to the social housing assets.

(4) 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. It achieves this by permitting the lender, upon an event of default, to realise its security by selling the social housing assets at open market value.

59. Mr Hutchings submits that subclause 10.1.1 should be interpreted having regard to all of these aims, as part of a *'whole contract reading'*. He says that the claimant's interpretation gives effect to the purposes of subclause 10.1.1 and the other relevant provisions of the s. 106 agreement, read as a whole, and produces a coherent scheme: the affordable housing is to be provided by a registered provider of social housing, and, if and so long as this is done, the lender is entitled, upon any default, to realise its security by selling the social housing assets at open market value.

60. Mr Hutchings also relies upon this further point: The regulation of the provider, and the safety net of the statutory moratorium, are all part of the benefit which it is the purpose of the s. 106 agreement to provide. It cannot be said that subclause 10.1.1 contains clear words removing this benefit in the event of the mortgagee's enforcement of its security.

61. Mr Hutchings points out that, on his interpretation of clause 10.1.1 of the s. 106 agreement, in an ordinary case of mortgage default, the application of the statutory moratorium, in combination with that subclause, is straightforward. The lender has a right to sell the affordable housing units at open market value; but it must first notify the regulator of its intention to enforce its security, thereby triggering the statutory moratorium, and providing an opportunity for the regulator to seek a solution to the provider's viability problem, or secure the disposal of the units to another registered provider.

62. Mr Hutchings seeks to anticipate, and address, the supposed difficulties which, on the claimant's interpretation, arise in the special case where the regulator notifies the

registered provider of its intention to deregister, and this constitutes the event of default which triggers the exercise of the mortgagee's right to sell. At the hearing of the claimant's interim injunction application, on 30 October 2024, the defendants contended that in the case of such a deregistration default, on the claimants' interpretation, the mortgagee would be exposed to the risk of only recovering existing use value because, after deregistration, the affordable housing units would have to be sold to another registered provider. The defendants argued that this risk would incentivise a mortgagee to sell early, rather than waiting to see if the registered provider could come to an arrangement with the regulator that would leave the social housing provision in place; and that this would undercut the agreement's broad purpose of securing affordable housing provision.

63. The short answer to this objection, says Mr Hutchings, is that, in the light of the statutory moratorium, the early initiation of enforcement by the mortgagee promotes, and does not undercut, the broad purpose of the s.106 agreement. The defendants' submissions on this point are said to fail to take account of how the system of regulation, and the moratorium, operate. The first formal step towards the sale of the affordable housing units (or the appointment of a receiver) lies in the mortgagee notifying the regulator of its intention to enforce its security. This alerts the regulator to the threat of the loss of the social housing assets, and triggers the statutory moratorium, and the regulator's powers to intervene to seek a solution. Indeed, any responsible lender will engage with the regulator before this point, so as to bring the threat of the loss of the social housing assets to the regulator's attention at as early a time as possible. The idea that, in such circumstances, the regulator would bring its powers of intervention to an end, and punish the lender, by proceeding to deregister the provider, regardless of the financial position of the lender, and, specifically, leaving the lender unable to recover the full amount secured by the mortgage, is characterised as *'fanciful'*.

64. Even if, despite this, there is a real risk of the lender being limited to recovering existing use value in the special case of a deregistration default, the claimant's interpretation of subclause 10.1.1 represents a negotiated compromise between the public policy aims of the local planning authority, and the developer's competing desire to ensure adequate funding for the affordable housing units. This is *'the essence of commercial common sense'*; and there is no reason to think that the parties did not intend it. To inject some realism into this debate, Mr Hutchings points to the absence of any evidence that any prospective lender has ever raised any issue with the wording of clause 10.1.1, although it was clearly apparent to the defendants' former conveyancing solicitors that it was a potential problem for the first defendant.

65. On the other hand, the defendants' interpretation is said to create a lacuna in a deregistration default scenario because the lender is able to avoid the statutory moratorium by failing to engage with the regulator, and simply waiting until after the registered provider has been deregistered before selling the affordable housing units. That is what happened in the present case. Once Kinsman was deregistered, the regulator's powers to intervene fell away.

66. Mr Hutchings emphasises that this lacuna is not limited to the circumstances of a deregistration default. Since, on the defendants' interpretation, the mortgagee's qualification as an excluded person for the purposes of enforcement is fixed at the date of the mortgage, there are multiple scenarios under which the mortgagee would

retain the benefit of the mortgagee exclusion clause, even though its mortgagor had long since ceased to be a registered provider of social housing. In all such cases, upon any default by the provider, the secured lender would be entitled to sell the affordable housing units at full market value; and the local planning authority would lose the safety net of the statutory moratorium. Mr Hutchings says that on the defendants' construction, any mortgage lender is incentivised to encourage or facilitate the housing provider's deregistration. This would run counter to the whole purpose of the s. 106 agreement, which is to ensure the provision of affordable housing, not just at the outset of the development, but continuing into the future.

67. In conclusion, Mr Hutchings submits that clause 10.1.1 of the s.106 agreement provides an incentive for a lender to provide finance which enables the delivery of affordable housing at the development by a registered provider over a period of time. Simplicity of administration required the parties to choose a single point in time at which the relevant criterion *'mortgagee of a Registered Social Provider'* is satisfied, in order for a person deriving title from the mortgagee to qualify for the exclusion. For the reasons already identified, commercial common sense supports the conclusion that this point in time is the date of the disposition of title. Particularly in a case such as the present, where the s. 106 agreement is a sophisticated contract, negotiated and prepared with the assistance of skilled professionals, the court should primarily be guided by a textual analysis, which is said decisively to support the claimant's interpretation. For these reasons, the court should hold that, on the correct interpretation of the s. 106 agreement, the first defendant does not come within the scope of sub-clause 10.1.1. The court should therefore grant the declaration claimed at paragraph 133, and the final injunction claimed at paragraph 135, of the re-amended particulars of claim.

68. In his reply to the oral submissions of Mr Elvin and Mr Morris, Mr Hutchings emphasises that it is common ground that commercial common sense only has a minor role to play in the interpretation of this s. 106 agreement. Neither party is advocating that the court should take the crow-bar of commercial common sense to the wording of this agreement. Nor does Mr Hutchings place undue reliance upon the commercial consequences of adopting either of the competing constructions. The paramount exercise is to focus intensively on the ordinary and natural meaning of the phrase *"any person deriving title through … any mortgagee of a Registered Social Provider"*, and to ask when these criteria have to be satisfied. There is no disagreement about the criteria themselves; merely as to when they must be satisfied. The claimant's case is that they had to be satisfied as at 16 February 2024, being the date of the sales of the affordable leases. If that is correct, the defendants lose the case. The defendants' case is that Securities was required to be a mortgagee as at that date; but (as confirmed by Mr Elvin during Mr Hutchings's submissions in reply) the requirement that Securities should have been the mortgagee of a registered social provider fell to be satisfied as at 27 July 2016, the date of the novation, when Kinsman became a party to the mortgage. That, says Mr Hutchings, is the basic contradiction that lies at the heart of the defendants' case, and which they have never satisfactorily explained. That is because there is no textual basis for applying two different dates to the satisfaction of the two essential qualifying criteria. That becomes crystal clear when one bears in mind the contrasting language of clause 10.1.2, which is not replicated in the immediately preceding sub-clause.

69. Mr Hutchings makes it clear that he is not advocating that the whole of clause 10.1.1 is ambulatory: whether it is or is not depends upon the precise language of the sub-clause. In the case of a sale by a receiver, the mortgagor must have qualified as a registered social provider at the time the receiver was appointed; but there is no need for it also to do so at the time of any later disposition by the receiver. However, Mr Hutchings reminds the court, any appointment of a receiver would require notice to be given to the regulator, thereby triggering the statutory moratorium. In answer to a question from the bench, Mr Hutchings accepts that a secured lender might be better off appointing a receiver at an early stage, because any sale by the receiver would not then be affected by any subsequent deregistration of the provider/mortgagor. But he emphasises the protective effect of the statutory moratorium triggered by any notice of the mortgagee's intention to appoint a receiver.

70. Mr Hutchings emphasises that the bespoke approval of an unregistered social housing provider would be very much the exception to the norm of using a registered provider to provide the affordable housing units because of the advantages that registration offers in terms of regulation. He submits that *'the tail should not be allowed to wag the dog'* when approaching issues of interpretation. Mr Hutchings also submits that the precise terms of the mortgagee exclusion clause were essentially a matter for commercial negotiation. The only reliable way of *"ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended"* (to adopt the language of Lord Hodge in *Wood v Capita*) is to apply the natural and ordinary meaning of clause 10.1.1.

(b) The defendants

71. The defendants' response to the claimant's pleaded case on interpretation is set out at paragraphs 65-68 of the re-amended defence, as follows:

> *65. Paragraphs 111 and to 119 set out submissions, fall outside the scope of* <u>*'a concise statement of the facts on which the claimant relies'*</u> *as required by rule 16. 4(a) of the Civil Procedure Rules, and do not advance any facts which the defendants can either admit or deny.*
>
> *66. Accordingly, the defendants do not plead to those paragraphs and will make appropriate submissions on the interpretation of the s. 106 agreement in due course, as required.*
>
> *67. Without prejudice to that (and without limiting the submissions which will be made in due course), the defendants aver that, on its true and proper construction, clause 10.1.1 does apply to the first defendant.*
>
> *68. Paragraph 120 is accordingly denied: the first defendant* <u>*does*</u> *come within the terms of the exclusion stipulated by clause 10.1.1.*

72. At paragraph 81, the defendants:

(1) admit that, if these proceedings are resolved in its favour, the first defendant intends to let the affordable housing units at market rents;

(2) deny, for all the reasons set out above, that doing so would amount to a breach of any of the obligations in the s. 106 agreement; and

(3) admit that, if these proceedings are resolved in its favour, the second defendant intends to permit or suffer the first defendant to let the affordable housing units at market rents.

73. At paragraph 83, the defendants deny that the claimant has any cause of action which entitles it to any injunctive relief; and aver, in any event, that it would not be just and convenient to grant final injunctive relief in the terms sought.

74. The defendants submit that the first defendant falls within the scope of the words "*any mortgagee of a Registered Social Provider ... or any person deriving title through any such mortgagee …*". Mr Elvin submits that this conclusion is supported, first, by the natural and ordinary meaning of the words of clause 10.1.1, particularly when read in the context of the immediately following words of clause 10.1.2; and, secondly, by the purpose of both the mortgagee exclusion clause, and the whole s. 106 agreement. I will relate each limb of his submissions in turn.

75. First, concerning the natural and ordinary meaning of the words of clause 10.1.1, Mr Elvin begins by identifying three different ways in which an entity can enjoy the benefit of the clause 10.1.1 exclusion:

(1) An entity will be excluded from the burdens imposed by Schedule One to the s.106 agreement if it is *"any mortgagee of a Registered Social Provider"*.

(2) An entity will also be excluded from those burdens if they are a receiver appointed by such a mortgagee.

(3) An entity will also be excluded from those burdens if they derive their title through an entity which was such a mortgagee or a receiver appointed by such a mortgagee – i.e. because the power of sale was exercised by the mortgagee, or by a receiver appointed by them.

76. Mr Elvin emphasises that the relationship of mortgagor and mortgagee comes into existence upon the grant of a mortgage. That mortgage also sets out the terms upon which any receiver may be appointed, and of the relationship between receiver and mortgagor. Thus, the phrase *'mortgagee of a Registered Social Provider'* naturally contemplates a mortgagee of an entity which was a *'Registered Social Provider'* at the point at which that entity granted the mortgage. As a matter of ordinary language, then, a third party which acquires title by way of a conveyance from a mortgagee whose mortgage was granted by a registered social provider will be a *'person deriving title through any such mortgagee'*. The title derives from a mortgage granted by a registered social provider because it was necessarily that grant which conferred any rights on the mortgagee in the first place.

77. Analysed in this way, the mortgagee exclusion clause will apply to a mortgagee of a registered social provider from the point of the grant of the mortgage; and it will continue to apply even if the provider in question is deregistered. The root of the mortgagee's title remains a mortgage granted by a registered social provider; and the

same applies to any third-party disponee of the mortgaged property by the mortgagee.

78. In this case, London District was a registered social provider when the 2015 mortgage was executed. Kinsman was a registered social provider when the deed of novation was executed on 27 July 2016. In other words, the root of the first defendant's title to the leases is a mortgage granted by a registered social provider. As a matter of ordinary language, Mr Elvin submits that it is not relevant that Kinsman was subsequently deregistered, prior to the disposition by the mortgagee to the first defendant.

79. Mr Elvin says that this analysis can be taken a step further. If the first defendant were to convey any of the leases to another entity, that other entity would still derive its title through the mortgagee of a registered social provider, regardless of the fact that the first defendant is not itself such a mortgagee. It is the grant of the mortgage by a registered social provider in the first place which engages the operation of the mortgagee exclusion clause, and not the registered social provider remaining registered at the point of the original disposition by its mortgagee.

80. The claimant contends that the phrase must be given a *'temporal meaning'* and that the only relevant moment of time is the date of the disposal to the first defendant. Not only is this at odds with the natural and ordinary meaning of the sub-clause, but also it involves reading into the exclusion a proviso that it only applies to an entity deriving title through any such mortgagee *'provided that at the time of the disposal by such a mortgagee, the mortgagor was still registered as a Registered Social Provider'*.

81. The difficulties with the claimant's interpretation are, first, that this is clearly not what the parties to the s. 106 agreement intended; and, secondly, that there is no need for the clause to be read in that way. The defendants note that in alternative s. 106 agreements entered into at around the time of the subject s. 106 agreement, the claimant negotiated wording which specifically incorporated the term it now seeks to imply. In an agreement dated 17 May 2011, between the claimant and Charles Eyre and others, the definition of *'Registered Provider'* is in similar terms to that in the subject s. 106 agreement, but with the addition of the words *"and has not been removed from the register pursuant to Section 4 of that Act"*. The same proviso is incorporated into a later agreement the claimant negotiated and entered into in in March 2012.

82. The drafting of the subject s. 106 agreement may not adopt the same detailed controls as other agreements, but this is a matter that lay within the control of the claimant, as the local planning authority. Even if that demonstrates weaker controls by the claimant, it does not make it legitimate to construe the contractual language so that it has the same effect as the differently drafted provisions in those other agreements, which were clearly required by the claimant in other cases.

83. Mr Elvin points out that the definition of *'Registered Social Provider'* in this s. 106 agreement extends to an unregistered social housing provider that the claimant may previously have approved for the specific purposes of this development. In such a case, the statutory moratorium would not apply; and the parties did not include any provision in the subject s. 106 agreement for any contractual moratorium. In any event, the statutory moratorium confers a considerable measure of protection upon

secured creditors. Any interpretation of clause 10.1.1 must encompass both types of *'Registered Social Provider'*. It must provide a coherent and logical structure to the clause as a whole. An approved provider cannot be subject to deregistration; and its status is fixed at the time the mortgage is granted.

84. Mr Elvin further submits that the claimant's construction is counter-intuitive, because it puts the 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. He says that there is nothing in the language of clause 10.1.1 that might suggest that the qualifying characteristics of mortgagor and mortgagee are ambulatory in their effect.

85. Mr Elvin addresses, secondly, the purpose of both the mortgagee exclusion clause and the whole s. 106 agreement. This was intended to impose obligations on the use and occupation of certain housing units to secure the provision of affordable housing as part of the development. However, it is clear from the presence of clause 10 that the parties (including the claimant) did not intend those obligations to apply in all circumstances, or to every successor in title to the developer. Once that is recognised, it becomes essential to determine why the parties provided for the exclusions in clause 10.

86. In the case of the clause 10.1.1 exclusion, the parties understood there to be a need to exclude from the effect of the affordable housing restrictions a mortgagee of a registered social provider. That can only have been because the parties considered and understood that:

(1) in order for the relevant units to be occupied as social housing, long leases would need to be sold to a registered social provider;

(2) such a provider might need to borrow money for the purposes of acquiring those leases;

(3) a lender would be likely to require a mortgage to be granted over the leases in order to secure the loan; and,

(4) such a lender would need to be satisfied that they would be able effectively to enforce their security in full in the event of any default on the part of the registered social provider; and that, to do so, they would need to be able to obtain a satisfactory disposal on the open market free from the Schedule One obligations.

87. Mr Elvin points to paragraph 76 (d) of Mr Hutchings's skeleton argument, where he recognises that:

> *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.*

That end is achieved by the defendants', rather than the claimant's, construction of clause 10.1.1.

88. In this context, Mr Elvin submits that the difficulties with the claimant's interpretation can be clearly seen. If, as it contends, the Schedule One obligations became binding on the mortgagee at the moment of Kinsman's deregistration, its security became encumbered by those obligations from that point in time. That would substantially undermine the purpose of the exclusion – not least because, on the claimant's case, a mortgagee could contract to sell its interest to a third party whilst the registered social provider was still registered, only for it to be deregistered before completion. That risk to the security might well deter mortgagees from lending at all. It would also introduce a powerful incentive for any mortgagee to structure its security on terms that enabled it to enforce at the earliest point in time, so as to maximise the chance of achieving an open-market sale before the mortgagor/provider was deregistered.

89. Putting to one side the moratorium, on which the claimant heavily relies, that incentive would work against the principal aim of the s. 106 agreement: it would encourage a mortgagee to sell early, free from the Schedule One restrictions, rather than waiting to see if a registered social provider could come to an arrangement with the regulator which would leave the social housing provision in place. That is unlikely to be what the parties intended: it appears very unlikely that it would have been considered necessary for any mortgagee of a registered social provider to become bound by the Schedule One restrictions after deregistration of such a provider, but not before.

90. Mr Elvin acknowledges the claimant's reliance upon the moratorium imposed by s. 108 of the HPA. The effect of that provision is that a person may not take any step to enforce a security over the property of a registered social provider unless notice of that intention has been given to the regulator and either (1) a period of 28 days has elapsed since the notice was given, or (2) the regulator has waived the notice requirement. The claimant contends that the purpose of the moratorium is to create a period of time for the regulator to seek a solution to a provider's viability problems, in order to protect the social housing assets and interests of the provider's tenants.

91. Mr Elvin submits that the claimant's suggestion that the defendants' construction has exposed a gap in the scheme of legislative protection for affordable housing requirements is greatly exaggerated. By s. 108 (2) of the HRA (re-enacting previous legislation), a person may not take any step to enforce a security over any of the property of the registered provider unless (a) notice of the intention to do so has been given to the regulator and a period of at least 28 days has elapsed since the notice was given, or (b) the regulator has waived that notice requirement. Here, the claimant could have elected to challenge the validity of the mortgagee's lease disposals to the first defendant on the grounds of want of due notice. Instead, it has elected to seek to enforce the affordable housing restrictions against the first defendant. In any event, if clause 10.1.1 has not worked in the way the claimant had hoped, and it has proved to have made a *'bad bargain'*, that is no basis for adopting an unnatural construction of the sub-clause.

92. Mr Elvin says that it is notable that in alternative s. 106 agreements negotiated and concluded by the claimant at around the same time as the subject s. 106 agreement, the claimant had negotiated wording which gives express contractual effect to a moratorium. He points out that, had this been the intention of the parties, it would have been open to the claimant to have required similar wording in the subject s. 106 agreement, so as to ensure that the leases of units intended for affordable housing

could not be sold by a mortgagee on the open market free from the Schedule One restrictions until after the moratorium had run its course. He says, however, that it would have made no difference if the claimant had done this. Even in such circumstances, it is clear that the parties intended that any mortgagee should be free to sell its interest in the affordable housing units after the end of any moratorium period free from the affordable housing restrictions. Even allowing for the statutory effect of the moratorium in the present case, the parties clearly intended that any mortgagee of a registered social provider should be able to sell its interest free from the Schedule One restrictions if no solution to the difficulties facing the provider were to be found during the moratorium.

93. Mr Elvin points out that no moratorium could apply after any deregistration of the registered social provider; and, to that extent, the existence of the statutory moratorium does not lend support to the claimant's construction in this case. Rather, it is said to reinforce the defendants' construction. If, as the claimant contends, a mortgagee could only sell free from the Schedule One restrictions if it achieved a sale before deregistration, it would be incentivised to structure its security so as to be able to point to events of default entitling it to enforce that security at the earliest possible moment, thereby triggering the 28-day moratorium as far in advance of the date of deregistration as possible. Only then could the mortgagee maximise its chances of disposing of the leases before deregistration. On the defendants' case, by contract, no such perverse incentive exists. So construed, the machinery in the s. 106 agreement confronts the mortgagee of the registered social provider with no incentive to enforce its security early. It is not penalised if it first seeks a solution involving a transfer to another registered social provider. If the provider/mortgagor is deregistered in the meantime, its mortgagee is nonetheless able to dispose of the leases free from the Schedule One restrictions after any rescue process has proved to be unsuccessful. For these reasons, Mr Elvin submits that the defendants' construction better accommodates the purposes of the s. 106 agreement.

94. Mr Elvin further submits that the correctness of the defendants' interpretation is also apparent from clause 10.1.2 of the s. 106 agreement. This provides that the obligations in Schedule One shall not be binding upon, nor enforceable against, *"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".* There is no suggestion in the contractual language that a mortgagee of a residential tenant who is granted a lease by a registered social provider should fall within the scope of the Schedule One obligations simply because the provider/lessor has been deregistered. The intention, clearly, was to ensure that residential tenants should be able to raise mortgage finance in order to buy leases from a registered social provider. In this case, no *'temporal'* restriction is suggested; and there is no good reason why a mortgagee entitled to the benefit of the mortgagee exclusion in clause 10.1.1 should be in any different position. 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 restrictions even though that provider had since been deregistered, but not a mortgagee whose mortgage had been granted by a registered social provider which has since been deregistered.

95. Mr Elvin submits that the defendants' approach to the construction of clause 10.1.1 is logical, and is in in keeping with the structure and the terms of clause 10.1, and the s. 106 agreement, as a whole. He further points out that clause 10.1.1 also applies to any person driving title through a receiver appointed by a mortgagee of a registered social provider. What if the provider is deregistered between the receiver's appointment and any sale by the receiver? On the claimant's construction, the purchaser should lose the benefit of the mortgagee exemption because it would be illogical to construe part of clause 10.1.1 as ambulatory and other parts as not. But it cannot have been intended that any purchaser from a receiver appointed by a mortgagee of a registered social provider as at the date of the appointment should lose the benefit of clause 10.1.1 merely because the provider is subsequently deregistered.

96. For all these reasons, the defendants invite the court to dismiss claim and to discharge the interim injunction granted by Edwin Johnson J.

VII: Analysis and conclusions

97. I bear all of the competing submissions of counsel firmly in mind. Not without some regret at the consequent loss of much-needed affordable housing, I have no hesitation in preferring the defendants' submissions to those advanced on behalf of the claimant. I do so because, in my judgment, the defendants' construction is consistent with the rationale and purpose of the mortgagee exclusion clause whilst the claimant's construction is not. That rationale and purpose is accurately identified by the claimant at paragraph 76 (d) of the skeleton argument of Mr Hutchings and Mr Feeney, 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.*

I consider that this aim is better achieved by the defendants', rather than the claimant's, construction of clause 10.1.1.

98. After re-arranging the order of the words, so as to elucidate, without distorting, their meaning, the wording of clause 10.1.1 of the subject s. 106 agreement that falls to be construed by the court is the phrase *"any person deriving title through any mortgagee of a Registered Social Provider*". That phrase 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.

99. I recognise that it is necessary to read the key provisions of any agreement in the context of the overall contractual scheme created by the relevant document. The court must also bear in mind the four propositions which I have sought to distil from the observations of Aikens LJ at paragraph 24 of his judgment in the *BMA* case, as set out at paragraph 39 of this judgment. I have sought to discern the intention of the parties, objectively speaking, from the words they used in the subject s. 106 agreement, read in their relevant context, and against the factual background in which that document was created. The starting point is the wording of the s. 106 agreement itself, and the

principle that the commercial parties who agreed that wording intended the words they used to mean what they say in delineating the parties' respective rights and obligations. 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'*, provided this can be objectively ascertained from the document itself and the admissible background. However, *'commercial common sense'* is not to be elevated to an overriding criterion of construction. Nor should the parties be subjected to the individual judge's own notions of what might have been the sensible solution to the parties' conflicting aims and aspirations. I recognise the potential subjectivity, and consequent unpredictability, of the interpretations to which competing commercial considerations may give rise. I recognise also, in the context of this agreement, that there is always a tension at play between the opposing interests of the developer's secured funder, which wants to be as free as possible to enforce its security, and the local planning authority, which wishes to restrict the mortgagee's ability to sell free from all affordable housing restrictions. The precise terms of any mortgagee exclusion clause are ultimately a matter for negotiation between the individual parties to the particular s. 106 agreement.

100. I acknowledge that the subject s. 106 agreement is a sophisticated and complex document, entered into with the benefit of skilled professional advice on both sides, which should be interpreted according to its terms. I also recognise that clear words are required to remove, through a subsidiary provision, any part of the benefit which this s. 106 agreement was intended to confer upon the parties to it. I bear in mind that no anti-avoidance principle, and no presumptions, apply to the interpretation of s.106 agreements.

101. I recognise that on the unchallenged evidence of Mr McDermott, 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. I also acknowledge Mr Hutchings's submission that *'the tail should not be allowed to wag the dog'* when considering issues of interpretation. Nevertheless, I consider it noteworthy that the claimant clearly contemplated the giving of such bespoke approval in the present case. In my judgment, any reading of the s. 106 agreement must be able to accommodate the exception from the norm in terms of the potential nomination of an unregistered provider; and the implications of any competing constructions must be tested against this alternative, albeit exceptional, scenario.

102. I bear in mind that shortly before (and after) entering into the subject s. 106 agreement, the claimant had negotiated and entered into similar s. 106 agreements, which included provision for a contractual moratorium. I also acknowledge that before entering into the subject s. 106 agreement, the claimant had negotiated and entered into similar agreements, which expressly identified the need for continuing registration as a pre-condition to qualification as a *'Registered Provider'*. It is common ground that these agreements are not admissible as an aid to the construction of the subject s. 106 agreement. They do, however, show that the claimant was aware of the potential for the use of different drafting techniques to address some of the issues that have been raised in the present case.

103. As I have already indicated, I consider that it is rarely helpful for a court of construction to be referred to different forms of words which, had they been adopted,

might have put the true interpretation of the subject agreement beyond doubt. With the benefit of hindsight, it is usually possible to say that the use of different words would have put a disputed issue of construction beyond doubt. At paragraph 38 of his judgment in *Napier Park*, Lewison LJ makes it clear that he does not find that exercise helpful. The court has to construe the words the parties have actually used in their agreement, and not alternative forms of words that they might have employed instead. Whilst weighing the effect of alternative competing constructions, the task of the court is to construe the document which the parties ultimately agreed to enter into. If its meaning had been clearly expressed, there would likely be no issue of construction for the court to determine.

104. I do not find Mr Hutchings's argument by analogy from other decided cases of any real assistance. The facts, and context, of the two cases that he cited are very different from the present. Rather, the court should primarily be guided by a textual analysis, supplemented by an understanding of the objective rationale and purpose of the inclusion of this mortgagee exclusion clause within this s. 106 agreement.

105. There is no dispute that the class of those entitled to the benefit of the mortgagee exclusion clause is not limitless. Nor is there any dispute about the substantive criteria that limit it. To qualify for the benefit of the mortgagee exclusion clause, a person (**Person A**) must derive title through another person (**Person B**) who is the mortgagee of a registered social provider (**Person C**). The question is: what is, or are, the relevant time, or times, at which those criteria fall to be satisfied? The phrase '*any mortgagee of a Registered Social Provider'* must be given a temporal meaning: when seeking to apply the exclusion clause, one has to ask *'when?'* in relation to the requirement, criterion, or test that the immediate root of title is the mortgagee of a registered social provider. It is common ground that at the time Person A derives title to the relevant property, Person B must be the mortgagee of that property. The issue is whether the requirement that Person C is a registered social provider must be satisfied at the point in the time when Person A derives title to the property from Person B, or merely at the earlier date when the mortgage was first granted to person B. The paramount exercise is to focus intensively on the ordinary and natural meaning of the phrase *'any person deriving title through ... any mortgagee of a Registered Social Provider'*, and to inquire when these criteria have to be satisfied. There is no disagreement about the criteria themselves, but merely as to when they must be satisfied.

106. The claimant's case is that the natural meaning of the phrase *'any mortgagee of a Registered Social Provider'* does not refer specifically to the time the mortgage is granted. Rather, like the status of a registered provider of social housing, on which it is primarily dependent, it is ambulatory. It simply means a mortgagee whose mortgagor is a registered social provider. The claimant says that the wording actually used in clause 10.1.1 favours its preferred construction, whilst the defendants' interpretation involves reading in words that are not actually there. The words *'such mortgagee'* within the phrase *'any person deriving title through any such mortgagee'* naturally refer to the circumstances of the mortgagee at the time of the disposition of title to the person claiming the benefit of the exclusion. Person A derives title from the mortgagee, and can only be ascertained at the point in time when the mortgagee realises its security. This is said to be a strong pointer that the relevant time at which to inquire whether all the criteria are met is the date of the disposition of title. The

phrase *'any person deriving title through any such mortgagee'*, in particular the use of the present participle (*'deriving'*), indicates that the relevant time at which to inquire whether the contractual criteria are met is when the first defendant derived its title from Securities. One should not be inquiring whether the mortgagor was a registered social provider at some date earlier than the disposal that triggers that inquiry. The status of registration is ambulatory; and the obvious time to pose the question whether the mortgagor is a registered provider is at the time when the exception falls to be applied, and thus the time of the relevant disposal by the mortgagee.

107. Mr Hutchings argues that it would be nonsense to apply the exclusion to a person who had once been, but had long ago ceased to be, the mortgagee of a registered provider. The natural meaning of the wording is to apply the test at the time of the disposal under which the purchaser from the mortgagee – in this case, the first defendant – derives title. Here, it is natural to say that the first defendant derived title through a mortgagee of an **un**registered social provider. There is no indication in the text of the exception that any different time-frame applies to the satisfaction of the two qualifying criteria: whether a person derives title through a mortgagee, and whether, at that point in time, the mortgagor is then listed in the register of social housing providers. That becomes crystal clear when one bears in mind the contrasting language of clause 10.1.2, which is not replicated in the immediately preceding sub-clause. When the parties intend the qualification of a person as an excluded person to be fixed by reference to historical circumstances as at the date of a particular transaction, they know how to express this concept. The very next subclause (10.1.2) uses the phrase *'any ... person to whom a Registered Social Provider grants a lease'*. This focuses the reasonable reader's attention upon the status of the landlord at the date the lease was granted. The status of the landlord at the date any mortgage over that lease was created is not a relevant consideration. The difference in language is said to be telling. Furthermore, clear words are required to remove, through a subsidiary provision, part of the benefit which it was the purpose of the s. 106 agreement to provide. The words of clause 10.1.1 do not clearly provide for a mortgagee of a deregistered provider, or persons deriving title through such a mortgagee, to be excluded from the scope of the affordable housing obligations and restrictions.

108. The defendants contend that the mortgagee's qualification as an excluded person is *'franked'* at the date of the mortgage and thereafter fixed, potentially for the term of the long lease of each affordable housing unit. However, given that a provider of social housing is able to move on and off the register maintained by the regulator, Mr Hutchings objects that it would be artificial to *'stop the clock'* at the point of the grant of the mortgage. He says it makes little sense to *'ossify'* the treatment of the contractual scheme by reference to an historical date.

109. I do not accept the claimant's submissions, as summarised at paragraphs 106-108 above. I do so essentially for the reasons given by Mr Elvin and Mr Morris, which I have set out earlier in this judgment. I do not agree with Mr Hutchings that the natural reading of the phrase *'any person deriving title through ... any mortgagee of a Registered Social Provider'* is ambulatory, and naturally refers to the characteristics of the mortgagee at the time of the disposition of title to the person claiming the benefit of the exclusion, rather than the earlier time when the mortgage was granted. In my judgment, the meaning of this phrase is open-ended, in the sense that it is

capable of either of the two competing meanings advanced in this litigation. 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. That being the case, in my judgment the ascertainment of the point in time by reference to which the status of the mortgagor falls to be determined has to be identified 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: in other words, which, objectively, is the better fit?

110. In my judgment, this points clearly to the point in time at which the mortgage was granted. I agree with Mr Elvin and Mr Morris that the primary objective of facilitating a registered provider to raise sufficient funding to enable it to acquire the long leases of the affordable housing units, which are mandated by the s. 106 agreement, requires the mortgagee's qualification as an excluded person to be *'franked'* as at the date of the mortgage, and thereafter fixed. I cannot accept Mr Hutchings's submissions that, given that a provider of social housing is able to move on and off the register maintained by the regulator, it would be artificial to *'stop the clock'* at the point of the grant of the mortgage; or that it makes little sense to *'ossify'* the treatment of the contractual scheme by reference to the historical date of the creation of the legal charge. In my judgment, such a temporal restriction is required 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. No lender would be prepared to run the risk of subsequent deregistration imperilling the value of their security.

111. In my judgment, Mr Elvin and Mr Morris are right to emphasise that the relationship of mortgagor and mortgagee comes into existence upon the grant of the mortgage. That mortgage also sets out the terms upon which the mortgagee may appoint any receiver, and of the relationship between that receiver and the mortgagor. Thus, the phrase *'any mortgagee of a Registered Social Provider'* naturally contemplates a mortgagee of an entity which was a registered social provider at the point at which that entity granted the mortgage. As a matter of ordinary language, then, a third party which acquires title by way of a disposition from a mortgagee whose mortgage was granted by a registered social provider can properly be said to qualify as *'any person deriving title through any such mortgagee'*. Their title derives from a mortgage granted by a registered social provider because it was necessarily that grant which conferred any rights on the mortgagee in the first place. I agree with Mr Elvin and Mr Morris that the claimant's alternative interpretation suffers from two difficulties. First, it is clearly not what the parties to the s. 106 agreement intended, given the objective reasons underlying the inclusion of the mortgagee exclusion clause. Secondly, there is no need for clause 10.1.1 to be read in such a counter-intuitive manner.

112. Analysed in this way, the mortgagee exclusion clause applies to a mortgagee of a registered social provider from the time the mortgage is granted; and it continues to apply even if the provider in question is subsequently deregistered. The root of the mortgagee's title remains a mortgage granted by a registered social provider; and the same applies to any third-party disponee of the mortgaged property by the mortgagee. In my judgment, clause 10.1.1 falls to be read in the sense that it applies to any person deriving title through any mortgagee to whom a registered social provider has granted a mortgage, rather than in the alternative sense of any mortgagee of a registered social

provider for the time being. Both possible meanings are encompassed by the phrase *'any person deriving title through … any mortgagee of a Registered Social Provider'*. But the former reading 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.

113. I agree with Mr Elvin and Mr Morris that the claimant's construction is 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. 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.

114. The terms of clause 10 show that the parties (including the claimant) did not intend the affordable housing restrictions in the subject s. 106 agreement to apply in all circumstances, or to every successor in title to the developer. So it is necessary to understand why the parties provided for the exclusions in clause 10. In the case of the clause 10.1.1 exclusion, the parties clearly understood that there was a need to exclude any mortgagee of a registered social provider from the effect of the affordable housing obligations and restrictions. As Mr Elvin submits, that can only have been because the parties considered and understood that:

(1) in order for the relevant units to be occupied as social housing, long leases would need to be sold to a registered social provider;

(2) such a provider might need to borrow money for the purposes of acquiring those leases;

(3) any lender would be likely to require a mortgage to be granted over the leases in order to secure any loan; and,

(4) any such lender would need to be satisfied that they would be able effectively to enforce their security in full in the event of any default on the part of the registered social provider; and that, to do so, they would need to be able to dispose of their security on the open market free from the Schedule One obligations and restrictions.

115. On this footing, the difficulties with the claimant's interpretation are immediately apparent. If, as it contends, the Schedule One obligations became binding on Securities at the moment of Kinsman's deregistration, its security became encumbered by those obligations and restrictions from that point in time. That would substantially undermine the purpose of the exclusion. The risk to their security that this would entail might well deter mortgagees from lending at all. It would certainly introduce a powerful incentive for any mortgagee to structure its security on terms that enabled it to enforce it at the earliest point in time, so as to maximise the chance of achieving an open-market sale before the mortgagor was deregistered. Mr Elvin suggests that, on the claimant's case, a mortgagee could contract to sell its interest to a third party whilst the registered social provider was still registered, only for it to be deregistered before completion. I do not necessarily view this as a fatal objection to the claimant's construction because, in such a case, it might well be the date of the contract, when the equitable title passes to the purchaser, rather than the date of

completion (or subsequent registration of the transfer), effecting the transfer of the legal estate, that should be taken as the relevant qualifying date. However, the overarching objections to the consequences of the claimant's construction remain.

116. I agree with Mr Elvin and Mr Morris that their approach to the construction of clause 10.1.1 is logical, and in keeping with the structure, and the terms, of both clause 10.1, and the s. 106 agreement, as a whole. In my judgment, the defendants' construction is supported by considering the application of clause 10.1 to other possible scenarios. First, there is the position of the unregistered provider who is approved by the claimant on a bespoke basis for the purposes of this particular development. There can be no risk of any mortgagee from such a provider losing the benefit of the mortgagee exclusion clause on any subsequent deregistration because the provider has never been registered in the first place. What is the rational justification for such differential treatment? It can only be because the claimant has chosen to approve the provider in the first place, notwithstanding its status as an unregistered provider. That does not seem to me to afford any sufficient justification for the potential loss of the full value of the mortgagee's security.

117. Secondly, there is the case, addressed in clause 10.1.2, of the mortgagee of a residential tenant who has been granted a lease by a registered social provider. There is no suggestion in the language of clause 10.1.2 that any person deriving title through such a mortgagee should fall within the scope of the Schedule One obligations and restrictions simply because the provider/lessor has subsequently been deregistered. The clear intention of clause 10.1.2 is to ensure that potential residential tenants should be free and able to raise mortgage finance in order to buy leases from a registered social provider. In this case, no *'temporal'* restriction is suggested. Mr Hutchings emphasises the differences in the language of clauses 10.1.1 and 10.1.2; and he objects that the defendants' reliance upon the terms of the latter sub-clause is misplaced because it is founded on the impermissible premise that both these subclauses are intended to work in the same way. He says that this inference cannot be discerned from the language of the two sub-clauses. Whilst I appreciate Mr Hutchings's point, I agree with Mr Elvin's counter-submission that 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.

118. Thirdly, clause 10.1.1 also applies to any person driving title through a receiver appointed by a mortgagee of a registered social provider. Mr Elvin poses the question: what if the provider is deregistered between the receiver's appointment and any sale by the receiver? He suggests that, on the claimant's construction, the purchaser should lose the benefit of the mortgagee exception clause, because it would be illogical to construe part of clause 10.1.1 as ambulatory and other parts as not. He submits that it cannot have been intended that any purchaser from any receiver appointed by a mortgagee of a registered social provider as at the date of the receiver's appointment should lose the benefit of clause 10.1.1 merely because that provider is subsequently

deregistered. Recognising this potential anomaly, Mr Hutchings made it clear during his oral submissions that, in the case of a sale by a receiver, the mortgagor must have qualified as a registered social provider only at the time the receiver was appointed. There is no need for it also to do so at the time of any later disposition by the receiver. However, in my judgment, this simply serves further to demonstrate the illogicality of the claimant's construction, by throwing a further potential qualifying date into the mix. In the case of a sale by a receiver appointed by the mortgagee of a registered social provider, as with the case of a sale by such a mortgagee, the relevant qualifying date for determining the status of the registered social provider must be the date of the grant of the mortgage, and not any later date.

119. For all these reasons, I reject the claimant's case that the defendants cannot claim the benefit of the mortgagee exclusion clause because Kinsman was not a registered social provider on 16 February 2024, being the date of the sales of the affordable leases. There is, however, one aspect of the case on which I would part company with Mr Elvin and Mr Morris, although it may be unlikely to arise in other cases, and, on the particular facts of the instant case, it makes no difference to the outcome. The defendants' case (as confirmed by Mr Elvin by way of an intervention during the course of Mr Hutchings's submissions in reply) is that the requirement that Securities should have been the mortgagee of a registered social provider falls to be considered as at 27 July 2016, the date of the novation, when Kinsman became a party to the mortgage. In my judgment, for all the reasons I have given, I consider that the crucial date is the date of the grant of the original mortgage by London District to Securities on 19 August 2015. London District needed to be a registered social provider as at that date for the mortgagee exclusion clause ever to apply. It may well be – and, indeed, I incline to think – that Kinsman also needed to be a registered social provider as at the date of the novation of the legal charge on 27 July 2016. But since it was so registered on that date, it is strictly unnecessary for me to decide this further point.

120. Mr Hutchings invites the court to consider the case of a new provider being set up as a subsidiary of a larger registered provider to manage the affordable housing at a particular development. He then postulates that, in error, the leases of the affordable housing units, and the charge over them, are granted before the subsidiary has been listed on the register of social housing providers, with the registration being completed shortly afterwards. In such circumstances, Mr Hutchings suggests that there is no commercial reason why the lender should not thereafter qualify as *'any mortgagee of a Registered Social Provider'* whereas, on my preferred construction of clause 10.1.1, it would not. I consider that this is a most unlikely scenario. In any event, it could be addressed by the discharge of the existing charge, and the immediate grant of a fresh charge. Failing that, a claim in professional negligence would almost certainly lie on the part of the secured lender against its conveyancing solicitors (backed by their insurers). Certainly, I do not consider that this unlikely scenario should be allowed to dictate a forced, and irrational, construction of clause 10.1.1.

VIII: Disposal

121. For the reasons I have given, I find in favour of the defendants. I dismiss the claim; and I discharge the injunction granted by Edwin Johnson J on 30 October 2024.

122. I invite the parties to seek to agree a substantive order to give effect to this judgment. This should address the effect of the injunction granted by Edwin Johnson J. In that connection, I note that the injunction continues *"until trial or further order"*. The draft order should also provide for the costs of and incidental to this claim.

123. If the parties cannot agree upon a suitable form of order, they should provide a draft composite order, containing their alternative provisions, together with brief written submissions on the outstanding consequential matters. This should be no longer than is strictly necessary, and, in any event, no longer than five pages in length, employing a font size of no less than 12 points, and without any foot-notes and annexures. Unless I direct otherwise, I will proceed to determine any outstanding matters on the papers.

124. I propose formally to hand down this judgment remotely at 10.00 am on Tuesday 22 July 2025. No attendance is required. I will extend the time for appealing to 28 days after formal hand down (i.e. to 4.00 pm on 19 August 2025). I direct that written submissions in support of any application for permission to appeal, with concise draft grounds of appeal, are to be filed and served within seven days after hand down (i.e. by 4.00 pm on 29 July 2025). Unless I direct otherwise, I will determine any such application on the papers.

125. I conclude by reiterating my thanks to all four counsel (and their respective solicitors) for their considerable assistance in facilitating the disposal of this application.

126. That concludes this reserved judgment.

Appendix 2

Westminster City Council v Gems House Residences Chiltern Street Ltd [2026] EWHC Civ 937 (21 July 2026)

Neutral Citation Number: [2026] EWCA Civ 937

Case No: CA-2025-001948

IN THE COURT OF APPEAL (CIVIL DIVISION)
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)
[2025] EWHC 1789 (Ch)

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 21/07/2026

Before :

SIR COLIN BIRSS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HOLGATE
and
LORD JUSTICE MILES

- -

Between :

WESTMINSTER CITY COUNCIL **Appellant**

- and -

(1) GEMS HOUSE RESIDENCES CHILTERN STREET LIMITED
(2) GEMS HOUSE CHILTERN STREET HEAD LEASE LIMITED **Respondents**

- -
- -

Matt Hutchings KC and Luke Decker (instructed by **Bi-Borough Legal Services**) for the **Appellant**
David Elvin KC and Tom Morris (instructed by **Mischon de Reya LLP**) for the **First and Second Respondents**

Hearing date : 23 June 2026

- -

Approved Judgment

This judgment was handed down remotely at 11am on 21 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

LORD JUSTICE HOLGATE :

1. On 11 April 2013 the appellant Westminster City Council ("WCC"), as the local planning authority ("LPA") for its area, granted planning permission for a mixed-use development at 74-76, Chiltern Street and 22-28, Paddington Street, London W1. The development included 60 flats. On the same day, an agreement was executed pursuant to s.106 of the Town and Country Planning Act 1990 ("TCPA 1990") between the developer and WCC. The agreement restricted the use of 16 of the flats to affordable housing. These are known as Flats 1-16, Gem House, 76 Chiltern Street, in the completed development.

2. The s.106 agreement required long leases of the completed affordable housing units to be granted to a Registered Social Provider ("RSP") who was to let the flats to occupying tenants at rents below market value. It was recognised that a RSP would need to raise secured funding for its purchase of those long leases and that the RSP's mortgagee would not wish to be bound by the developer's obligations under the agreement, including the affordable housing obligation.

3. Accordingly, clause 10.1.1 provided that the developer's obligations in sched. 1 to the agreement are not binding upon nor enforceable against "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."

4. On 7 September 2023 the Regulator of Social Housing ("the Regulator") removed the then RSP of the 16 affordable housing units from the register of social housing providers kept under the Housing and Regeneration Act 2008 ("the HRA 2008"). That was a default event in the legal charge of the RSP's mortgagee. On 16 February 2024, exercising its power of sale under that charge, the mortgagee assigned the long leases of the 16 affordable housing units to the first respondent, Gems House Residences Chiltern Street Limited.

5. The issue is whether the first respondent is entitled to rely upon the mortgagee exclusion clause 10.1.1 as a "person deriving title through" a "mortgagee of a [RSP]". If it is not, then it is bound by the affordable housing obligation and will be unable to realise the value of the 16 flats as general market housing.

6. To answer this question, it is necessary for the court to determine the date at which the mortgagee in question must have qualified as a mortgagee of the RSP for the purposes of clause 10.1.1. Is it:

(1) the date when the RSP granted the mortgage to the mortgagee; or is it

(2) the later date when the mortgagee transferred the mortgagor's interest (unencumbered by the mortgage) to a purchaser, in this case the first defendant?

7. In a careful and thorough judgment HHJ Hodge KC decided that construction (1) is correct ([2025] EWHC 1789 (Ch)). He dismissed WCC's claim for an injunction to enforce the affordable housing obligation and discharged the interim injunction until trial granted by Edwin Johnson J on 30 October 2024 against the first respondent.

8. WCC appeals against the judge's order with the leave of Arnold LJ. The Council contends that we should adopt construction (2).

9. It is common ground that if this court should uphold construction (1), then the affordable housing obligation does not bind the respondents, but that if construction (2) is correct, the obligation is binding on them and WCC is entitled to a permanent injunction enforcing it (in the absence of a suitable undertaking to the court to the same effect).

10. I am grateful to all counsel for their helpful oral and written submissions.

Factual background

11. The commercial arrangements were somewhat complex. I will refer only to those matters which are essential for the resolution of the legal issues before us.

12. The parties to the s.106 agreement were:

- WCC as LPA

- Paddington Street GP Limited and Paddington Street Nominee Limited (as freeholders and developer)

- Barclays Bank plc (the freeholders' mortgagee)

The s.106 agreement was registered as a local land charge.

13. By a loan agreement dated 22 October 2014, PEP Securities No.17 Limited ("Securities") as lender agreed to advance to PEP Finance No.17 LP ("Finance") £3m as borrower to be used to fund the purchase by a RSP, London District Housing Association Limited

("London District"), of the 16 affordable housing units within the development.

14. On 19 August 2015 the freeholders granted to London District 16 leases of the affordable housing units for terms of 125 years. On that date London District was a RSP registered under Part 2 of the HRA 2008. The premiums for the leases totalled £3m. Each lease contained a covenant by the lessee to use the demised flat for affordable housing in accordance with the s.106 agreement.

15. Also on 19 August 2015 London District granted a third party legal charge over the 16 leases in favour of Securities.

16. On 27 July 2016 London District transferred the legal title to the 16 leases to Kinsman Housing Limited ("Kinsman"), a RSP registered under Part 2 of the HRA 2008. By a deed of novation made on 27 July 2016 between Securities, Finance, London District and Kinsman, all of London District's rights, obligations and liabilities under the legal charge were novated to Kinsman with effect from that date.

17. In 2018 the Regulator began to issue a series of regulatory notices against Kinsman. The first was dated 18 November 2018. Kinsman had failed to comply with governance and consumer standards, it was not managing its affairs with an appropriate level of skill, diligence and prudence and it was failing to manage risk appropriately. A further notice was issued on 13 March 2019.

18. On 10 February 2023 the Regulator issued an enforcement notice against Kinsman under s.219 of the HRA 2008. Despite the earlier notices, the steps taken by Kinsman had not overcome the Regulator's concerns. In addition, the Regulator had not received adequate assurances that Kinsman was managing its resources so as to maintain its viability (including long term viability), while avoiding undue risk to its social housing assets. Kinsman had also failed to satisfy health and safety requirements. The notice directed Kinsman to take a number of specified actions.

19. On 30 June 2023 the Regulator issued a notice that he was proposing to exercise his power under s.118 of the HRA 2008 to remove Kinsman from the register of social housing providers. Kinsman was given the opportunity to make it representations. The Regulator had concluded that Kinsman had failed to demonstrate that it met the eligibility criteria in s.112(3) of the HRA 2008 on viability. Those criteria had had to be satisfied by Kinsman when it was registered in June 2013 and also had to be met on an ongoing basis. The Regulator has the power to de-register a "private registered provider" if satisfied that it is no longer eligible for registration.

20. A notice published on 16 August 2023 announced that the Regulator had decided to deregister Kinsman. De-registration took place on 7 September 2023. Kinsman did not exercise its right of appeal to the First-tier Tribunal under s.121 of the HRA 2008.

21. The notice of intention to de-register published on 16 August 2023 constituted a default event under clause 7.1(i) of the loan agreement and under clause 1.1 of the legal charge. On 23 August 2023 Securities gave notice of the default to Finance which was copied to Kinsman.

22. On 16 February 2024, Securities exercised its power of sale by assigning the long leases of the 16 affordable housing units to the first respondent, subject to the occupational assured shorthold tenancies of those flats.

The section 106 agreement

23. The third recital to the s.106 agreement stated:

> "The Council considers it expedient in the interests of the proper planning of its area and having regard to the provisions of its local plan policies that provision should be made in this Agreement for regulating or facilitating the Development and/or use of the Property in the manner set out in this Agreement."

24. Clause 1 defines a number of expressions "unless the context demands otherwise":

> **"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"

"Director of Housing"
"The Chief Officer within the Council with responsibility for Housing matters"

"Market Housing Units"
"That part of the Development which is general market housing available on the open market and which is not Affordable Housing"

"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)"

25. Clause 2.1 enables WCC as the LPA to enforce the agreement as one made under s.106 of the TCPA 1990:

> "2.1 This Agreement is made pursuant to Section 106 of the Act and 111 of the Local Government Acts 1972 and 2000 and the obligations and covenants herein contained: -
>
> (a) are covenants and planning obligations to which these statutory provisions apply; and
>
> (b) relate to the Property; and
>
> (c) are enforceable by the Council as the local planning authority."

26. Clause 2.2 deals with the enforceability of the developer's obligations on successors in title:

> "2.2 Subject to Clause 9 below the obligations in this Agreement shall be binding on the Developer together with the agents and the successors in title and assigns of each and those deriving title under them Provided That no person shall be liable for any breach of any covenant or obligation contained in this Agreement after it has parted with all of its interest in the Property save in relation to any antecedent breach prior to parting with such interest."

It is clear from the structure and content of the s.106 agreement, and it is common ground between the parties. that references in clause 2.2 and elsewhere to clause 9 are typographical errors which should be treated as referring to clause 10.

27. Clause 5 contains the developer's covenants. Clause 5.2 provides:

> "5.2 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".

28. Paragraph 11 of schedule 1 deals with requirements for the provision of affordable housing. Paragraphs 11.1 to 11.3 provide:

> "11.1 Not to occupy any of the Market Housing Units until the Affordable Housing Units have been completed and made ready for occupation and for transfer on a long lease of at least ninety nine years to a Registered Social Provider or other Social Provider as the Director of Housing shall have approved in writing beforehand for this transaction
>
> 11.2 Subject to a Registered Social Provider or other Social Provider as the Director of Housing shall have approved in writing beforehand for this transaction being willing to accept a transfer by way of grant of a long lease of at least ninety nine years (the premium and any annual or other charges for such disposition as paid by the Registered Social Provider or other approved transferee not to include or reflect any costs relating to the value of the land) of the Affordable Housing Units to grant such lease to such body
>
> 11.3 Not (subject to Clause 9 above of this Agreement and paragraph 11.6 below of this Schedule One) to occupy the Affordable Housing Units other than for Affordable Housing."

29. Paragraph 11.6 deals with the situation where a RSP has not taken a lease of all of the affordable housing units within 12 months of their completion:

> "11.6 In the event that after a period of twelve months from the Affordable Housing Units in accordance with the provisions of paragraph 11.2 above of this Schedule One then the Developer will be entitled to request relaxation and/or variation and/or deletion of the restrictions contained in paragraphs 11.3 and/or 11.4 and/or 11.5 of this Schedule One."

30. Paragraphs 11.4 and 11.5 deal with the levels at which occupation rents may be set for “Social Rented Units” and “Intermediate Rented Units”.

31. By clause 6 WCC covenanted to observe and perform the undertakings, covenants and restrictions in Schedule 2 of the agreement. Paragraph 8 of schedule 2 lays down the process by which a developer’s request under para. 11.6 of schedule 1 to relax vary or delete affordable housing obligations in paras. 11.3 to 11.5 are to be dealt with.

> “8. In the event of the Developer seeking in accordance with paragraph 11.6 of Schedule One above of this Agreement relaxation and/or variation and/or deletion of the restrictions contained in paragraphs 11.3 and/or 11.4 and/or 11.5 of Schedule One above of this Agreement the Council shall consider such request (including proposals for contributions towards off-site provision of Affordable Housing and any viability submissions) reasonably and in the event that agreement cannot be reached between the Council and the Developer as to the appropriate revision of those paragraphs 11.3, 11.4 and 11.5 then the Council accepts that the Developer shall be entitled to refer the matter to an Independent Expert in accordance with clause 8 of this Agreement and the Council will effect such variation as may be determined appropriate as a result of that Independent Expert process.”

Accordingly, if the parties do not reach agreement on the relaxation or deletion of the affordable housing obligation, the developer is entitled to have that issue determined by an independent expert appointed by the President of the Law Society. That procedure is dealt with by clause 9, rather than clause 8 as incorrectly cross-referenced in para.8 of sched. 2.

32. Clause 2.11 provides:

> “2.11 It is agreed and declared between the parties hereto that the obligations prohibitions and restrictions in Schedule One of this Agreement shall operate subject to Clause 9 as below of this Agreement”

33. Clause 10 sets out exclusions from the enforceability of obligations in sched. 1 to the agreement:

> "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 telecommunication 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."

Principles for the interpretation of a section 106 agreement

34. The modern approach has been to break down former divisions between the principles for interpreting different types of legal documents, whether public or private, and to apply more general rules for ascertaining the meaning of language. Thus, the approach for interpreting a planning permission does not differ materially from that appropriate for other legal documents (*Trump International Golf Club Scotland Limited v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85 at [33], [53] and [66] and *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 WLR 4317 at [16]).

35. Section 106 instruments, like planning permissions, are public documents. Planning obligations or agreements are registrable as local land charges and are enforceable by the relevant LPA against the original obligor or covenantor and successors in title. They are typically entered into as a prerequisite for a grant of planning permission, in order to make acceptable the development being approved. Both draft and final versions of s.106 obligations must be placed on the planning register so as to be open to public inspection. There are therefore some similarities between restrictions or requirements in a s.106 obligation and the imposition of conditions on a planning permission. Accordingly, there is no reason in principle why the approach in *Trump* and *Lambeth* should not also apply to s.106 agreements or unilateral obligations (*Norfolk Homes Limited v North Norfolk District Council* [2020] EWHC 2265 (QB); [2021] PTSR 863).

36. The public nature of a planning permission or a planning agreement *may* operate so as to reduce reliance upon (i) knowledge which is specific to the contracting parties and (ii) extrinsic materials (see *Trump* at [34]). But neither of those two considerations affects the issues in the present appeal.

37. Applying the approach set out by Lord Hodge JSC in *Trump* at [34], the court should consider what a reasonable reader would understand the words in question to mean, reading that language in the context of other provisions of the agreement and of the document as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purposes of the agreement, any other provisions which cast light on the purpose of those words and common sense.

38. The general principles on the interpretation of agreements and other legal documents are set out in case law which is so familiar and well trodden as not to require rehearsal in this judgment. The judge helpfully summarised a number of the relevant principles in his judgment at [31] and [37]-[43]. The parties referred *inter alia* to *Re Sigma Finance Corporation* [2009] UKSC 2; [2010] 1 All ER 571; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Limited* [2017] UKSC 24; [2017] AC 1173 and *Providence Building Services Limited v Hexagon Housing Association Limited* [2026] UKSC 1; [2026] 1 WLR 538.

39. In *BMA Special Opportunity Hub Fund Limited v African Minerals Finance Limited* [2013] EWCA Civ 416 Aikens LJ referred at [24] to the principle that where there are two (or more) possible constructions of an agreement, a court is entitled to prefer the construction which is more consistent with "business common

sense", if this can be ascertained. But he added that commercial common sense should not be elevated to an overriding criterion of construction. The parties should not be subjected to an individual judge's notion of what might have been the sensible solution to the problem, still less commercial common sense from the perspective of one party to the contract (see also Lord Hodge JSC in *Wood v Capita Insurance* at [28]).

40. Rival interpretations should be tested against other provisions of the agreement and the commercial consequences of each interpretation. But the court should seek to discern commercial intention and commercial consequences from the terms of the contract itself (Lewison LJ in *Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-Rata Clo 2 B.V.* [2014] EWCA Civ 984 at [31]-[33]).

Statutory framework

Town and Country Planning Act 1990

41. Section 106 of the TCPA 1990 provides in so far as material:

> "**106.— Planning obligations.**
>
> (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as "a *planning obligation*"), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."
>
> …
>
> (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."

A planning obligation is to be registered as a local land charge (s.106(11)).

42. Section 106A(1) and (2) provide that a planning obligation may not be modified or discharged except by agreement in a deed between the LPA and the persons against whom the obligation is enforceable, or in accordance with s.106A and s.106B. Section 106A(3)-(4) enables a person against whom a planning obligation is enforceable to apply to the LPA after 5 years have elapsed from the date of execution for the obligation to be modified or discharged. Section 106A(6) sets out the decisions which a LPA may take in response to such an application:

"(6) Where an application is made to an authority under subsection (3), the authority may determine—

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications."

43. Under s.106B(1) where a LPA fails to determine an application under s.106A, or decides that the planning obligation shall continue unmodified, the applicant may appeal to the Secretary of State.

The Housing and Regeneration Act 2008

44. The s.106 agreement was entered into in order to achieve planning purposes. These included securing the provision of 16 affordable housing units on-site as part of the development and thereafter their maintenance as affordable housing for successive occupants. Under the agreement WCC required the affordable housing to be managed by a social housing provider registered under the HRA 2008 (because such a provider would be regulated by that statutory

regime) alternatively an unregistered provider approved in advance by WCC. The appellant accepts that the primary purpose of para.10.1.1 of sched. 1 to the agreement was to encourage sufficient commercial lending to enable RSPs to purchase long leases of the affordable housing units. The exclusion clause allows a mortgagee to realise its security in the event of default by selling the affordable housing at general market value, subject to the statutory moratorium provisions in the HRA 2008 where applicable (judgment at [19] and [97] and appellant's skeleton at para. 45).

45. It is common ground that the HRA 2008 formed part of the context in which the parties entered into the s.106 agreement. But it is necessary to consider the statute as it stood when the s.106 agreement was executed on 11 April 2013, that is before substantial changes were introduced by *inter alia* the Housing and Planning Act 2016.

46. The "fundamental objectives" of the Regulator are set out in s.92K:

> "**92K Fundamental objectives**
>
> (1) The regulator must perform its functions with a view to achieving (so far as is possible)—
>
> (a) the economic regulation objective, and (b) the
>
> consumer regulation objective.
>
> (2) The economic regulation objective is—
>
> (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),
>
> (c) to ensure that value for money is obtained from public investment in social housing,
>
> (d) to ensure that an unreasonable burden is not imposed
> (directly or indirectly) on public funds, and
>
> (e) to guard against the misuse of public funds.
>
> (3) The consumer regulation objective is—

> (a) to support the provision of social housing that is well managed and of appropriate quality,
>
> (b) to ensure that actual or potential tenants of social housing have an appropriate degree of choice and protection,
>
> (c) to ensure that tenants of social housing have the opportunity to be involved in its management and to hold their landlords to account, and
>
> (d) to encourage registered providers of social housing to contribute to the environmental, social and economic wellbeing of the areas in which the housing is situated."

47. Section 111 requires the Regulator to maintain a register of providers of social housing, referred to in the legislation as "registered providers". Those who are not local authorities are referred to as "private registered providers" (s.80(2) and (3)).

48. Section 112 provides for criteria to determine eligibility for registration. They include criteria set by the Regulator as to the financing and management of a provider. Anyone who makes an application and is "eligible" under s.112(1) is entitled to be registered (s.116(1)).

49. A body entered in the register remains a registered provider unless and until deregistration takes place under s.118 (compulsory) or s.119 (voluntary) (s.116(4)). The Regulator may de-register a private registered provider which he considers *inter alia* is no longer eligible for registration (s.118(1)).

50. Sections 143A *et seq.* deal with registered social providers which are the subject of winding up or administration, or where certain steps have been taken to enforce a security over land held by a provider (ss.144-145 and Art.2 of The Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010 – SI 2010 No. 660). A step to enforce such security is only effective if the party enforcing it gives notice thereof to the Regulator (s.144).

51. When a step is taken to enforce a security, a moratorium on the disposal of land by the registered provider begins (s.145(1) and s.146(1)). That moratorium ends 28 working days from the date when the Regulator is notified that that step has been taken, unless extended or cancelled (s.146(2)). A moratorium may be extended by the Regulator whilst it is continuing, but only with the consent of each secured creditor of the registered provider which can reasonably be located (s.146(3)).

52. During a moratorium a disposal of the registered provider's land generally requires the consent of the Regulator (s.148(2) subject to the exceptions in s.149). By s.150(1) a disposal by a registered provider is void if the Regulator has not given any consent required under s.148.

53. Section 152 gives the Regulator the power during the moratorium to make proposals about the future ownership and management of the registered provider's land with a view to ensuring that it will be properly managed by a registered provider (s.152(1)). The proposals may include the appointment of a manager under s.155 (s.152(3)). By s.153(2) the Regulator must send a copy of his proposals to such of the secured creditors as he is able to locate after making reasonable enquiries. If each of those secured creditors agree to the proposals they have effect, but not otherwise (s.153(4)). Proposals may be modified or amended, but only with the agreement of the same secured creditors (s.153(5) and (8)).

The grounds of appeal

54. The main grounds of appeal are as follows:

> "1. 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".
>
> 2. 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."

55. In addition, ground 3 complains that the judge's finding at [110] that no lender would be prepared to lend to a provider of the affordable housing on WCC's construction of para.10.1.1 of sched. 1 was not based on any evidence. But in my judgment the criticism is misdirected.

56. What the judge actually said was more nuanced:

> "In my judgment, such a temporal restriction is required 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. No lender would be prepared to run *the risk of subsequent deregistration* imperilling the value of their security."

This was simply an assessment of the effect of WCC's interpretation on commercial consequences and risk. The passage criticised by WCC needs to be read in the context of the judgment as a whole. For example, at [97] the judge concluded that the aim of the mortgagee exception clause, as defined in WCC's skeleton is "better achieved" by the respondent's construction than that of WCC (and see [115]).

57. In any event, ground 3 ultimately leads nowhere. The question of construction is a matter of law upon which this court must reach its own view (para. 27 of WCC's skeleton).

Discussion

58. Towards the beginning of his submissions Mr Hutchings KC placed some reliance on para. 11.3 of Sched.1 to the s.106 agreement (read together with the definition of "affordable housing" in clause 1.1.) as "a continuing obligation on the developers' successors in title to make the affordable housing available through a registered provider." He suggested that this continuing obligation supported construction (2) of clause 10.1.1. I disagree. First, the obligation in para. 11.3 of sched. 1 is negative, not positive. It does not impose the continuing obligation claimed by WCC. Second, we are dealing with the ambit of the exclusion in clause 10.1.1. from liability to comply with the affordable housing and other obligations under sched. 1 to the agreement, whatever the scope of that liability may be. That exclusion depends primarily upon the correct interpretation

of the language used in clause 10.1.1. Third, the definition of a "Registered Social Provider" includes a provider which is not registered under Part 2 of the HRA 2008, but is approved by WCC's Director of Housing before the grant of the long leases of the affordable housing (required by paras. 11.1 and 11.2 of sched. 1) and any mortgage to fund that purchase. Paragraph 11.3 does not imply that the operation of clause 10.1.1. depends upon the status of the RSP, whether registered or non-registered, when its mortgagee transfers those leases in the exercise of a power of sale.

59. It is common ground that one of the purposes of the s.106 agreement is to secure the provision and maintenance of the 16 affordable housing units. However, clause 10.1.1 sits within a set of provisions which allow for those units to cease to provide affordable housing in certain circumstances. An occupational tenant may exercise a statutory right to buy (clause 10.1.4), or the right to acquire under the Housing Act 1996 (clause 10.1.5) in relation to a particular affordable housing unit. Clause 10.1.2 then provides that a mortgagee of a "residential tenant" who has exercised those rights (and persons deriving title through any such mortgagee) are not bound by the affordable housing and other obligations in sched. 1. I return to this provision below.

60. Clause 10.1.1 contains three linked exclusions from the obligations in sched. 1:

(1) any mortgagee of a "registered social provider"; and

(2) any receiver appointed by "such mortgagee"; and

(3) any person deriving title through any "such mortgagee or receiver".

61. WCC's submissions focused on limb (3). They suggested that the expression "deriving title through any such mortgagee" requires the identification of a mortgagee in relation to a subsisting mortgage and thus the mortgagor. Then they submitted that those matters have to be identified as at the date of the transaction between the mortgagee and the person deriving title from him, typically the date when a power of sale is exercised. So, according to WCC, the exclusion does not apply unless the mortgagor is a "registered social provider" on that date. Mr Hutchings says that clause 10.1.1 is "ambulatory": the exclusion applies at any time when the mortgagor is registered under Part 2 of the HRA 2008, but not otherwise. This means that under limb (1) the mortgagee, and under limb (3) a person deriving title from a mortgagee, only have the protection of the exclusion

clause if the registered social provider remains so registered. The judge was entitled to doubt that commercial bodies would be willing to provide secured loans of substantial amounts of money where the value of their security could suddenly drop to affordable housing value simply because a RSP has been de-registered.

62. But WCC's construction would have wider consequences. They say that the exclusion in limb (3) of clause 10.1.1 only applies if at the time of the sale by the mortgagee the RSP is still registered under the Act. Supposing that it was, what happens when the transferee (or a subsequent successor in title) disposes of its interest at some point in the future? Subject only to clause 10, the obligations in the s.106 agreement bind successors in title (clause 2.2). A successor in title will therefore need to be able to rely on clause 10.1.1. But that clause would still bear the same construction as WCC advances in this appeal. The transferee will not be able to rely upon limb (3) of that clause if by the date he comes to dispose of his interest the RSP has been de-registered under Part 2 of the HRA 2008. Thus, the transferee, having paid general market value for the leases to the mortgagee, will only be able to sell at affordable housing value. Moreover, even if that problem does not arise on a second transfer, the risk of deregistration will hang over subsequent dispositions of the leases. Although WCC's construction suits its case as it applies to the events which took place here, it proves too much.

63. In my judgment WCC's construction of clause 10.1.1 does not represent the natural meaning of the words used. Part of the problem is that it fails to read limb (3) in the context of the two preceding limbs. WCC contended that limb (2) is also ambulatory in that a mortgage must have been granted by a mortgagor who remains registered under Part 2 of the HRA 2008, but in this case at the date when a receiver is appointed by the mortgagee, and not also at the subsequent date when the receiver disposes of an interest to a purchaser. Clause 10.1.1 does not contain any language which would justify treating the words "such mortgagee" differently in limbs (2) and (3).

64. But what about limb (1)? On any view that is not ambulatory. A mortgagee of a RSP registered under Part 2 of the HRA 2008 on the date of the mortgage is entitled to rely on that limb from then onwards. Clause 10.1.1 simply requires that the lender be a mortgagee "of" a RSP. It refers to the mortgage relationship with a mortgagee RSP created on the date of the mortgage. There is no language in limb (1), or elsewhere in the s.106 agreement which requires that a registered RSP continues to be registered for that limb to remain applicable. It would then be inconsistent with that straightforward reading of limb (1) for a mortgagee to find that although it could rely on that limb, neither its receiver nor its transferee could rely on limbs (2) or (3) because on the dates indicated by WCC the RSP had ceased to be registered under the HRA 2008.

65. The natural reading of limbs (2) and (3) is the same as limb (1). The words "such mortgagee" provide a straightforward link, indeed the sole link, between limbs (2) and (3) on the one hand and limb (1) on the other. Limbs (2) and (3) simply refer to the mortgagee identified in limb (1). Clause 10.1.1 does not go beyond requiring the relationship of mortgagor and mortgagee, as created by the mortgage (or in the present case the deed of novation), to subsist. There is no temporal test of the kind suggested by WCC. There is no reference in limbs (2) or (3) to the mortgagor, let alone any characteristic of the mortgagor, after the date when the mortgage was created. The language and structure of clause 10.1.1, as set out in [60] above, is crystal clear and does not admit of elaborate analysis. None of the three limbs are ambulatory.

66. Furthermore, a mortgagee would not have to rely upon its power of sale and limb (3). Instead, it could rely on limb (1) and its right to foreclose. In that scenario the mortgagee would not be dependent on the mortgagor remaining registered under the HRA 2008 on the dates of foreclosure and of any subsequent disposition. WCC's response that foreclosure is not a commonly used remedy is nothing to the point. The remedy is available and may be used. There is no logical reason for limb (3) to operate in such a different way from limb (1).

67. WCC seeks to contrast the language of limb (3) of clause 10.1.1 with clause 10.1.2. The authority submits that it is significant that the latter refers to the grant by a RSP of a lease or transfer to a "residential tenant or person", indicating that the registration of the RSP needs only to be considered at the date of that disposition. With respect this argument is misconceived. Clause 10.1.2, like clause 10.1.1, falls into three parts. The second and third limbs of clause 10.1.2 are identical to limbs (2) and (3) of clause 10.1.1 and are likewise linked to the first limb of that clause by the words "such mortgagee".

68. The expanded text of the first limb of clause 10.1.2 is only necessary because its object was to describe the types of "residential tenant" or "person" (as mortgagor) whose mortgagee is entitled to rely upon the exclusion. Those types are the same as the ones defined in 10.1.4 or 10.1.5 by reference to the transactions there specified. Thus, it is necessary for the text in clause 10.1.2 to refer to the RSP granting a lease or transfer under the statutory provisions (or contractual equivalents) identified in clause 10.1.4 and 10.1.5 to a "residential tenant" or "person". In essence the first limb of clause 10.1.2 simply refers to a mortgagee of a transferee or lessee from a RSB pursuant to those provisions. Once this is understood it can be seen that the legal structure and functions of clauses 10.1.1 and 10.1.2 (and their three limbs) are essentially the same. Persons deriving title from a qualifying mortgagee are not treated differently by those two

clauses. Contrary to WCC's suggestion, there was no need for the draftsman to add any additional language into clause 10.1.1 in order for the construction adopted by the judge to be correct.

69. I come back to the point that the term "registered social provider" in the s.106 agreement is used to refer not only to a provider registered under Part 2 of the HRA 2008 but also to an unregistered provider approved by WCC's Director of Housing before being granted long leases of the 16 affordable housing units. The judge accepted WCC's evidence that the approval by WCC of an unregistered provider is generally an exception to the norm of using a registered provider [101]. Nevertheless, a proper interpretation of clause 10.1.1 and the s.106 agreement as a whole must take into account the possibility of WCC accepting this type of provider.

70. Where that happens the phrase "mortgagee of a RSP" is applied as at the date when the mortgage was created. The issue is simply whether before the grant of long leases to the RSP and the creation of a mortgage to fund that acquisition, WCC approved the unregistered RSP to be the provider of the affordable housing in the development. If the answer to that question is yes, each of the three limbs of clause 10.1.1 is applicable. If subsequently such a mortgagee should find it necessary to appoint a receiver or to exercise the power of sale, then, as Mr Elvin KC pointed out for the respondents, the second and third limbs of clause 10.1.1 are not ambulatory. The application of those provisions does not depend on the RSP continuing to fulfil any particular criterion. The qualification of the provider as a RSP, or the lender as "the mortgagee of a RSP", only has to be demonstrated at the date when the mortgage was created.

71. Clause 10.1.1 does not contain any language which could justify a different approach, namely WCC's construction, when the lender is a mortgagee of a social housing provider registered under Part 2 of the HRA 2008.

72. It is common ground that the s.106 agreement needs to be read in the context of the regime in the HRA 2008 for registered social housing providers as it was on 11 April 2013. A provider was only subject to regulation, and the moratorium provisions in the legislation only applied, if the provider was registered. WCC points out that the construction adopted by the judge enables a mortgagee to avoid the statutory moratorium by waiting until deregistration occurs before taking a step to enforce its security.

73. In my judgment this consequence has limited weight as an aid to the interpretation of the s.106 agreement. First, the statutory moratorium would not apply to an unregistered provider approved in advance by WCC. Second, the provisions for a statutory moratorium in force when the agreement was made, provided only a

limited opportunity for the Regulator to protect the 16 units as affordable housing (and the interests of the occupational tenants). A mortgagee would only suffer a delay of 28 working days to the enforcement of its security and would not have to submit to any proposals by the Regulator such as the appointment of a manager with a power to sell the RSP's interests. It was not until 5 July 2018 that the Housing and Planning Act 2016 introduced the more effective tool of a housing administration order. Third, and in any event, this argument needs to be considered in the context of a broader view of the consequences of the rival interpretations of limb (3) of clause 10.1.1.

74. In *Wood v Capita Insurance* Lord Hodge cautioned that in commercial negotiations business common sense rarely assists the court in ascertaining the final position of the centre line of the tug o' war rope when those negotiations ended [28]. But here we are not dealing with a purely commercial deal with competing objectives which are wholly mainly commercial. The s.106 agreement was entered into in order to secure planning requirements which were judged necessary to make the development acceptable in planning terms (reg. 122 of The Community Infrastructure Levy Regulations 2010 – SI 2010 No. 948). The main parties to the negotiations were WCC and the developer, not the eventual mortgagee of the eventual RSP. To some extent the planning and commercial objectives were shared by those main parties. They were pulling in a similar direction rather than opposing directions.

75. The starting point is that the s.106 agreement seeks the provision and maintenance of the 16 affordable housing units. The developer could not realise the value of the market housing units until the affordable housing was completed and made ready for occupation and for transfer on long leases of at least 99 years to a "Registered Social Provider" (para. 11.1 of sched. 1), whether regulated under the HRA 2008 or not. The developer therefore had an interest in finding such a provider, which aligned with WCC's objective. If there were to be difficulty in signing up a social housing provider, the developer would not be able to rely upon para. 11.6 to request a relaxation or discharge of the affordable housing obligation for at least one year from the date when the affordable housing units were ready for occupation. In addition to that delay, and any consequential funding costs, the developer would then face the uncertainty of determination by an independent expert if agreement could not be reached with WCC (clause 9). The developer would not be able to rely upon the modification and discharge procedures in ss.106A and 106B of the TCPA 1990 until 11 April 2018.

76. Both WCC and the developer envisaged that the RSP, whether registered or nonregistered, would be likely to have wanted secured funding for its purchase of the long leases of the affordable housing.

WCC accepts that the agreement needed to contain a mortgagee exclusion clause to encourage sufficient commercial lending for that provider. In part, the clause seeks to achieve this by allowing the mortgagee, upon a default by the provider, to realise its security by selling the affordable housing at open market value, that is as general market units (para. 45 of skeleton). In so far as the drafting of the mortgagee exclusion clause will affect the degree of risk faced by a lender when realising its security, so the clause may encourage or discourage the supply of secured funding to the RSP for the purchase of the long leases and the provision of the units.

77. Thus, WCC faced a risk, also faced by the developer, that the terms of a mortgagee exclusion clause could discourage commercial lending to the extent that a RSP might not be signed up within the one year period in para. 11.6. As a result the authority would also face the risk that no affordable housing would be provided under the planning permission, either through the operation of the procedure for expert determination and/or ss.106A and 106B of the TCPA 1990.

78. The developer and WCC also faced further risks. If the developer considered that the terms of a mortgagee exclusion clause made the obtaining of finance for a provider, and thus the obtaining of a provider, too uncertain, then given the terms of para.11.1 of sched. 1 of the agreement, the developer might not be prepared to risk investment in land transactions and the construction of the project. Instead, it could make a further application for planning permission and pursue an appeal to the Secretary of State against an actual or deemed refusal of planning permission if there continued to be a significant issue with WCC about the terms of a mortgagee exclusion clause in the accompanying s.106 agreement. The developer could put forward a unilateral s.106 obligation containing the terms it thought appropriate, conditional upon the grant of a planning permission. An Inspector could then decide on the merits of the positions adopted by the parties.

79. The upshot is that *both* WCC and the developer needed to take a realistic view in their negotiations of (1) the acceptability of the risks to which a secured lender of a social housing provider would be exposed by a mortgagee exclusion clause and (2) the weight to be attached to the moratorium regime as it stood in 2013.

80. Accordingly, little weight can properly be given to WCC’s concern about the nonoperation of the statutory moratorium compared to the risk of not obtaining secured funding from a lender, and hence a RSP, to provide the affordable housing in the first place.

81. Clause 10.1.1 begins by making it clear that the mortgagee is not bound by the developer’s obligations in the s.106 agreement, including the affordable housing obligation. A mortgagee would expect to be able to realise its security at open market value

unencumbered by those obligations. If it exercises its power of sale at a time when the RSP remains registered under Part 2 of the HRA 2008, then on WCC's construction, it is able to do so. But if the RSP ceases to be so registered, then the lender can only sell the provider's leases subject to the affordable housing obligations and therefore can only realise affordable housing value.

82. A lender would find it difficult to identify any logic in a clause which reduces the value of its security in this way simply because the borrower has become deregistered. For a substantial period of time the lender would have been able to realise full market value in the event of having to sell the mortgaged property, but it then finds that it cannot do so because of a change in circumstance over which it had no control. The judge was correct to doubt whether commercial funding could be obtained for such a proposition.

83. However, even if lenders would be prepared to enter into such an arrangement on the basis of WCC's construction, then, as the respondents point out, they would wish to be able to enforce their security at full open market value at an earlier stage so as to avoid the risk of deregistration. For example, they might structure the provisions in the loan agreement for default events to that end. The earlier realisation of the security would have been subject to the statutory moratorium provisions as they were in 2013. But the overall effect would have been to make it less likely that the units would be retained as affordable housing. This raises the question, what is the point of an exclusion clause which ceases to protect the mortgagee's security in the event of deregistration?

84. The answer to that question is put beyond doubt by the effect of WCC's construction on the mortgagee's successors in title (see [62] above). The language of clause 10.1.1 agreed by the parties did not have such unreasonable consequences.

Conclusion

85. For all these reasons, I conclude that under limb (3) of clause 10.1.1 a person deriving title to an affordable housing unit in Gems House from a mortgagee of that property, is not bound by the developer's obligations in sched.1 to the s.106 agreement if, when the mortgage was created, the mortgagor was a registered social provider within the meaning of that agreement. For that exclusion to apply it is not necessary that the provider was also registered under Part 2 of the HRA 2008 when the unit was transferred to a successor in title.

LORD JUSTICE MILES

86. I agree.

SIR COLIN BIRSS, CHANCELLOR OF THE HIGH COURT

87. I also agree.

Appendix 3

Inside Housing article entitled “Security Blanket” dated 15th August 2008

Security blanket

INSIGHT 15.08.08 12.00 AM BY GENE ROBERTSON

A mortgagee exclusion clause within a section 106 planning agreement enables a mortgagee, in the event of a default by a registered social landlord under its loan agreement, to enforce its security and sell the mortgaged property free of the provisions contained within an agreement that normally restricts the ability of the owner to sell such property.

What is the preferred position of a bank lending to a social landlord?

Landmark ruling confirms landlords can be permitted forced access to homes for safety inspections

Death of man who fell from collapsed railing at association block being investigated as possible corporate manslaughter

Making community energy work for social housing
Sponsored by Sureserve

The preference of any lending bank would be for an agreement to contain an unqualified exclusion clause, so that the bank can be certain that if the social landlord defaults, it can recover the money it has lent by realising its security for the best possible value without delay.

Any type of restriction on an exclusion clause will raise concerns with lending banks.

However, it is becoming common for exclusion clauses to contain restrictions on the freedom of a lender to dispose of mortgaged property by imposing a delay of three months to two years before it can sell the property on the open market.

What is the position of a local authority?

The preference of any local authority would be for an agreement not to have any exclusion clause at all. Local authorities are concerned to ensure that affordable housing stock, partly funded by public money, is preserved by imposing restrictions in an agreement on the mortgagee’s power to dispose of the property on default.

What are the consequences if there is either a restricted or no exclusion clause?

It may affect how much a bank is prepared to lend to a social landlord for a development which is subject to an agreement, or the cost of that loan, or even whether to lend at all.

If the bank considers that the restrictions on selling are excessive it may only lend against the ‘existing use’ value rather than ‘market value, subject to tenancies’ of the property.

This can severely limit the borrowing capacity of a social landlord and might affect its ability to take on development projects.

Can the local authority rely on any other protection for the preservation of social housing stock?

Before the mortgagee of a social landlord can enforce its security, there is a 28-day moratorium while the Housing Corporation decides what to do with the distressed landlord, including considering the possibility of a transfer of engagements to an alternative social landlord.

The moratorium can, and is likely to be, extended and does provide protection for the public purse and social housing stock, as has been shown in the case of Ujima Housing Association.

One could argue that a further delay imposed by an agreement is unnecessary.

The Law Society has drawn up a model section 106 agreement that provides a delay of three months in the exclusion clause before a lender can enforce a sale of the mortgaged property without any restriction on the open market.

This has been supported by the Council of Mortgage Lenders and has generally been accepted by lending banks.

But the debate is certain to continue, given the current economic climate.

Patricia Umunna and Shelley Chadda are solicitors at Winckworth Sherwood.
pumunna@wslaw.co.uk; schadda@wslaw.co.uk

Add New Comment

You must be logged in to comment.

RELATED STORIES

For general enquiries you can contact Inside Housing at:
Suite 6.04, Exchange Tower,
1 Harbour Exchange Square,
London,
E14 9GE
Tel: 0207 772 8300

Appendix 4

Article entitled “Safe as Houses? Insolvency in the social housing sector”, authored by Nicholas Levy, partner at Trowers & Hamlins LLP dated 1st October 2024

Safe as Houses? Insolvency in the social housing sector

01 October 2024

By Nicholas Levy

In this article, we explain the background and operation to a special administration regime that relates to registered providers of social housing (RPs).

These bodies are crucially important to the provision of affordable housing in the UK. They are subject to oversight by the Regulator of Social Housing. The sector has historically been very stable, with only a few incidences of RPs suffering financial adversity. However, no sector is immune from the vagaries of the economy or poor strategic or operational judgments.

Part of this risk is mitigated by the variety of tools that the Regulator has long had to oversee and intervene in operations that do not meet its standards. There has also long been a tool that gives the Regulator a chance to find a solution if an RP or one of its creditors takes a step towards a formal insolvency process. This is currently found in section 143 onwards in the Housing and Regeneration Act 2008 (2008 Act). Once initial steps to initiate an insolvency process are taken, that scheme prevents an insolvency process from continuing for a four week window within which the Regulator is able to make proposals for the ownership and management of the RP's housing stock. It also involves what is perhaps confusingly referred to as a moratorium during this four week window. Regular visitors to or practitioners in the insolvency space will be familiar with this word in other areas of the insolvency legislation, most importantly in the context of administration. A moratorium in administration restricts creditor action, enforcement of security and claims generally for the period of the administration. A moratorium under the proposals scheme in the 2008 Act simply prevents the RP's land from being disposed of without the consent of the Regulator.

The Regulator's objectives are to protect the interests of those being housed, many of whom may be vulnerable individuals, and to protect the public money that often went towards the construction or purchase of the RP's land and buildings. To do this, the housing stock must remain with the registered sector. That means that if the 2008 Act proposal process is engaged, another RP must be found who is willing to take some or all of the ailing RP's housing stock into its own portfolio. If the Regulator makes proposals that involves some or all of the ailing RP's housing stock to move to another RP, those proposals will be binding on everyone, provided all the RP's secured creditors agree.

This is a potentially powerful tool. In addition, there are certain statutory provisions applicable to the registered sector that make this process easier than it would be if dealing with commercial entities. For example, certain RPs are able to carry out what is called a "transfer of engagements". This is a transfer of all the RPs rights and liabilities to a third party assignee. Under ordinary contract law it is not possible to assign or transfer a liability or a burden. That is only possible if the party who is entitled to receive the performance of that liability is also party to the assignment (this is called a novation). However, a transfer of engagements is not so restricted: there is no need for the third party to be included in the process. It is, in effect, a statutory novation, whether or not the third party agrees.

However, whilst there are certain advantages to the process, which could potentially be very helpful in the right circumstances, it is not a panacea. The Regulator does not have carte blanche to impose its proposals. There are consultation and agreement requirements. There are also various practical issues that in theory could present challenges if a relevant situation arose and the use of these powers was under consideration. These start with the need within a short space of time to identify the RPs land interests, its secured creditors, the extent to which creditor consultation is required, its overall liabilities and any potential rescuer. Of course, these situations do not arise out of the blue, and it is likely that by the time that the use of the proposal powers arose, the Regulator will have been well aware of the situation. The Regulator has a number of powers in relation to ongoing governance which are likely to have been exercised. These include the ability to make appointments to an RP's board. However, even though it is likely that some of these powers will already have been exercised and prior background work to a potential rescue will have been carried out, the timescales for the process remain very compressed. 28 days might sound feasible, but this period needs to include time to consider, potentially consult on, finalise and have proposals approved, whilst in the meantime lining up the prospective rescuer who may not feel there is sufficient time to make an informed bid for the assets. Whilst it is possible for the Regulator to extend the 28 day time period with the consent of the RP's secured creditors, this remains an uncertain process. This is not least in part due to the fact that each secured creditor has to agree the proposals, which may not happen.

It was recognition of these potential shortcomings that led the Regulator to seek a more sophisticated tool. This ultimately culminated in the introduction of housing administration in the Housing and Planning Act 2016 (2016 Act). This is a "special administration" process. There are examples of other special administrations on the statute book. They all concern the provision of some public service and the special administration process in each case is designed to protect the delivery of that service, or those who are affected by it. These include examples in the banking, education and utilities sectors. Each are likely to have some common themes but there will be differences, some significant.

Housing administration follows the scheme of ordinary administration, but applies certain new provisions and disapplies others (s102 and schedule 5 of the 2016 Act and see also The Housing Administration (England and Wales) Rules 2018). Unlike ordinary administration, it is only available by court order, on the application or with the consent of the Secretary of State. The objectives of ordinary administration are:

1. rescuing the company as a going concern, or
2. achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
3. realising property in order to make a distribution to one or more secured or preferential creditors.

In housing administration, the objectives are the same as those in ordinary administration (i.e., those set out above), but also include an additional objective: to keep social housing in the regulated sector (ss96, 97 Housing and Planning Act 2016). However, whilst the housing administrator should work towards both objectives, the objective to keep social housing in the regulated sector only applies to the extent that it does not result in a worse outcome to creditors than would be the case were there no objective to keep the social housing in the regulated sector. This is a key difference to certain other special administrations, e.g., in the energy sector, where provision of the supply trumps many other considerations. It may be difficult in a specific case to determine the counter factual: i.e., what would have happened had there been no housing administration objective. This may provide some comfort to the housing administrator, should the housing objective be adopted in any such administration as it suggests that any third party challenge would, save in the clearest case, be speculative and uncertain.

The feel and look of a housing administration would otherwise look relatively similar to ordinary administration. The usual administration moratorium preventing creditor or claimant action against the insolvent entity would apply. Importantly, paragraph 71 of Schedule B1 of the Insolvency Act 1986 applies in the usual way. This prevents the housing administrator from disposing of any assets subject to a fixed charge without the consent of the relevant secured creditor or the permission of the court. Permission can only be given on terms that the net proceeds of any such disposal are applied to the sums secured by the security together with any additional sum that would produce the amount which would be realised by sale of the property at an undervalue. As any housing administration will be dealing with land, there is a high likelihood that this will be subject to fixed charges. Furthermore, there is often a difference in value between land that is subject to its existing use for housing and if sold on the open market, out of the regulated sector.

The three principal features mentioned above, namely the way the objectives work, the existence of the moratorium and the incorporation of paragraph 71 of Schedule B1 to the 1986 Act neatly encapsulate the most important concepts behind housing administration. The preservation of housing in the regulated sector is a highly important objective, but it does not trump other creditors' rights. The position of fixed charge creditors to the sector should not in the meantime be prejudiced. Secured lending provides lifeblood to the sector and prejudicing secured creditors' interests in one case could have much wider ramifications for the sector. However, where a housing administration may be appropriate, say in the case of a large and complex RP failure, the protection of the moratorium and much of the other process machinery of ordinary administration allows an orderly work through which will better protect the interests of residents and the sector.

Whilst this means that we might see housing insolvencies that do not justify housing administration, it is nonetheless notable that there has not been a single housing administration, despite the fact that the legislation has now been in place for some 8 years. This fact takes us back to the premise at the outset of this article, namely that the sector has been a stable one. All key stakeholders are keen to see this continue.

Nicholas Levy
Partner, Co-Head of Dispute Resolution

London

+44 (0)20 7423 8146

Email me

Related Services

Restructuring and insolvency

Appendix 5

RSH's written evidence to the House of Lords Industry and Regulators Committee Inquiry on regulators and growth (dated 19 January 2026)

Written evidence from the Regulator of Social Housing (RSH) (RAG0084)

Thank you for inviting us to share our views about the role of regulators in relation to economic growth, as part of the Committee's inquiry into regulators and growth (the Inquiry). We welcome the Inquiry and thank the Committee for its work.

In our response, we have provided an overview of our role, as well as responding to the specific questions you put to us.

Our role

1. The Regulator of Social Housing (RSH) regulates for a viable, efficient, and well governed social housing sector able to deliver more and better social homes.

2. We regulate at the landlord level to drive improvement in how landlords operate. These can either be local authorities, or private registered providers (PRPs, such as non-profit housing associations, co-operatives, or profit-making organisations). We set economic and consumer standards which state outcomes that landlords must deliver. We have a different role for regulating local authorities than for other landlords. This is because we have a narrower role for local authorities and the Governance and Financial Viability Standard, and Value for Money Standard do not apply.

3. Regulation of the social housing sector supports its ability to raise private finance to invest in new and existing social housing. The sector's total agreed borrowing facilities reached £138.1 billion at the end of September 2025. The sector's ability to attract private finance is fundamental to supporting the government's target to build 1.5 million homes in the current parliament.

How do you feel you are able to support growth, particularly if you do not have a formal growth duty already?

4. Our role is aligned with the Government's growth mission and enabling the delivery of growth is built into our regulation. Our economic objective, which applies to PRPs includes supporting the delivery of social homes, encouraging and promoting private investment and ensuring value for money is obtained from public investment in housing. Our regulation requires social landlords to maximise their efficiency and make optimum use of their resources.

5. We effectively balance our new supply focused objectives with others for social housing quality, but those other objectives also support growth. The standards we set for housing quality, energy efficiency and safety drive substantial improvements and investment in social housing assets with multiplier effects in job creation and the construction sector supply chain. They also support innovation in the delivery of zero carbon technology for homes. Standards for landlords' service quality encourage a well-run sector delivering good outcomes for tenants which supports investment and growth.

6. Ensuring our regulation does not impose undue burdens on social landlords is written into our founding statute. We have a statutory duty to minimise interference and (as far as possible) act proportionately, consistently, transparently, and accountably. Our principles of regulation align with this duty,

and we have designed our regulatory functions to deliver our fundamental objectives in a way that minimises interference with organisations and enables innovation and growth.

7. We set standards for the outcomes that landlords are expected to deliver, rather than prescribing onerous rules for landlords to follow. Our outcomes focus means landlords are free to innovate to help them maximise benefit from resources and assets. It also supports a dynamic and diverse sector that includes charities, local authorities and non-profit private registered providers (PRPs), as well as for-profit providers of social housing.

8. We take a proportionate approach to regulation focusing on driving improvement in social landlords registered with us and ensuring that PRPs are well-governed, financially viable and deliver value for money in providing good quality homes and services to tenants. Where we judge that there are serious failings in a landlord delivering the outcomes of our standards, we hold them to account and require improvements.

9. Our regulation boosts lender and investor confidence which maintains a low cost of capital for the PRP sector (meaning more and better homes get built), protects the taxpayer and generates other economic benefits, as well as supporting innovation.

What does growth mean for you and your sector?

10. For RSH and the social housing sector growth is about registered landlords having the capacity and capability to deliver more and better social homes. To deliver this our regulation supports investment through boosting lender and investor confidence, requires landlords to demonstrate that they optimise value for money from investment, as well as supporting landlords to innovate to help them overcome delivery challenges within existing business models and approaches. There are a range of positive economic (and social) impacts of building and managing social housing, including savings for government.

Supporting investment to deliver more and better homes

11. *The demand for social housing is higher than ever and is expected to continue to grow. Our regulation supports the Government's commitments to build more social and affordable homes and drive further improvement in the quality of social housing.*

12. Our work to ensure the sector is well-governed and financially viable supports PRPs' capacity and capability to sustainably invest in new supply and existing homes by creating the conditions to attract private investment. Our regulation of the sector maintains investor confidence, ensuring that landlords can access private finance at rates which reflect that confidence and government investment.

13. The strength of our regulatory framework is key for investor confidence. Credit rating agencies take account of our regulatory framework in their credit ratings of PRPs[1], and it is a factor that lenders and investors to the sector take account of in their pricing of debt and investment decisions. PRPs can access private finance on competitive terms and maintain a low cost of capital which supports PRPs' capacity to develop new homes and contribute to the Government's ambition to build 1.5 million new homes over the next five years.

14. While we do not guarantee the obligations of PRPs, we have a strong record of preventing and resolving issues in PRPs when they arise. As a result, PRPs have £138bn of private finance borrowing facilities currently agreed.[2] For large PRPs, £36.6bn of new finance was arranged in the three years to September 2025.[3] The sector's access to private finance has grown over the years. Total facilities from September 2019 to September 2025 grew from £99.8bn to £138.1bn[4] with a net increase of 225,562 social housing units over a similar period[5].

15. Despite development of new housing being a more challenging activity than in the recent past (with the impacts of inflation, contractor insolvency and higher interest rates), the number of new social homes PRPs delivered in the year to 31 March 2025 was consistent with the previous year, with a total of 54,000 completions.[6] PRPs are planning to raise £49bn of new additional facilities by March 2030.[7]

Economic benefits of more and better homes

16. Social landlords' focus on both the quality and supply of social housing supports economic growth, and despite financial pressures, landlords are investing record amounts in new and existing stock. In the 12 months to September 2025, landlords invested £13.2 billion in the acquisition and development of housing.[8]. In addition, a record £9.3bn was spent by landlords on repairs and maintenance, 10% higher than the £8.4bn incurred in the previous year.[9]

17. Recent reports have outlined the positive economic (and social) impact of building and managing social housing.[10] In addition to the significant economic activity related to construction (including jobs), recurring economic benefits arise from the management of increased social housing stock, savings on housing benefit expenditure and wider indirect benefits including alleviating homelessness, increased employment and savings on healthcare. Management (including the maintenance) of existing social homes also generates such recurring economic benefits.

Supporting innovation and taking a risk-based approach

18. We take a proportionate, risk and assurance-based regulatory approach, focused on landlords delivering the outcomes of our standards (these are our principles of regulation). Landlords decide for themselves how to deliver the outcomes of our standards in ways that are best for their organisation and tenants. As well as our statutory duty to minimise interference, in setting regulatory standards we must have regard to the desirability of landlords being free to choose how to provide services and conduct business. Seven concise and outcomes-based regulatory standards make it clear to PRPs what they must deliver, and our landlord level regulation means the focus is on the outcomes landlords are delivering overall.
Our codes of practice amplify our standards and help landlords understand how they might deliver the outcomes we expect, balancing regulatory flexibility with predictability for providers.

19. Our regulatory standards empower registered landlords to pursue innovation as a way of achieving increased benefit from resources and assets. That innovation could be, for example, technological or a new business model. This is particularly important as the social housing sector is under significant pressure to increase housing supply and new approaches and models will need

to play a part. Whatever the innovation may be, our focus is on landlords delivering the outcomes of our standards, not *how* a provider delivers them.

20. Social landlords are independent organisations and their boards and governing bodies are responsible for how they are run and the outcomes they deliver. This is reflected in our co-regulatory approach.

21. Our approach is also risk based but not risk averse, which supports our ability to facilitate growth and innovation. This is built into our objectives: for example our economic objectives to encourage private investment and support new social housing delivery. A risk-based approach helps us to ensure we are proportionate, smart and targeted in our regulation and put our resources to best use scrutinising more closely areas of higher risk to prevent significant harms. Preventing harms, including reputational harms to the sector, is important to maintaining investor confidence.

22. Where things do go wrong, we work with a landlord to ensure that they put things right. We drive sustainable improvement through requiring the landlord to identify root causes and implement an improvement plan. It is rare that we need to use our enforcement powers, and where do, we take a proportionate approach and apply what we consider to be the most appropriate power, or combination of powers available.

23. To deliver our work effectively, we have built a highly skilled workforce with expertise in finance, governance, risk management and consumer issues. By continuously reviewing our capacity, recruiting specialists in areas like corporate finance and legal structures, engaging with key stakeholders (including the businesses we regulate, government, investors, tenants and other regulators) we are well-equipped to regulate a diverse and evolving sector, ensuring it remains attractive to investors and can deliver growth, including by encouraging innovation. The regulated sector has evolved under our existing framework to, for example, accommodate new entrants such as for-profit providers. This demonstrates our agility as a regulator, as well as our commitment to supporting growth including through non-traditional social housing providers. For-profit providers accounted for 20% of the net increase in social stock (low-cost rental and low-cost home ownership) across the sector between 2024 and 2025.[11]

Value for Money

24. Our Value for Money Standard[12] sets an expectation that PRPs deliver value for money and constrained resources increase the importance of this. PRPs must ensure that they achieve optimal benefit from their resources and assets. They must continue to maximise their efficiency and effectiveness in delivering their strategic objectives, including through innovation as appropriate. This helps to ensure PRPs focus on getting the most out of their businesses and do not stand still but seek to improve and grow. We expect all landlords (both PRPs and local authority registered providers) to have a good understanding about the condition of their homes, and this drives better financial planning and value for money as providers take a more proactive and planned approach to maintaining homes.

Neighbourhood and communities

25. Registered landlords also contribute to the neighbourhoods and communities in which they have homes, working with local communities and other partners (such as local authorities). Our Neighbourhood and Community Standard[13] sets an expectation that all registered landlords play a role in

promoting the social, environmental and economic wellbeing in the areas they provide social housing and co-operate with local partners to support those areas. Social housing landlords operating in areas with weaker local economies play an important role as anchor businesses in their localities.

What changes are you making or planning to your strategic direction to meet the Government's ambitions for regulators to tackle complexity, reduce uncertainty and shift risk aversion? We would also like to hear about any specific actions you are taking to support growth, or to reduce the administrative burden of your regulation.

26. We are committed to supporting the Government's economic growth mission through our regulation of social landlords registered with us. The Ministry of Housing Communities and Local Government's (MHCLG) recent Public Bodies Review[14] concluded that we are a well-run organisation that demonstrates no fundamental weaknesses across our operations. As part of the government's commitment to build more social and affordable homes, drive up standards, and ensure social housing landlords remain financially sound, MHCLG identified key areas where it will work collaboratively with us to further strengthen our ability to deliver. This includes considering how the regulatory system may need to evolve in the future to respond to any new changes to the social housing sector (which is captured in our corporate plan 25-28).

27. Our corporate plan 2025-28[15] sets out how we will regulate for more and better homes and our corporate priorities are aligned to economic growth. In the delivery of our statutory role, we will focus on:

- **Maintaining confidence** - maintaining stakeholder and investor confidence in social housing by sharing our insight, research and analysis to enable landlords to respond appropriately to sector risks, challenges and opportunities and deliver more quality homes and landlord services.
- **Driving improvement** - delivering improved outcomes for current and future tenants of social housing through our robust regulation of registered landlords.
- **Working with others** - informing the development and delivery of effective social housing policy, by working with a range of stakeholders, including tenants and government.
- **Building the organisation** - developing and maintaining a diverse, skilled and engaged workforce, by creating an inclusive culture that enables continuous learning and having corporate functions and systems that support and enable effective regulation.

28. In our corporate plan 2025-28 we have set out the high-level activities which will support the delivery of our four strategic objectives. Activities relevant to the Government's ambitions for regulators to tackle complexity, reduce uncertainty and shift risk aversion are set out below:

- We are carrying out strategic reviews of our regulatory approach and our understanding of the sector environment to ensure they remain effective in achieving our vision for more and better homes in a changing landscape. The outcome of this work will feed into projects focussed on key elements of our regulatory framework including a review of our economic standards and our approach to registrations, which will include consideration of how we can ensure further growth of the sector.
- We are developing a new data strategy to ensure that we are gathering the data and intelligence that we need to support our risk-based regulation as the sector evolves. We will also review our programme of strategic analysis and regular analytical publications so that we continue to inform

stakeholders' understanding of key trends and risks in the sector and maintain confidence in social housing.

- We will continue to work closely with other regulators to avoid duplication in and provide clarity about the regulatory landscape.
- We will continue to challenge ourselves on the effectiveness of our approach through impact analysis of our activities and will also develop new ways of evidencing the impact of our economic regulation. We will seek to gather insights about the influence and impact our economic regulation has on individual landlords and the growth of the wider social housing sector.

29. We will continue to seek views from stakeholders, through regular engagement across all of our key stakeholders and stakeholder surveys, to monitor confidence in our regulatory framework and approach and inform operational development. As part of our work to develop our performance monitoring, we have refreshed our key performance indicators (KPIs). Our KPIs are quantitative measures that can be tracked over time to indicate our performance in delivering the strategic objectives of our corporate plan. Our revised KPIs should help us and other stakeholders to better hold us to account for our performance.

30. We welcome this inquiry on regulation and growth and if you require additional information or have any further questions, please do get in touch with us.

19 January 2026

[1] For example, see https://ratings.moodys.com/api/rmc-documents/425582
[2] Quarterly survey for Q2 (July to September 2025) - GOV.UK
[3] Quarterly survey for Q2 (July to September 2025) - GOV.UK
[4] Quarterly survey for Q2 (July to September 2025) - GOV.UK
[5] Private registered provider social housing stock and rents in England 2024 to 2025 - GOV.UK
[6] Draft 2025 Global Accounts of private registered providers
[7] Draft Financial Forecast Return 2025
[8] Quarterly survey for Q2 (July to September 2025) - GOV.UK
[9] Quarterly survey for Q2 (July to September 2025) - GOV.UK
[10] Cebr_report.pdf, Building-the-homes-we-need-web.pdf
[11] Private registered provider social housing stock and rents in England 2024 to 2025 - GOV.UK
[12] Value for Money Standard and Code of Practice - GOV.UK
[13] See our Neighbourhood and Community Standard - GOV.UK
[14] Government concludes Public Bodies Review of the Regulator of Social Housing - GOV.UK
[15] Regulator of Social Housing Corporate Plan 2025-2028 - GOV.UK

We use three types of cookies. You can choose which cookies you are happy for us to use.

Read our cookie policy for more information

Essential cookies

These cookies always need to be on as they help to make our website work. Essential cookies are a site's basic form of memory, so they do things like remember if you are logged in to a part of the website.

You may be able to block these cookies by changing the preferences on your browser, but this can limit you from accessing our online services.

Analytics cookies

- [x] On

We use analytics tools to collect data on how people use our website to help make improvements.

These cookies let us understand how people access our site, where they are accessing from, what pages they visit and what technology they are using.

Marketing cookies

- [x] On

These cookies may be set by third-party sites and help ensure our marketing content is relevant, timely and interesting to you.

It also helps to measure and improve the effectiveness of our advertising campaigns.

Save cookie settings Close cookie settings

Appendix 6

S&P Global Rating dated 5th November 2025 relating to [RP1]

[redacted]

November 5, 2025

This report does not constitute a rating action.

Primary Contact

Tim Chow, CFA
London
44-2071760684
tim.chow
@spglobal.com

Secondary Contact

Colleen Sheridan
London
44-20-7176-0561
colleen.sheridan
@spglobal.com

Analytical Group Contact

Sovereign and IPF EMEA
SOVIPF
@spglobal.com

Credit Highlights

Overview

Enterprise profile	Financial profile
[redacted] planning on stock investment has reduced its financial headroom, but its credit quality remains underpinned by a strong market position and focus on traditional social housing activities.	We project that the improvement in [redacted] financial metrics will be gradual from a weak level in fiscal 2025.
[redacted] focus on social and affordable housing rental, and relatively contained exposure to more cyclical sales activities, should provide a stable and predictable revenue.	[redacted] substantial investment needs in existing homes will keep its financial performance subdued.
--Demand for [redacted] properties should remain high, supported by significantly lower average general needs rents than market rents in its areas of operations across London and Southeast England.	--Reduced targets for new home development and continued disposals of noncore assets will moderate debt intake, but the debt burden will remain high.
--Management is actively taking actions to mitigate cost pressures, but the positive impacts need time to fully materialize.	--We estimate the group's liquidity will remain very strong, backed by large undrawn facilities.

[redacted] large investment program in existing properties will mute the financial improvements in the medium term. The group underperformed in fiscal 2025 (ended March 31, 2025) resulting in adjusted EBITDA margin dipping below 10%. Spending will continue to be high, however, covering building safety works and investment in energy efficiency, as well as ongoing repairs and maintenance. We expect management's cost-saving initiatives could only slightly offset the cost pressures.

The debt burden remains high, despite property sales and reduced new developments. S&P Global Ratings observed that the group's development sales activities have progressed more slowly than expected, which would delay its plan to lower debt. Also, while the group's noncore and void property disposals will help fund investments, the timing of receiving cash proceeds from property sales is uncertain, as they are subject to external market conditions. The group is scaling back its development of new homes which will slow debt buildup, but we project the debt level will remain high.

Outlook

The stable outlook reflects our view that the group will effectively execute its measures to contain investments in existing and new homes in line with our base-case assumptions. At the same time, we anticipate that [redacted] will generate funds through new home sales and asset disposals, which should lead to a gradual recovery of credit metrics.

Downside scenario

We could lower the rating on [redacted] if management loosens control over investments in new or existing homes, or if unfavorable market conditions hinder its plans to sell properties. We consider that this could prevent or slow a recovery of the group's financial metrics, such that S&P Global Ratings-adjusted EBITDA margin falls toward 10% or adjusted nonsales EBITDA interest coverage stays below 0.5x on a sustained basis.

Furthermore, we could lower the rating if we revise downward our view of the likelihood of extraordinary support to [redacted] from the U.K. government in the event of financial distress.

Upside scenario

We could raise the rating on [redacted] if management successfully navigates the risks associated with investment in existing homes, resulting in a sustained material improvement of performance with adjusted nonsales EBITDA interest coverage recovering toward 1x.

Rationale

Enterprise profile: Underpinned by a robust market position in London and a strong focus on social and affordable rented properties

[redacted] is one of the largest housing associations in England. With more than [redacted] units in its portfolio across London and Southeast England, it should have more financial and operational resources than most peers to absorb external shocks and fund its investments. We think demand for its properties will remain high because its average general needs rent--about 39% of the prevailing market rent--is low compared with that of peers. We consider the group's average vacancy rate of 1.5% over the past three years is on par with the sector average in England.

[redacted] will remain focused on the social and affordable housing rental sector, where revenue is more predictable and less cyclical than sales activities. In our view, the group will limit its exposure to market sales in tandem with its ongoing plan to reduce new home development. We project exposure to sales income, including that generated by joint ventures, will be contained to less than 25% of the group's adjusted revenue on average over the next two to three years.

The group's plan to catch up on investing in its existing properties is constraining its financial capacity. The group is increasing visibility in the stock conditions by progressing to achieve all its stocks surveyed within five years from the current 80% level. While this will enhance the group's ability to plan investment for its housing portfolio, the required investment level remains high, reflecting the group's larger exposure than peers in the rest of the country to high rises in London. The group's continued plan to reduce development targets will help balance the cost pressures. It is also proactively generating more resources to accommodate the large investment in existing homes, through generating cost efficiencies and divesting noncore and void assets. However, the outcome of these actions has been below our previous expectations and depends on external market conditions. We expect they need time to materialize, which will prolong the recovery time of the financial metrics.

We assess the regulatory framework under which registered providers of social housing in England operate as strong (see "Regulatory Framework Assessment: Strong For Social Housing Providers In The U.K.," April 17, 2025).

Financial profile: Management's actions should support a gradual recovery of credit metrics

We forecast that the group's high level of investment in existing homes will limit the improvement of the financial performance, leading to the adjusted EBITDA margin reaching a relatively modest 15% only by the end of fiscal 2028. The spending will remain substantial in the next two to three years to remediate its high-rise blocks and achieve its goal for the remaining approximately 20% of its stocks to be at Energy Performance Certificate C or above by 2030. We project that the group's rent increases will outpace inflation, and together with potential grant funding and recoveries, will help support an improvement of the margins from the currently weak level.

The group's plan to lower the debt burden will require time. Although the group is reducing its overall development program, the current level of capital expenditure remains high so as to complete the committed schemes before dropping off in fiscal 2028. We forecast the group's elevated debt levels ,despite growing adjusted EBITDA, will weigh on its debt metrics, with the adjusted nonsales EBITDA interest coverage remaining below 0.7x and debt to adjusted nonsales EBITDA exceeding 30x through fiscal 2028.

We view [redacted] liquidity as strong. The group's liquidity sources cover its uses by approximately 1.4x in the next 12 months. We forecast liquidity sources of about £1.5 billion, which comprise cash, undrawn and available revolving credit facilities, fixed asset sales, grant receipts, and cash from operations (after adding back the noncash cost of sales). This will cover liquidity uses of about £1.1 billion--mainly capital expenditure and debt service payments. At the same time, we believe Peabody Trust retains strong access to external liquidity, if needed.

Government-related entity analysis

We think there is a moderately high likelihood that [redacted] would receive timely extraordinary support from the U.K. government in the case of financial distress. This provides a two-notch uplift from the stand-alone credit profile. Since one of the key goals of the Regulator of Social Housing (RSH) is to maintain lender confidence and low funding costs across the sector, we think it is likely the RSH would intervene to try and prevent a default in the sector. We base this view on previous instances where the RSH has mediated mergers or arranged liquidity support from other registered providers in cases of financial distress, and we think this would also apply to [redacted]

Key Statistics

[redacted]-Financial statistics

	--Fiscal year ended March 31--				
Mil. £	**2024 A**	**2025 A**	**2026 BC**	**2027 BC**	**2028 BC**
Number of units owned or managed	108,823	108,902	109,580	110,099	110,323

[redacted]

[redacted]--Financial statistics

Mil. £	--Fiscal year ended March 31-- 2024 A	2025 A	2026 BC	2027 BC	2028 BC
Adjusted operating revenue	972.0	1,011.0	1,078.8	1,142.3	1,227.3
Adjusted EBITDA	143.0	89.0	143.3	160.1	194.5
Nonsales adjusted EBITDA	128.0	78.0	130.4	145.7	177.4
Capital expense	513.0	359.0	547.9	469.4	288.9
Debt	4,835.0	5,079.0	5,364.0	5,434.4	5,398.6
Interest expense	223.0	237.0	234.9	242.3	242.8
Adjusted EBITDA/Adjusted operating revenue (%)	14.7	8.8	13.3	14.0	15.8
Debt/Nonsales adjusted EBITDA (x)	37.8	65.1	41.1	37.3	30.4
Nonsales adjusted EBITDA/interest coverage(x)	0.6	0.3	0.6	0.6	0.7

a--Actual. e--Estimate. bc--Base case reflects S&P Global Ratings' expectations of the most likely scenario. N.A.--Not available.

Rating Component Scores

[redacted]--Ratings score snapshot

Enterprise risk profile	3
Industry risk	2
Regulatory framework	3
Market dependencies	2
Management and governance	4
Financial risk profile	4
Financial performance	5
Debt profile	6
Liquidity	2
Stand-alone credit profile	bbb-
Issuer credit rating	BBB+

S&P Global Ratings bases its ratings on nonprofit social housing providers on the seven main rating factors listed in the table above. Our "Methodology For Rating Public And Nonprofit Social Housing Providers," published on June 1, 2021, summarizes how the seven factors are combined to derive each social housing provider's stand-alone credit profile and issuer credit rating.

Related Criteria

- General Criteria: Environmental, Social, And Governance Principles In Credit Ratings, Oct. 10, 2021
- Criteria | Governments | General: Methodology For Rating Public And Nonprofit Social Housing Providers, June 1, 2021
- General Criteria: Group Rating Methodology, July 1, 2019
- General Criteria: Rating Government-Related Entities: Methodology And Assumptions, March 25, 2015
- General Criteria: Methodology: Industry Risk, Nov. 19, 2013

- General Criteria: Principles Of Credit Ratings, Feb. 16, 2011

Related Research

- United Kingdom, Oct. 13, 2025
- U.K. Economic Outlook Q4 2025: Inflation And Labor Costs Are A Persistent Challenge, Sept. 23, 2025
- Regulatory Framework And Systemic Support Assessments For Nonprofit Social Housing Providers, Sept. 10, 2025
- European Housing Markets: Strong Demand And Weak Supply Will Keep Prices High, July 10, 2025
- U.K. Social Housing Providers: Extra Development Grants Won't Improve Financial Headroom, June 26, 2025
- Non-U.S. Social Housing Providers Ratings Risk Indicators: Stabilization At Lower Levels, May 12, 2025
- Non-U.S. Social Housing Providers Ratings History: April 2025, May 12, 2025
- U.K. Social Housing Borrowing 2025: Focused On Containing Debt, April 24, 2025
- Regulatory Framework Assessment: Strong For Social Housing Providers In The U.K., April 17, 2025
- Non-U.S. Social Housing Sector Outlook 2025: Quality Maintenance Constrains Recovery, Jan. 14, 2025
- The Autumn Budget Kicks Off A Funding Regime Revision For U.K. Public Sector Entities, Nov. 5, 2024
- U.K. Social Housing Providers' Financial Capacity Shrinks On Investment Needs, Nov. 4, 2024
- Cyber Risk Brief: U.K. Public Sector Is Increasingly Under Threat, Oct. 24, 2024

Ratings Detail (as of November 05, 2025)*

[redacted]	
Issuer Credit Rating	BBB+/Stable/--
Senior Secured	BBB+
Senior Unsecured	BBB+
Issuer Credit Ratings History	
01-Jul-2025	BBB+/Stable/--
07-Oct-2022	A-/Negative/--
20-Aug-2021	A-/Stable/--

*Unless otherwise noted, all ratings in this report are global scale ratings. S&P Global Ratings' credit ratings on the global scale are comparable across countries. S&P Global Ratings' credit ratings on a national scale are relative to obligors or obligations within that specific country. Issue and debt ratings could include debt guaranteed by another entity, and rated debt that an entity guarantees.

Appendix 7

Moody's Rating dated 16th February 2026 relating to [RP1]

CREDIT OPINION

16 February 2026

Update

Send Your Feedback

RATINGS

[redacted]

Domicile	London, United Kingdom
Long Term Rating	A3
Type	LT Issuer Rating - Dom Curr
Outlook	Stable

Please see the ratings section at the end of this report for more information. The ratings and outlook shown reflect information as of the publication date.

Contacts

Zoe Jankel +44.20.7772.1031
VP-Sr Credit Officer
zoe.jankel@moodys.com

James Boachie-Yiadom +44.20.7772.5298
Sr Ratings Associate
james.boachieyiadom@moodys.com

Jeanne Harrison +44.20.7772.1751
Vice President - Senior Credit Officer
jeanne.harrison@moodys.com

[redacted] (United Kingdom)

Update following rating affirmation, outlook stable

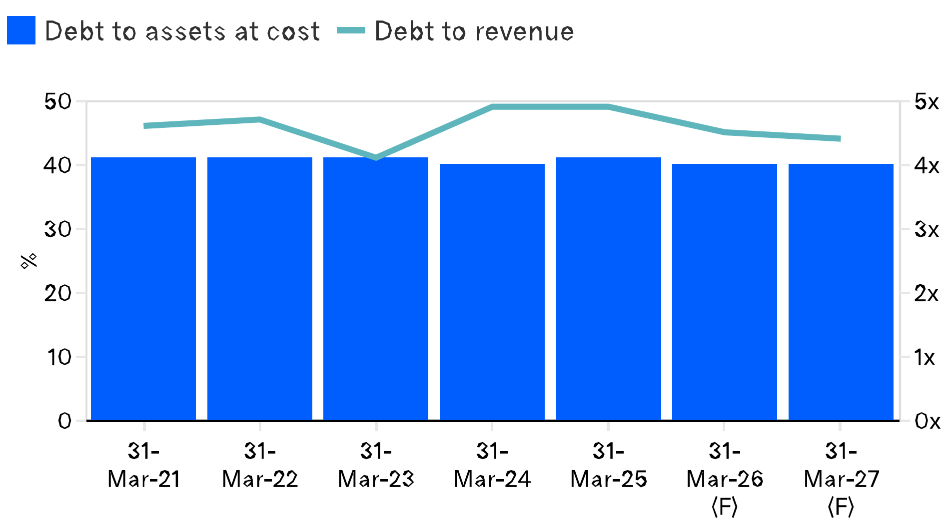
Summary

The credit profile of [redacted] A3 stable) reflects its scale as one of the largest housing associations in the UK, its strong debt metrics and its solid liquidity. Its credit profile also reflects weakened financial performance and risks relating to market sales. [redacted] benefits from the strong regulatory framework governing English housing associations and our assessment that there is a strong likelihood that the government of the United Kingdom (Aa3 stable) would act in a timely manner to prevent a default.

Exhibit 1

We expect [redacted] gearing to remain strong, and debt to revenue to strengthen over the medium term

Debt to assets at cost (%, LHS) and debt to revenue (RHS), fiscals 2021 to 2027



Source: [redacted] Moody's Ratings

Credit Strengths

» Large housing association with strong balance sheet and robust debt metrics

» Solid liquidity

» Supportive institutional framework in England

Credit Challenges

» Weakened financial performance

» High exposure to market sales

Rating Outlook

The stable outlook reflects our view that [redacted] financial performance will improve and its debt metrics remain broadly stable over the medium term.

Factors that Could Lead to an Upgrade

Upward pressure on the ratings may occur if financial performance is substantially better than expected, if there is a significant reduction in debt or a marked increase in government support for the sector.

Factors that Could Lead to a Downgrade

The ratings could face downward pressure if financial performance deteriorates further, debt growth is much higher than anticipated or if there is less government support for the sector.

Key Indicators

Exhibit 2

[redacted]

	31-Mar-21	31-Mar-22	31-Mar-23	31-Mar-24	31-Mar-25	31-Mar-26 (F)	31-Mar-27 (F)
Units under management (no.)	66,257	66,916	105,531	106,917	107,139	108,683	109,951
Operating margin, before interest (%)	22.9	20.0	16.7	17.3	13.8	18.6	18.4
Net capital expenditure as % turnover	51.0	58.9	28.2	49.9	46.2	37.0	21.0
Social housing letting interest coverage (x times)	1.8	1.7	0.9	0.8	0.7	0.8	1.0
Cash flow volatility interest coverage (x times)	(1.3)	(0.5)	1.6	0.5	0.7	1.5	1.7
Debt to revenues (x times)	4.6	4.7	4.1	4.9	4.9	4.5	4.4
Debt to assets at cost (%)	40.6	40.9	40.1	40.9	41.9	42.0	41.0

Source: [redacted] *Moody's Ratings*

Profile

[redacted] is one of the UK's largest housing associations, operating primarily across London and the Home Counties. It manages around 107,000 units. The group focuses predominantly on low-risk social housing lettings with high exposure to market sales, including joint ventures (JVs).

Detailed Rating Considerations

On 12 February, we affirmed the BCA and ratings of [redacted] and maintained the stable outlook.

[redacted] A3 ratings combine: (1) its Baseline Credit Assessment (BCA) of baa2; and (2) a strong likelihood of extraordinary support coming from the UK government in the event that [redacted] faced acute liquidity stress.

Baseline Credit Assessment

Large housing association with strong balance sheet and robust debt metrics

[redacted] is one of the UK's largest not-for-profit housing associations, managing around 107,000 homes and serving approximately 220,000 residents across London and the Home Counties. The group's portfolio includes a significant proportion of unencumbered properties, with £3.9 billion of unused property security as of March 2025, supporting substantial borrowing capacity.

Gearing increased slightly to 42% in FY2025 (FY2024: 41%), remaining well below the A3 median of 52%. We expect gearing to fall below 40% from FY2028, reflecting [redacted] strategic focus on reducing development activity and prioritising investment in existing homes. Total debt is forecast to peak at around £5.3 billion in FY2026 and decline to £4.7 billion by FY2030, supported by fixed asset sales and reduced capital expenditure. Debt to revenue stabilised at 4.9x in FY2025 and is expected to decline as capital expenditure moderates.

Solid liquidity

[redacted] maintains solid liquidity, underpinned by strict liquidity management practices. As of September 2025, the organisation's liquidity resources was above £1 billion, comprising £107 million in cash and £977 million in readily accessible, undrawn, secured credit facilities. This liquidity level comfortably exceeds 1.5 times the forecast cash requirement for the next two years.

[redacted] also has access to an additional £380 million in extended, undrawn facilities, including a fully secured £100 million retained bond maturing in 2048 and £112 million in shelf facilities, of which £37 million relates to a committed NWF-backed facility requiring approval before drawdown. The organisation's liquidity policy mandates maintaining sufficient cash and committed credit facilities to cover 18 months of planned expenditures, a threshold that extends to three years when uncommitted facilities are considered.

Supportive institutional framework in England

The sector's credit quality benefits from the strong institutional framework governing English housing associations (HAs) reflected in an Operating Environment score of a2 and a Regulatory Framework score of a1. These scores are assigned at a national level and reflect the following credit considerations:

The regulator maintains strong oversight through quarterly returns, long-term business plans, annual reviews, and regular programmed inspections for HAs with more than 1,000 units. The regulator has a strong track record of intervention in cases of mismanagement or financial stress.

The operating environment for English housing associations is supportive. Demand for social housing is very high and English housing associations retain some expenditure flexibility, with a track record of controlling costs to mitigate lower income. We recently upgraded the score to a2, reflecting recent credit-positive policy announcements that will provide greater revenue certainty and expenditure flexibility to the sector, including a 10-year rent settlement at CPI+1% and more generous funding for new and existing assets.

Weak financial performance

Operating margin declined to 14% in FY2025 (FY2024: 18%), partly due to £23 million in exceptional costs. The underlying margin, excluding exceptional costs, was 16%, reflecting continued high repairs and maintenance expenditure, building safety costs, and inflationary pressures. Performance was also affected by lower-than-expected market sales.

Social housing lettings interest coverage (SHLIC) was 0.7x in FY2025, below the A3-rated peer median of 1.0x, reflecting the higher repairs and maintenance expenditure and higher interest costs from increased debt. We expect that [redacted] SHLIC will improve to an average of 1.0x over the next three years, supported by a recovery in operating performance and limited growth in interest costs. At present, [redacted] has not incorporated building safety grants into its projections, but does assume some level of contractor recovery, which is expected to support margin improvement.

High exposure to market sales

[redacted] strategy remains significantly tied to the cyclical housing market. Market sales, including joint ventures, accounted for 31% of total revenue in FY2025 and are expected to remain high, averaging 29% over the next three years. This reliance increases cash flow volatility, as reflected in the cash flow volatility interest coverage (CVIC) ratio, which declined to 0.5x in FY2024 from 1.6x in FY2023, primarily due to reduced market sales receipts. CVIC improved to 0.7x in FY2025, supported by positive working capital movements. Assuming successful delivery of planned market sales, CVIC is projected to exceed 1.0x over the next three years.

[redacted] collaborates with commercial developers in joint ventures to mitigate risks associated with market sale schemes. [redacted]

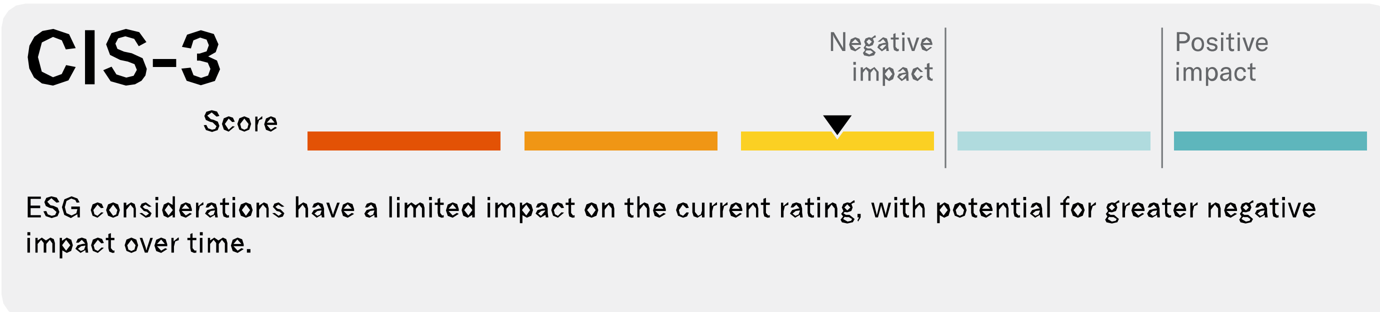
Extraordinary Support Considerations

The strong level of extraordinary support factored into the ratings reflects our view of the UK government's support for the housing association sector due to its political, economic and social importance. Extraordinary support for the sector is predominantly exercised through sector regulators whose wide-ranging powers in cases of financial distress include facilitating mergers. However, this process can be protracted and is reliant on housing associations agreeing to merge, which is more challenging in a weakened operating environment, with high expenditure pressures and high borrowing costs. In addition, our assessment that there is a very high default dependence between [redacted] and the UK government reflects their strong financial and operational linkages.

ESG considerations

[redacted] ESG credit impact score is CIS-3

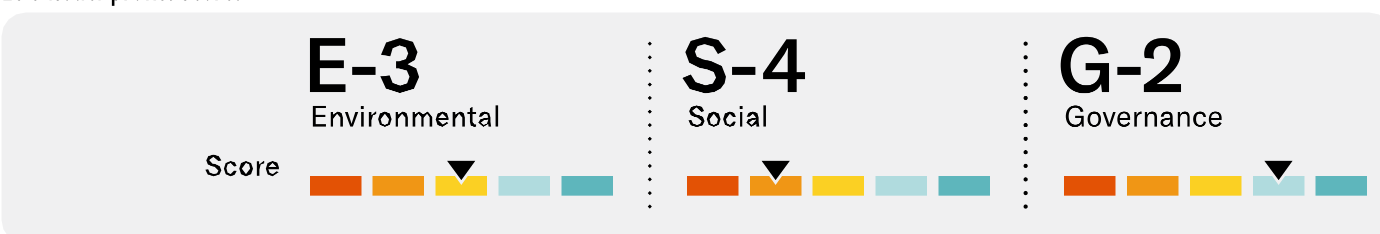
Exhibit 3
ESG credit impact score



Source: Moody's Ratings

[redacted] **CIS-3** reflects our view that ESG risks have a materially negative impact on its rating. In particular, expenditure requirements related to carbon transition and building and safety will weaken margins and increase financing needs, as well as affordability constraints for low-income tenants, which have led to government-imposed sub-inflationary rent caps.

Exhibit 4
ESG issuer profile scores



Source: Moody's Ratings

Environmental

[redacted] has a material exposure to environmental risks (**E-3**), relating to a significant proportion of its stock requiring retrofit to meet energy efficiency standards by 2030 (carbon transition risks), leading to increased expenditure.

Social

[redacted] is highly exposed to social risks (**S-4**) through sector-wide legislative requirements to improve the safety of existing housing stock (responsible production risks) for which [redacted] has considerable expenditure requirements, which will weigh on its margins and interest coverage over the medium term. [redacted] is also affected by cost of living or affordability pressures on social tenants (demographic and societal trends).

Governance

[redacted] has limited governance risks (**G-2**). Its governance is fit for purpose, with strong financial management policies and processes, detailed reporting and a somewhat more complicated organisational structure due to significant joint ventures, but we consider this mitigated by the group's strong management and governance practices. The regulatory framework also supports good governance in the sector.

ESG Issuer Profile Scores and Credit Impact Scores for the rated entity/transaction are available on Moodys.com. In order to view the latest scores, please click here to go to the landing page for the entity/transaction on MDC and view the ESG Scores section.

Rating Methodology and Scorecard Factors

The assigned BCA of baa2 is the same as the scorecard-indicated BCA outcome.

The methodologies used in this rating were European Social Housing Providers, published in July 2024, and Government-Related Issuers, published in May 2025.

Exhibit 5
Fiscal 2025 scorecard

[redacted]

Baseline Credit Assessment	Sub-factor Weighting	Value	Score
Factor 1: Institutional Framework			
Operating Environment	10%	a	a
Regulatory Framework	10%	a	a
Factor 2: Market Position			
Units Under Management	10%	107,139	aa
Factor 3: Financial Performance			
Operating Margin	5%	13.8%	baa
Social Housing Letting Interest Coverage	10%	0.7x	b
Cash-Flow Volatility Interest Coverage	10%	0.7x	b
Factor 4: Debt and Liquidity			
Debt to Revenue	5%	4.9x	ba
Debt to Assets	10%	41.9%	ba
Liquidity Coverage	10%	1.5x	a
Factor 5: Management and Governance			
Financial Management	10%	baa	baa
Investment and Debt Management	10%	baa	baa
Scorecard - Indicated BCA Outcome			**baa2**
Assigned BCA			**baa2**

Source: [redacted] and Moody's Ratings

Ratings

Exhibit 6

Category	Moody's Rating
[redacted]	
Outlook	Stable
Baseline Credit Assessment	baa2
Issuer Rating -Dom Curr	A3
Senior Secured MTN -Dom Curr	(P)A3
Senior Unsecured MTN -Dom Curr	(P)A3
[redacted]	
Outlook	Stable
Senior Secured -Dom Curr	A3
[redacted]	
Outlook	Stable
Senior Secured -Dom Curr	A3

Source: Moody's Ratings

REPORT NUMBER 1471095

CLIENT SERVICES

Americas	1-212-553-1653
Asia Pacific	852-3551-3077
Japan	81-3-5408-4100
EMEA	44-20-7772-5454

Appendix 8

Fitch's Rating dated 17th December 2025 relating to [RP1]

Fitch Ratings

[redacted]

Fitch Ratings considers [redacted] to be a government-related entity (GRE) of the UK (AA-/Stable). Fitch has 'Strong Expectations' that the state would provide support to [redacted]. Combined with a Standalone Credit Profile (SCP) assessed at 'a-', which is three notches below the sovereign, this leads to a one-notch uplift for the Issuer Default Rating (IDR) to 'A'.

The revision of the Outlook to Negative reflects [redacted] weak financial performance in the financial year ending 31 March 2025 (FY25), with leverage ratios above previous expectations. We continue to expect some improvement in financial metrics through the rating case, but this is tempered by the higher historical leverage and anticipated lower capital revenue.

Key Rating Drivers

Support Score Assessment – 'Strong Expectations': This reflects our 'Strong Expectations' of exceptional support in the event of [redacted] being in financial distress. This is reflected in a score of 20 points (of a maximum of 60) under our *Government-Related Entities Rating Criteria*.

Responsibility to Support – 'Strong': We assess both responsibility-to-support factors – decision-making and oversight, and precedents of support – as 'Strong'. This assessment is supported by the sector being highly regulated, with a history of regulator intervention to prevent default. Central and local governments provide ongoing support to the social housing sector through grants to renovate or build homes and maintain existing ones to the required standard.

Incentives to Support – 'Strong': Fitch assesses one incentive-to-support factor – preservation of government policy role – as 'Strong', considering that social housing is a key public service and a default by [redacted] would not cause short-term disruption to services, but it could affect the sector in the medium term by limiting the availability of funding for maintenance capex and new investment.

We assess contagion risk as 'Not Applicable', considering a default would have little impact on cost of debt for the sponsor. However, limiting access to markets for the sector could have a profound impact on continued provision of service and delivery of a public policy mission.

Standalone Credit Profile – 'a-': [redacted] SCP reflects the combination of a 'Stronger' risk profile and a financial profile that we assess in the 'bbb' category. [redacted] has had weaker performance historically, with net debt/EBITDA peaking in FY25 at about 17x. Fitch does not see this as representative of [redacted] underlying financial health, with leverage ratios expected to improve towards 11x by FY30. We expect net debt to remain at about GBP4.9 billion until FY30.

Ratings

Foreign Currency	
Long-Term IDR	A
Short-Term IDR	F1+
Local Currency	
Long-Term IDR	A
Short-Term IDR	F1+
Outlooks	
Long-Term Foreign-Currency IDR	Negative
Long-Term Local-Currency IDR	Negative
Debt Ratings	
Senior Unsecured Debt - Long-Term Rating	A
Senior Secured Debt - Long-Term Rating	A

Issuer Profile Summary

[redacted] is one of the largest providers of social housing in the UK, with about [redacted] units owned and managed. It operates predominantly in London and has a core number of assets in counties to the north and the south of the capital.

Financial Data Summary

(GBPm)	2025	2030rc
Net adjusted debt/EBITDA (x)	17.3	10.5
EBITDA/gross interest coverage (x)	1.2	2.2
Operating revenue	1,011	1,185
EBITDA	296	465
Net adjusted debt	5,129	4,891
Total assets	13,515	-

rc: Fitch's rating-case scenario
Source: Fitch Ratings, Fitch Solutions, [redacted] Trust

Applicable Criteria

Public Policy Revenue-Supported Entities Rating Criteria (January 2024)

Government-Related Entities Rating Criteria (July 2025)

Related Research

UK Spending Review Is Credit Positive for English Social Housing Providers (June 2025)

English Social Housing – Peer Credit Analysis (March 2025)

English Social Housing Scorecard 2025 (March 2025)

Analysts

Michael Brooks, ACA
+44 20 3530 1409
michael.brooks2@fitchratings.com

Ines Callahan
+34 93 467 8745
ines.callahan@fitchratings.com

Rating Synopsis

[redacted] Rating Derivation

Summary	
Government LT IDR	AA-
GRE Standalone Credit Profile (SCP)	a-
Support category	Strong expectations
Notching expression	Bottom up +1
Single equalisation factor	No
GRE LT IDR	A

GRE Key Risk Factors and Support Score	
Responsibility to support	10
Decision making and oversight	Strong
Precedents of support	Strong
Incentives to support	10
Preservation of government policy role	Strong
Contagion risk	N/A
Support score	20 (max 60)

Standalone Credit Profile	
Risk profile	Stronger
Revenue risk	Stronger
Expenditure risk	Stronger
Liabilities and liquidity risk	Stronger
Financial profile	bbb
Qualitative factors adjustments	Neutral
GRE SCP	a-

Distance \ Support score	>=45	35-42.5	30-32.5	20-25	15	12.5	<=10
SCP > IDR	S-A/Cap	S-A/Cap	S-A/Cap	S-A/Cap	S-A/Cap	S-A/Cap	S-A/Cap
0	0	0	0	S-A	S-A	S-A	S-A
-1	0	0	0	+1/S-A	S-A	S-A	S-A
-2	0	0	0	+1	S-A	S-A	S-A
-3	0	0	-1	+1	S-A	S-A	S-A
-4	0	-1	-2	+1	S-A	S-A	S-A
-5	0	-1	-2	+2	+1	S-A	S-A
-6	0	-1	-2	+3	+2	+1	S-A
-7	0	-1	-2	+4	+2	+1	S-A
-8	0	-1	-2	+4	+3	+1	S-A
-9	0	-1	-2	+5	+3	+1	S-A
-10	0	-2	-3	+5	+3	+1	S-A

Stylized Notching Guideline Table: refer to GRE criteria for details

Analytical Outcome Guidance Table

Risk profile	Financial profile					
Stronger	aaa or aa	a	bbb	bb	b	
High Midrange	aaa	aa	a	bbb	bb	b
Midrange		aaa	aa	a	bbb	bb or below
Low Midrange			aaa	aa	a	bbb or below
Weaker				aaa	aa	a or below
Vulnerable					aaa	aa or below
Suggested analytical outcome	aaa	aa	a	bbb	bb	b

Government LT IDR	GRE SCP	GRE LT IDR
AAA	aaa	AAA
AA+	aa+	AA+
AA	aa	AA
AA-	aa-	AA-
A+	a+	A+
A	a	A
A-	a-	A-
BBB+	bbb+	BBB+
BBB	bbb	BBB
BBB-	bbb-	BBB-
BB+	bb+	BB+
BB	bb	BB
BB-	bb-	BB-
B+	b+	B+
B	b	B
B-	b-	B-
CCC+	ccc+	CCC+
CCC	ccc	CCC
CCC-	ccc-	CCC-
CC	cc	CC
C	c	C
RD	rd	RD
D	d	D

LT IDR – Long-Term Issuer Default Rating; GRE – Government-related entity
Source: Fitch Ratings

Rating Sensitivities

Factors that Could, Individually or Collectively, Lead to Positive Rating Action/Upgrade

The Outlook could be revised to Stable if net debt/EBITDA moves structurally below 12x.

Factors that Could, Individually or Collectively, Lead to Negative Rating Action/Downgrade

Inability of net debt/EBITDA to return to levels structurally below 12x on a sustained basis, or a multi-notch sovereign downgrade.

Issuer Profile

[redacted] is one of the largest providers of social housing in the UK and owns or manages more than 109,000 units. It operates mostly in London but has assets in counties to the north and south of the capital, as it is required to maintain a primary presence in the south-east. [redacted] assets are distributed widely, have a demographically diverse customer base, and with multiple opportunities for development and expansion.

[redacted] was established in [redacted] as the [redacted]. It has since grown both organically and through mergers, the latest of which was completed in [redacted] between [redacted]

[redacted] structure is similar to that of other registered providers, with a parent entity overseeing asset owning registered providers, development entities, maintenance entities and specialist financing vehicles.

Support Rating Factors

Summary

Responsibility to support		Incentives to support		Support score	Support category
Decision making and oversight	Precedents of support	Preservation of government policy role	Contagion risk		
Strong	Strong	Strong	Not Strong Enough	20 (max 60)	Strong Expectations

Source: Fitch Ratings

Decision Making and Oversight

[redacted] is a private, not-for-profit social housing registered provider, so is not owned by the UK government. As a Community Benefit Society all surpluses are reinvested to provide social housing. We view the regulatory framework for English social housing as robust and that the Regulator of Social Housing (RSH) controls and strictly monitors registered providers.

Precedents of Support

[redacted] receives ongoing financial support through grants from Homes England and the Greater London Authority for social, affordable and shared-ownership development. This is to support additional subsidised housing or the regeneration of existing estates, rather than to finance debt or prevent default. Policy influence is supportive of the financial stability of registered providers, with very few entering financial difficulties and none reaching a default. Regulatory restrictions on government support are unlikely to prevent timely intervention in exceptional circumstances.

Preservation of Government Policy Role

Social housing is a major public service. A [redacted] default would have no immediate impact on service but over the medium term it could affect external financing upon which registered providers rely for maintenance capex and new investments. Other registered providers could act as substitutes were [redacted] to default, but reduced access to financing and subsequently diminished financial resilience would lead to a decline in medium-term service provision.

Contagion Risk

Default would have a minimal impact on the availability and cost of domestic financing for the UK. Fitch considers that if a default occurred, it would be treated as an isolated case of mismanagement or viability concerns. Consequently, this should not affect the sector at large. However, it could raise questions about the role of the regulator and sponsor.

Standalone Credit Profile Assessment

[redacted] 'a-' SCP reflects the combination of a 'Stronger' risk profile, and a financial profile assessed in the 'bbb' category.

Risk Profile Assessment

Summary

Revenue risk	Expenditure risk	Liabilities and liquidity risk	Operating environment score	Risk profile
Stronger	Stronger	Stronger	aa	**Stronger**

Source: Fitch Ratings

The 'Stronger' risk profile reflects the following combination of assessments.

Revenue Risk: Stronger

Demand in the UK for social housing is high and sustained, and any change in the rents that registered providers charge is unlikely to materially affect demand, nor would it be affected by economic pressures. Social housing is counter-cyclical to the UK economy, meaning that demand strengthens in a downturn.

[redacted] has flexibility over pricing from its non-social housing activity, which it uses to cross-subsidise the core business. We believe the regulatory framework will maintain compensation for services at a level that supports the solvency of the sector.

In 2024, there were more than 1.3 million households registered on local authority housing waiting lists in England, according to the government. In London, where [redacted] predominately operates, the population is growing rapidly, and market rents are much higher than elsewhere in the country leading to exacerbated demand for below-market-rate rental properties.

Social rent increases are governed by the Rent Standard, with which the RSH expects registered providers to comply. The current standard applies from April 2026 to March 2035 and allows for annual increases capped at the Consumer Price Index (CPI) plus 1%, where CPI is assessed in the September prior to the increase. In November 2022, the government announced a 7% cap on social rent increases, to be applied from April 2023 for one year. We believe the cap still supported solvency in the sector and has limited impact on our 'Stronger' assessment of pricing.

Most of [redacted] revenue comes from social housing lettings with capped prices (80%), though there is some uncapped market activity. Market activity allows for greater pricing flexibility but is riskier. This limited uncapped market activity has a positive impact on our assessment of pricing, but could weaken our assessment of demand if the provider becomes reliant on it, as the demand risk is higher.

[redacted] will focus future developments on mixed tenure schemes. This enables them to access grant funding to limit exposure and still sell a portion of the asset and realise market returns.

Revenue Breakdown Excluding Non-Cash Items, 2025

	(GBPm)	% of operating revenue
Social housing lettings	814	80.6
Other social housing revenue	80	7.9
Market sale	54	5.3
Other non-social housing revenue	63	6.2
Other operating revenue	0	0
Operating revenue	**1,011**	**100**
Interest revenue	3	-
Capital revenue	259	-
Memo: Non-cash operating revenue	0	-

Source: Fitch Ratings, Fitch Solutions, [redacted]

Expenditure Risk: Stronger

[redacted] has clear cost drivers and low potential volatility in major items. The largest opex items are staff (27%) and maintenance costs (28%), which [redacted] controls. It has no material supply constraints on labour or resources. [redacted] as with the rest of the sector, faces heavy cost pressures due to previously high inflation.

[redacted] has a clear, documented capital-planning process, a phased approach to its development strategy, and it regularly monitors projects. It has limited required capex (building safety), and the timing and delivery of all other capex is flexible.

[redacted] can curtail some discretionary expenditure or reduce spending on non-essential work. However, reducing repairs and maintenance work is not sustainable over the long term, and will likely increase costs. Fitch expects maintenance and major repair costs to remain a priority for [redacted] as it continues to invest in its existing stock. We expect this trend to continue, for many registered providers, as economic conditions make it increasingly difficult to build homes and improve the existing stock.

Expenditure Breakdown Excluding Non-Cash Items, 2025

	(GBPm)	% of operating expenditure
Staff costs	196	27
Planned maintenance costs	200	28
Service charge costs	104	15
Other operating expenditure	215	30
Operating expenditure	**715**	**100**
Interest expenditure	183	-
Capital expenditure	590	-

Expenditure Breakdown Excluding Non-Cash Items, 2025

	(GBPm)	% of operating expenditure
Memo: Non-cash operating expenditure	174	-

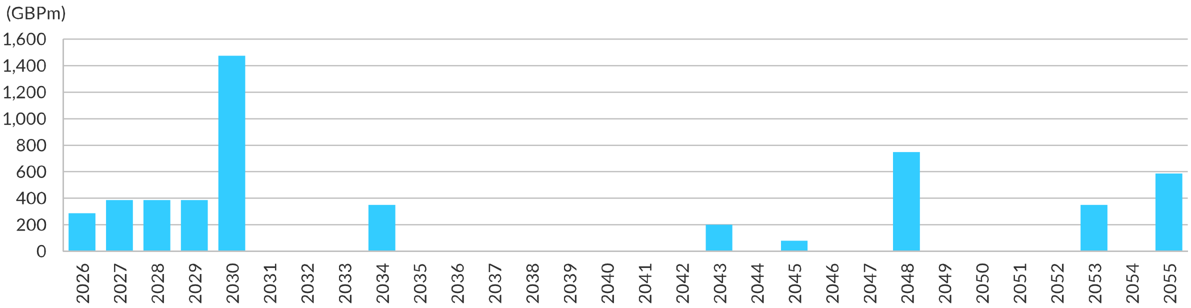
Source: Fitch Ratings, Fitch Solutions, [redacted]

Liabilities and Liquidity Risk: Stronger

[redacted]'s debt totalled about GBP5.2 billion at end-FY25. It operates in a developed financial market with full access to banks, debt capital markets and private placements. About three-quarters of debt is fixed rate, limiting exposure to capital market fluctuations. [redacted] has a strong debt profile with smooth and long-term repayment (weighted-average life of debt is over six years) with little short-term debt. There are no off-balance-sheet risks.

The sector has general access to finance, with institutional investors and banks widely available. At end-FY25, [redacted] had GBP1,010 million undrawn accessible credit lines (end-FY24: GBP1,198 million), with about GBP900 million from committed revolving credit facilities. It also held about GBP106 million in cash, providing adequate liquidity to support its medium-term business plan.

Debt Repayment Profile (As of End-2025)



Source: Fitch Ratings, Peabody Trust. Note: Issuer has some facilities that mature beyond 2055.

Debt and Liquidity Analysis

	End-2025
Total debt (GBPm)	5,235
Cash and liquidity available for debt service (GBPm)	106
Undrawn committed credit lines (GBPm)	1,010
Debt at floating interest rates (% total debt)	25
Short-term debt (% of total debt)	6.4
Issued debt (% of total debt)	45.2
Apparent cost of debt (%)	4.8
Weighted average life of debt (years)	12.2

Source: Fitch Ratings, Fitch Solutions, [redacted]

Financial Profile Assessment

We expect [redacted] performance to improve from FY26, after net debt/EBITDA peaked in FY25 at about 17x due to completion delays on a development. We do not view this as representative of [redacted] underlying financial strength and expect leverage ratios to improve to below 12x by FY30.

Fitch expects net debt to remain at about GBP5 billion by FY30, with strategic disposals enabling reinvestment in existing assets. An expected improvement in EBITDA over the next five years will result in improved net debt/EBITDA, which we expect to average about GBP414 million. This will reflect social rents increasing in line with CPI + 1% and costs being managed through the larger merged group and lower inflation than in recent years. We also expect a reduction in non-recurring remediation costs, which have weighed on margins historically.

Financial Profile Guidance Table

	Primary metric	Secondary metrics		
	Leverage ratio (x)	Debt service coverage ratio (x)	Gross interest coverage ratio (x)	Liquidity coverage ratio (x)
aaa	X ≤ 0	X ≥ 3	X ≥ 10	X ≥ 5
aa	0 < X ≤ 4	2 ≤ X < 3	6 ≤ X < 10	3 ≤ X < 5
a	4 < X ≤ 8	**1.4 ≤ X < 2**	4 ≤ X < 6	**1.8 ≤ X < 3**
bbb	**8 < X ≤ 12**	1 ≤ X < 1.4	**2 ≤ X < 4**	1.2 ≤ X < 1.8
bb	12 < X ≤ 18	0.6 ≤ X < 1	1 ≤ X < 2	0.8 ≤ X < 1.2
b	X > 18	X < 0.6	X < 1	X < 0.8

Note: Yellow highlights show metric ranges applicable to Issuer
Source: Fitch Ratings

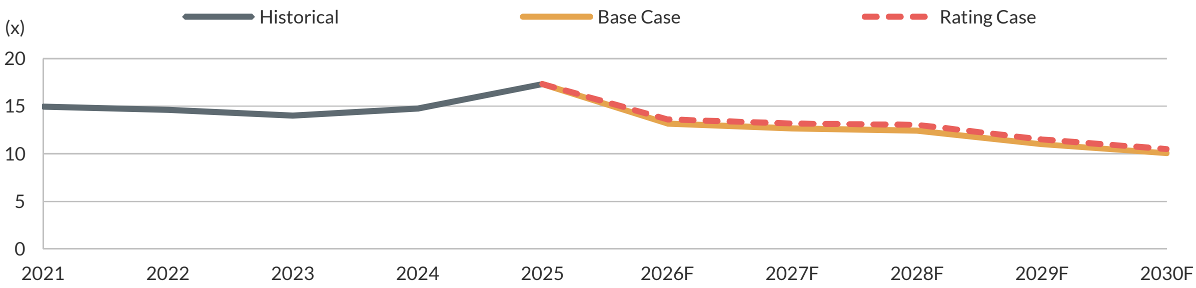
Fitch's Base and Rating Cases - Main Assumptions and Outcomes

		2026 - 2030 average	
Assumptions	2021 - 2025 historical average	Base case	Rating case
Operating revenue growth (%)	1.6	3.3	3.2
Operating expenditure growth (%)	2.6	-0.1	0.1
Net capital expenditure (GBPm)	-378	-148	-148
Apparent cost of debt, 2025 (%)	4.8	4.3	4.3

		2030	
Outcomes	2025	Base case	Rating case
EBITDA (GBPm)	296	479	465
Net adjusted debt (GBPm)	5,129	4,821	4,891
Net adjusted debt / EBITDA (x)	17.3	10.1	10.5

Note: Historical and scenario data exclude non-cash items
Source: Fitch Ratings, Fitch Solutions, [redacted]

Net Adjusted Debt/EBITDA - Fitch's Base and Rating Case Scenarios



Source: Fitch Ratings, Fitch Solutions, [redacted]

Additional Risk Factor Considerations

Asymmetric Risk Considerations

Management and Governance	Accounting Policies, Reporting and Transparency	Country Risk and Legal Regime	Asymmetric Risk Impact (Notches)
Neutral	Neutral	Neutral	No

Source: Fitch Ratings

We assess all asymmetric risk attributes as 'Neutral' due to a strong regulatory framework, transparent reporting of information and a risk-averse debt structure.

Short-Term Rating Derivation

The Short-Term IDR is the higher of two possible outcomes, 'F1+', as a result of the 'A' Long-Term IDR and strong liquidity metrics.

Debt Ratings

The senior secured debt rating is in line with the Long-Term IDR. This rating has been applied to all existing senior secured issuances and [redacted], including those issued by [redacted]

Peer Analysis

Peer Comparison

	Risk Profile	Financial Profile	SCP	Support Category	Notching Expression	Long-Term IDR/Outlook
[redacted]	Stronger	bbb	a-	Strong Expectations	Bottom up + 1	A/Negative
[redacted]	Stronger	bbb	a	Strong Expectations	Bottom up + 1	A+/Negative
[redacted]	Stronger	bb	bbb+	Strong Expectations	Bottom up + 1	A-/Stable
[redacted]	Stronger	bb	bbb+	Strong Expectations	Bottom up + 1	A-/Stable
[redacted]	Stronger	bb	bbb+	Strong Expectations	Bottom up + 1	A-/Stable
[redacted]	Stronger	bb	bbb+	Strong Expectations	Bottom up + 1	A-/Stable
[redacted]	Stronger	bbb	a-	Strong Expectations	Bottom up + 1	A/Stable

Source: Fitch Ratings

We consider [redacted] closest peers [redacted] and [redacted], both of which have a significant presence in London, with similar challenges relating to fire safety measures.

All three registered providers own and manage more than 100,000 units and maintain robust development. [redacted] has been slightly more affected by building safety costs, leading to several years' peaking leverage ratios, whereas [redacted] has a much more stable outlook.

[redacted] expects to deleverage through non-core asset divestment, reduction in development and building safety costs as their programme completes. [redacted] and [redacted] expect to continue developing at a moderate level for their size, managing building safety risk consistently and focusing on core assets and affordable development.

ESG Considerations

The highest level of ESG credit relevance is a score of '3' – ESG issues are credit neutral or have only a minimal credit impact on the entity, either due to their nature or the way in which they are being managed by the entity. Fitch's ESG Relevance Scores are not inputs in the rating process; they are an observation on the relevance and materiality of ESG factors in the rating decision. For more information on our ESG Relevance Scores, visit www.fitchratings.com/site/esg.

Appendix A: Financial Data

[redacted]

(GBPm)	2021	2022	2023	2024	2025
Income statement					
Operating revenue	911	942	1,097	972	1,011
Operating expenditure	-730	-777	-926	-818	-889
Interest revenue	0	0	1	4	3
Interest expenditure	-122	-122	-139	-176	-183
Other non-operating items	84	297	1,932	76	103
Taxation	0	-19	7	-1	2
Profit (loss) after tax	144	321	1,972	57	47
Memo: Transfers and grants from public sector	0	0	0	0	0
Balance sheet summary					
Long-term assets	10,933	11,655	11,949	12,487	12,789
Stakes (equity investment)	0	0	0	0	0
Stock	532	570	469	428	462
Trade debtors	96	106	145	132	158
Other current assets	0	0	0	0	0
Total cash, liquid investments, sinking funds	287	223	142	133	106
Total assets	11,847	12,553	12,705	13,180	13,515
Long-term liabilities	6,279	6,693	6,654	7,040	7,117
Trade creditors	18	26	20	23	35
Other short-term liabilities	567	478	487	512	708
Charter capital	0	0	0	0	0
Reserves and retained earnings	4,983	5,356	5,544	5,605	5,655
Minority interests	0	0	0	0	0
Liabilities and equity	11,847	12,553	12,705	13,180	13,515
Net equity	4,983	5,356	5,544	5,605	5,655
Debt statement					
Short-term debt	246	106	108	155	336
Long-term debt	4,695	4,508	4,430	4,680	4,899
Total debt	4,941	4,614	4,538	4,835	5,235
Other Fitch-classified debt	0	0	0	0	0
Adjusted debt	4,941	4,614	4,538	4,835	5,235
Unrestricted cash, liquid investments, sinking funds	287	223	142	133	106
Net adjusted debt	4,654	4,391	4,396	4,702	5,129
EBITDA reconciliation					
Operating balance	181	165	171	154	122
+ Depreciation	130	135	143	142	174
+ Provision and impairments	0	0	0	23	0
+/- Other non-cash operating expenditures/revenues	0	0	0	0	0
= EBITDA	312	301	314	319	296

Source: Fitch Ratings, Fitch Solutions, [redacted]

Appendix B: Financial Ratios

[redacted]

	2021	2022	2023	2024	2025
Income statement ratios (%)					
Operating revenue annual growth	-2.3	3.4	16.4	-11.4	4.0
Operating expenditure annual growth	-2.2	6.5	19.2	-11.7	8.7
EBITDA/operating revenue	34.2	31.9	28.6	32.8	29.3
Personnel costs/operating expenditure	29.6	29.0	24.5	28.6	27.4
Total transfers from public sector/operating revenue and ad-hoc transfers	0.0	0.0	0.0	0.0	0.0
Balance sheet ratios (%)					
Current assets/adjusted debt	18.5	19.5	16.7	14.3	13.9
Current assets/total assets	7.7	7.2	6.0	5.3	5.4
Total assets/adjusted debt	239.8	272.1	280.0	272.6	258.2
Return on equity	2.9	6.0	35.6	1.0	0.8
Return on assets	1.2	2.6	15.5	0.4	0.4
Debt and liquidity ratios					
Net adjusted debt/EBITDA (x)	14.9	14.6	14.0	14.7	17.3
EBITDA/debt service coverage (x)	1.8	0.8	1.1	0.9	0.7
EBITDA/gross interest coverage (x)	2.4	2.2	1.7	1.4	1.2
Liquidity coverage ratio (x)	1.6	0.7	0.8	5.2	3.4
Net adjusted debt/operating revenue (%)	510.9	466.1	400.7	483.7	507.3
Net adjusted debt/equity (%)	93.4	82.0	79.3	83.9	90.7
Debt in foreign currency/total debt (%)	0.0	0.0	0.0	0.0	0.0
Debt at floating interest rates/total debt (%)	25.7	23.3	23.3	31.8	34.7
Short-term debt/total debt (%)	5.0	2.3	2.4	3.2	6.4
Issued debt/total debt (%)	12.2	27.8	50.3	41.7	45.2
Government-related debt/total debt (%)	0.0	0.0	0.0	0.0	0.0

Source: Fitch Ratings, Fitch Solutions, [redacted]

Appendix C: Fitch's Rating-Case Scenario

[redacted]

(GBPm)	2026rc	2027rc	2028rc	2029rc	2030rc
Cash-adjusted income statement					
Operating revenue	1,158	1,185	1,241	1,222	1,185
Operating revenue annual growth (%)	14.5	2.4	4.7	-1.5	-3.0
Operating expenditure	-765	-779	-837	-782	-720
Operating expenditure annual growth (%)	7.0	1.8	7.5	-6.5	-8.0
EBITDA	393	406	404	440	465
Interest revenue	3	2	2	2	2
Interest expenditure	-242	-241	-231	-217	-208
Financial balance	-239	-239	-229	-215	-206
Net capital expenditure	-370	-177	-87	-17	-90
Capital injection and other cash-items	0	0	0	0	0
Dividend paid	0	0	0	0	0
Other cash-items (net)	0	0	0	0	0
Net debt movement	222	-31	-111	-221	-161
Change in cash	5	-42	-23	-13	8
Debt and liquidity					
Adjusted debt	5,457	5,426	5,315	5,094	4,933
Memo: Non-cash movement in adjusted debt	0	0	0	0	0
Unrestricted cash	111	69	46	33	42
Net adjusted debt	5,345	5,356	5,268	5,060	4,891
Financial and liquidity ratios					
Net adjusted debt / EBITDA (x)	13.6	13.2	13.0	11.5	10.5
EBITDA/debt service coverage (x)	0.7	1.1	1.1	0.7	1.7
EBITDA/gross interest coverage (x)	1.6	1.7	1.7	2.0	2.2
Liquidity coverage ratio (x)	1.9	3.0	2.9	1.7	3.9

rc - Fitch's rating-case scenario: a through-the-cycle scenario that incorporates a combination of revenue, cost or financial risk stresses
Source: Fitch Ratings, Fitch Solutions, [redacted]

SOLICITATION & PARTICIPATION STATUS

For information on the solicitation status of the ratings included within this report, please refer to the solicitation status shown in the relevant entity's summary page of the Fitch Ratings website.

For information on the participation status in the rating process of an issuer listed in this report, please refer to the most recent rating action commentary for the relevant issuer, available on the Fitch Ratings website.

Appendix 9

S&P Global Rating dated 13th August 2025 relating to [RP2]

S&P Global Ratings

RatingsDirect®

[redacted]

August 13, 2025

This report does not constitute a rating action.

Credit Highlights

Primary Contact

Colleen Sheridan
London
44-20-7176-0561
colleen.sheridan
@spglobal.com

Secondary Contact

Mahek Bhojani
London
44-2071760846
mahek.bhojani
@spglobal.com

Analytical Group Contact

Sovereign and IPF EMEA
SOVIPF
@spglobal.com

Overview

Enterprise profile	Financial profile
Large, diverse portfolio, contained appetite for sales, and solid planning underpin [redacted] enterprise risk profile.	Increased investments in existing homes will moderate expected improvement.
We anticipate that [redacted]. [redacted] strategic de-risking of sales activity and focus on traditional social housing activities will generate a strong and predictable rental revenue stream from a portfolio of over 57,000 units.	Higher investments in existing homes will weigh on financial performance though we expect alongside increased rental income that management's efforts to contain costs and generate efficiencies will support stable to improving metrics over the forecast.
While the group's vacancy rates remain relatively high, stemming from exposure to supported housing, we still consider demand for properties to be strong.	Though we forecast moderate debt build-up to fund investments as sales surplus declines, expansion of non-sales EBITDA should strengthen interest coverage.
Despite higher investments in existing properties, we believe management's plans are solid, robustly stress tested, and contain flexibility to scale back if needed.	Liquidity position remains very strong in our view.

We forecast the improvement in financial metrics to be more gradual as [redacted] increases investments in existing homes through fiscal year ending March 31, 2028. Performance over fiscal year ending March 31, 2025, was marginally stronger than we had expected as [redacted] planned repairs were lower, and management secured savings in other areas of the business. Demand for responsive repairs however was high which contributed to a modest weakening of debt metrics as compared to fiscal 2024. While we project repairs to remain high over our forecast period and further investments are embedded into plans, we expect management will continue to work to contain costs. We believe that a portion of higher investment in existing homes is flexible and consider stock quality remains solid. We also understand that development plans have been scaled back in recent years, particularly for supported housing and outright sales. Still, we anticipate higher investments in existing homes alongside development, will lead to modest debt increase and prolong improvement of debt metrics as compared to previous expectations.

[redacted]

Outlook

The stable outlook reflects our view that the group's strategy to de-risk its development program, along with its expanding rental asset base and flexibility in plans will help mitigate cost and investment pressures.

Downside scenario

We could lower the rating if [redacted] financial indicators weakened structurally. This could happen if a significant increase in its cost base had a more severe effect on the group's S&P Global Ratings-adjusted EBITDA than we project. Along with an increase in debt-funded capital spending, this could weaken the group's interest coverage to below 1x on a sustained basis.

Upside scenario

We could raise the rating if management's efforts to control costs or secure additional grants for investments in existing stock translate into its adjusted EBITDA improving above our current projections. This will also help strengthen the group's debt metrics, all else remaining equal.

Rationale

Enterprise profile: Operational metrics will benefit from large portfolio size, strong demand and contained exposure to market sale activities

We view [redacted] as a traditional social housing provider, with solid demand for its properties, comprising of social and affordable homes, shared ownership, supported and care housing, and mid-market rented units. [redacted] owns and manages a portfolio of over 57,000 homes spread across the U.K. with the majority in the north of England. We believe that [redacted] large portfolio size helps to diversify its exposure to local market conditions. Demand for [redacted] properties remains strong, as evidenced by solid average social and affordable rent estimated at roughly 55% of average market rent. The group's vacancy rates, however, averaged at about 2.9% over the past three years, which we assess to be significantly higher than the sector average. We understand that this is mainly due to the group's supported housing portfolio for which voids are, in general, higher compared with affordable rented homes.

We believe [redacted] continues to reduce volatility in its revenue base by decreasing development for sales over the forecast period. While the group is increasing sales activity through joint ventures, we expect revenue originating from sale of first tranche shared ownership units, outright sales, and market sales from joint ventures, will remain comfortably below one-third of the group’s adjusted revenue through fiscal 2028. Overall, we consider risk appetite for sales remains contained.

While we anticipate [redacted] will increase investments in existing homes, we expect management’s efforts to contain costs and generate efficiencies will provide the group with some headroom to address cost and investment pressures. [redacted] also successfully secured Warm Homes Grants to support investments which have been brought forward to match funding. There are however some additional investments related to fire door surveys and potential replacements not previously in plans though we understand management aims to be more proactive with regards to asset investment and a portion of that budgeted spend is flexible and conservative. We consider management is evolving its regional structure to supplement its grasp on stock. Asset quality is also solid with about 73% of the portfolio holding an Energy

Performance Certificate of C or above and minimal exposure to high rises with no outstanding cladding issues. We also consider [redacted] maintains flexibility in its development program to respond to market dynamics and pressures.

We assess the regulatory framework under which registered providers of social housing in England operate as strong (see "Regulatory Framework Assessment: Strong For Social Housing Providers In The U.K, April 17, 2025).

Financial profile: Increasing rental income, cost containment, and moderated development will support gradual improvement in financial metrics amid higher investments in existing homes

We project [redacted] improvement in financial performance over the forecast period will not be as pronounced as previously expected due to the frontloading of sustainability spend and increased investments in existing homes particularly in fiscal 2027 and 2028. However, we still expect adjusted EBITDA and margins to expand. We project Home Group will continue to benefit from increased rental revenue despite lower turnover due to scale back of outright sales. Additionally, we expect management will mitigate increased investments by containing costs and securing efficiencies in other areas of the business, resulting in relatively stable performance beyond fiscal 2026.

We expect a more gradual improvement in financial performance as compared to previous projections will also support improvement in debt metrics. While [redacted] has modestly scaled back its development plans in recent years, we expect cash flows will be impacted by higher repair costs as well as lower sales volume. We therefore expect debt to be moderately higher than previous expectations, leading to higher interest costs. Still, we forecast debt metrics will recover with interest coverage remaining above 1.0x and debt to non-sales EBITDA around 20x through fiscal 2028.

We assess [redacted] liquidity position as very strong and estimate sources of liquidity will cover uses by about 2.1x over the next 12 months. This is based on our forecast of liquidity sources of approximately £494 million (mainly comprising cash and undrawn available facilities, grant receipts, inflows from joint ventures, proceeds from fixed-asset sales, and cash from operations after adding back the noncash cost of sales), compared with liquidity uses of about £237 million (primarily capital expenditure, interest, and principal repayments). We also consider that Home Group has satisfactory access to external liquidity.

Government-related entity analysis

We believe there is a moderately high likelihood that [redacted] would receive timely extraordinary government support in case of financial distress. This provides one notch of uplift from the stand-alone credit profile. As one of the Regulator of Social Housing's (RSH's) key goals is to maintain lender confidence and low funding costs across the sector, we believe it is likely that the RSH would step in to try to prevent a default in the sector. We base this view on previous records of the RSH mediating mergers or arranging liquidity support from other registered providers in cases of financial distress, and we think this would also apply to [redacted]

[redacted]

Key Statistics

[redacted]--Key Statistics

	--Year ended March 31--				
Mil. £	2024a	2025e	2026bc	2027bc	2028bc
Number of units owned or managed	56840	57460	57739	58153	58614
Adjusted operating revenue	483.9	495.2	475.4	488.3	510.2
Adjusted EBITDA	65.3	68.2	72.0	74.2	80.1
Non-sales adjusted EBITDA	60.6	60.6	68.5	71.2	77.2
Capital expense	173.3	153.4	151.2	154.2	148.7
Debt	1298.9	1363.3	1410.1	1486.7	1517.7
Interest expense	56.3	60.9	61.0	63.7	66.6
Adjusted EBITDA/Adjusted operating revenue (%)	13.5	13.8	15.1	15.2	15.7
Debt/Non-sales adjusted EBITDA (x)	21.4	22.5	20.6	20.9	19.7
Non-sales adjusted EBITDA/interest coverage(x)	1.1	1.0	1.1	1.1	1.2

a--Actual. e--Estimate. bc--Base case reflects S&P Global Ratings' expectations of the most likely scenario.

Rating Component Scores

[redacted]--Ratings Score Snapshot

Assessment	Score
Enterprise risk profile	3
Industry risk	2
Regulatory framework	3
Market dependencies	3
Management and Governance	3
Financial risk profile	4
Financial performance	5
Debt profile	5
Liquidity	2
Stand-alone credit profile	bbb+
Issuer credit rating	A-

S&P Global Ratings bases its ratings on non-profit social housing providers on the seven main rating factors listed in the table above. S&P Global Ratings' "Methodology For Rating Public And Nonprofit Social Housing Providers," published on June 1, 2021, summarizes how the seven factors are combined to derive each social housing provider's stand-alone credit profile and issuer credit rating.

Related Criteria

- General Criteria: Environmental, Social, And Governance Principles In Credit Ratings, Oct. 10, 2021
- Criteria | Governments | General: Methodology For Rating Public And Nonprofit Social Housing Providers, June 1, 2021

- General Criteria: Rating Government-Related Entities: Methodology And Assumptions, March 25, 2015
- General Criteria: Methodology: Industry Risk, Nov. 19, 2013
- General Criteria: Principles Of Credit Ratings, Feb. 16, 2011

Related Research

- European Housing Markets: Strong Demand And Weak Supply Will Keep Prices High, July 10, 2025,
- U.K. Social Housing Providers: Extra Development Grants Won't Improve Financial Headroom, June 26, 2025,
- Non-U.S. Social Housing Providers Ratings Risk Indicators: Stabilization At Lower Levels, May 12, 2025,
- Non-U.S. Social Housing Providers Ratings History: April 2025, May 12, 2025,
- U.K. Social Housing Borrowing 2025: Focused On Containing Debt, April 24, 2025,
- Regulatory Framework Assessment: Strong For Social Housing Providers In The U.K, April 17, 2025,
- United Kingdom, April 14, 2025,
- Non-U.S. Social Housing Sector Outlook 2025: Quality Maintenance Constrains Recovery, Jan. 14, 2025,
- The Autumn Budget Kicks Off A Funding Regime Revision For U.K. Public Sector Entities, Nov. 5, 2024,
- U.K. Social Housing Providers' Financial Capacity Shrinks On Investment Needs, Nov. 4, 2024,
- Cyber Risk Brief: U.K. Public Sector Is Increasingly Under Threat, Oct. 24, 2024,

Ratings Detail (as of August 13, 2025)*

[redacted]	
Issuer Credit Rating	A-/Stable/--
Senior Secured	A-
Issuer Credit Ratings History	
14-Dec-2018	A-/Stable/--
08-Dec-2017	A/Negative/--
04-Jul-2016	A/Stable/--

*Unless otherwise noted, all ratings in this report are global scale ratings. S&P Global Ratings' credit ratings on the global scale are comparable across countries. S&P Global Ratings' credit ratings on a national scale are relative to obligors or obligations within that specific country. Issue and debt ratings could include debt guaranteed by another entity, and rated debt that an entity guarantees.