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

- -
- -

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

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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.

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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 de-register 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 de-registration 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 non-registered, 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 non-operation 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.