Neutral Citation Number: [2022] EWHC 3171 (Admin)

Case No: CO/212/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2022

Before :

MR JUSTICE CAVANAGH

- -

Between :

NATIONAL COMMUNITY HOMES CIC (formerly known as LARCH HOUSING ASSOCIATION LIMITED)	**Appellant**
- and -	
REGULATOR OF SOCIAL HOUSING	**Respondent**

- -
- -

Jay Gajjar (instructed by **Thamina Solicitors**) for the **Appellant**
Samantha Broadfoot KC (instructed by **Mills & Reeve**) for the **Respondent**

Hearing date: 26 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Cavanagh:

Introduction

1. This is a statutory appeal, brought under section 121 of the Housing and Regeneration Act 2008 ("the 2008 Act"), against the decision of the Respondent ("the Regulator") dated 17 December 2021 to remove the Appellant from the register of social housing providers ("the Register"). At the material time, the Appellant was known as Larch Housing Association Limited and, for convenience, will be referred to in this judgment as "Larch".

2. In broad summary, the decision to de-register Larch was taken because of the Regulator's view that Larch did not meet the Regulator's registration criteria, as set out in section 112(3) of the 2008 Act. In particular, the Regulator took the view that Larch did not satisfy the requirement to demonstrate its financial viability on an on-going basis.

3. This is the first occasion upon which an appeal under section 121 of the 2008 Act has been determined by the High Court. There has, however, been a judicial review challenge to a regulatory judgment of the Regulator, in which a social housing provider had been assessed as being "non-compliant" in respect of financial viability and governance: **Inclusion Housing Community Interest Company v Regulator of Social Housing** [2020] EWHC 346 (Admin) ("**Inclusion Housing**", Chamberlain J).

4. I will set out the facts in greater detail later in this judgment, but, in brief, about 95% of Larch's housing units were leased from two head landlords, known as "Henley" and "SLIL". The units that were leased from Henley were located in Devon and were known as the "Devon Portfolio". Larch had run into financial difficulties in relation to the Devon Portfolio, but contended that, at the time the decision to de-register was taken, Larch was on the cusp of solving the problems with the Devon Portfolio. This was to be achieved by handing the units back to the head landlord, Henley, in return for allocating to Henley the right to recover the debts currently owed to Larch in relation to these properties. Larch said that this would have the effect of cancelling out Larch's liabilities to Henley in respect of outstanding rent for the units. In addition, Larch said that it had reached agreement with SLIL to crystallise SLIL's forbearance toward Larch for failing to pay its debts to SLIL, by means of a loan agreement, and that it had negotiated Heads of Terms for three contracts to provide property management services for some 813 units, retaining £20 per unit as its service fee. Larch contended that the resolution of the problems with the Devon Portfolio, along with these other matters, was likely to mean that its short- to medium- term financial viability was secured.

5. Against that background, Larch appealed against the decision to de-regulate it on three grounds:

   (1) The decision to de-register Larch on 17 December 2021 in the full knowledge that it was on the cusp of settling the problems with the Devon Portfolio was irrational, disproportionate, premature and improper;

   (2) The Regulator was plainly wrong to find that no sufficient evidence had been put forward as to its loan agreement with its senior landlord and creditor, SLIL, or

alternatively, it should have asked for further information, rather than proceeding to de-register Larch; and

(3) A series of factual findings made by the Regulator were incorrect and, therefore, flawed.

6. The Regulator submitted that its decision to de-regulate Larch should stand. The decision to de-regulate Larch, notified by letter dated 17 December 2021, had followed a long history of intensive engagement with Larch by the Regulator. A non-compliant Regulatory Notice had been published in November 2019, and, since then, the Regulator had worked closely with Larch in an attempt to resolve its compliance issues. The Regulator had accepted a Voluntary Undertaking that had been offered by Larch in July 2020, but Larch had failed to comply with its Undertaking. The Regulator said that it had ample grounds for de-registration in December 2021, and that, especially given the long history of engagement, it was under no obligation to delay its decision any further. An extra-statutory internal review of the decision to de-register was conducted at Larch's request, but the decision was upheld and this was notified to Larch on 2 February 2022. (This appeal is, however, against the decision to de-register in December 2021, rather than the against the outcome of the extra-statutory internal review.)

7. No time limit for an appeal against de-registration is provided for in section 121. In those circumstances, the default time limit for bringing an appeal in CPR 52.12(2)(b) applies. This means that an appeal must be brought within 21 days after the date of the decision under challenge. In fact, the appeal was filed out of time, on 20 January 2022. Larch has applied for an extension of time for appealing, and this is not opposed by the Regulator. I grant the extension of time.

8. Pursuant to section 121(2) of the 2008 Act (see below), Larch has remained on the Register, pending the outcome of this appeal.

9. In this appeal, Larch has been represented by Mr Jay Gajjar of counsel, and the Regulator by Ms Samantha Broadfoot KC. I am grateful to both counsel for their helpful submissions, both orally and in writing.

The evidence

10. I have been provided with a large bundle of documentation for this appeal, running to over 1000 pages. The notice of appeal was accompanied by a witness statement from Mr Wayne Feltham, the then Chief Executive Officer (and sole shareholder) of Larch, dated 20 January 2022, plus exhibits. On behalf of the Regulator, I have been provided with two statements from Harold Brown, Senior Assistant Director of Investigation and Enforcement, dated 23 May and 22 June 2022. Further statements on behalf of Larch have been provided, consisting of a statement of Sarah Ferdinand, a director of Larch, dated 22 May 2022, enclosing further documentation, and a statement dated 7 July 2022 from Joy Malyon, the Chair of Larch since March 2022, and, previously Chair and Director of the company during the period from 19 May 2020 to 21 September 2021. The statement of Ms Malyon responded to points made in the second statement of Mr Brown.

11. On 19 October 2022, about a week before the hearing, Larch applied for leave to rely upon a further witness statement from Ms Malyon. The purpose of the statement, which is dated 7 October 2022, is stated, at paragraph 1, to be "to update [the Court] on the Appellant's progress on many matters through the new board of directors ("the Board") since March 2022." The Regulator opposed the admission of this statement on three grounds, namely irrelevance, service so late as to be prejudicial, and an abuse of process in light of the procedural history.

12. I have read the second statement of Ms Malyon de bene esse. The statement essentially simply exhibits, without elaboration or explanation, a number of documents relating to Larch's financial and governance position in the period from March 2022 onwards. I agree that it should not be admitted on the first ground put forward by the Regulator, namely relevance. This is because the statement deals solely with developments since March 2022, whereas the appeal is against a decision which was communicated to Larch on 17 December 2021. Evidence about subsequent events cannot retrospectively affect the question whether the decision to de-register Larch in December 2021 was one which the Regulator was entitled to take, and so cannot affect the outcome of the appeal. It is open to Larch to apply for re-registration under section 112 of the 2008 Act, and events since December 2021 are potentially relevant to such an application, but that is not a matter with which this Court is presently concerned. I also accept the Regulator's submission that this material was filed so late that the Regulator was not given a fair opportunity to deal with it, but the principal reason why I have declined to admit this statement is that it contains nothing of relevance to the appeal. I should add that, if I had been otherwise minded to admit the statement, I would not have declined to admit it solely because of points made by the Regulator about the somewhat chequered procedural history of this appeal.

The statutory framework, the Standards, and relevant provisions in the Code of Practice

13. The relevant legislative regime was very helpfully summarised by Chamberlain J in **Inclusion Housing** at paragraphs 3-20. I cannot improve on this summary and so I will gratefully set it out in this judgment:

> "3. Part 2 of the Housing and Regeneration Act 2008 ('the 2008 Act') establishes a regulatory regime for social housing. When the 2008 Act came into force, the functions of the regulator were discharged by the Office for Tenants and Social Landlords, also known as the Tenant Services Authority. Later, they passed to the Regulation Committee of the Homes and Communities Agency ('HCA'), which is now known as Homes England, and then from 1 October 2018 to the Defendant. I shall use the statutory term 'regulator' to refer to these different entities without distinction."
>
> 4. Section 111 of the 2008 Act requires the regulator to maintain a register of providers of social housing. 'Social housing', often used interchangeably with 'affordable housing', means (a) low cost rental accommodation and (b) low cost home ownership accommodation: s. 68. This case concerns the

former, which is accommodation made available for rent, where the rent is below the market rate, in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market: s. 69. In relation to low cost rental accommodation, the 'provider of social housing' is the landlord: s. 80(1) .

5. Social housing providers do not have to be registered, but may choose to be, for a variety of reasons. Where housing is acquired, built or converted by public grant, the landlord must be registered: s. 31 of the 2008 Act. This is not the reason that Inclusion is registered: its business model does not involve the use of public grant. But there are other advantages of registration. It may cause lenders and rating agencies to view private social housing providers more favourably. Moreover, many local authorities require social housing providers to be registered before they will use them to house those people on their waiting lists.

6. Section 116, headed 'Entry in the register: voluntary registration', imposes on the regulator a duty to register anyone who is eligible for registration and applies to be registered. The regulator has powers to set standards for the provision of social housing (see s. 193-198B) and to monitor compliance with those standards (ss. 199-210). Section 195 empowers the regulator to issue a code of practice which (a) relates to a matter addressed by a standard and (b) amplifies the standard. By s. 195(2), the regulator may have regard to any such code in considering whether the standards have been met.

7. An English body is eligible for registration if it meets the conditions set out in s. 112 and does not fall within the exceptions in s. 113 : s. 112(1) . Condition 1 is that the body (a) is a provider of social housing in England or (b) intends to become one. Condition 2 is that the body satisfies any relevant criteria set by the regulator as to (a) its financial situation, (b) its constitution and (c) other arrangements for its management. The exceptions in s. 113 are local housing authorities and county councils.

8. Section 92K defines the regulator's 'fundamental objectives'. It requires the regulator to perform its functions with a view to achieving (so far as is possible) (a) the economic regulation objective and (b) the consumer regulation objective. By s. 92K(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.'

By s. 92K(5) :

'The regulator must exercise its functions in a way that—

(a) minimises interference, and

(b) (so far as is possible) is proportionate, consistent, transparent and accountable.'

9. The Governance and Financial Viability Standard, published in April 2015 ('the Standard'), provides as follows at §1 under the heading 'Required outcomes':

'1.1 Governance

Registered providers shall ensure effective governance arrangements that deliver their aims, objectives and intended outcomes for tenants and potential tenants in an effective, transparent and accountable manner. Governance arrangements shall ensure registered providers:

(a) adhere to all relevant law

(b) comply with their governing documents and all regulatory requirements

(c) are accountable to tenants, the regulator and all relevant stakeholders

(d) safeguard taxpayers' interests and the reputation of the sector

(e) have an effective risk management and internal controls assurance framework

(f) protect social housing assets.

1.2 Financial viability

Registered providers shall manage their resources effectively to ensure their viability is maintained while ensuring that social housing assets are not put at undue risk.'

10. So far as governance is concerned, there are four possible grades, which are set out at §4.2 of a document entitled Regulating the Standards , published in April 2018: G1, which is awarded where the provider 'meets our governance requirements'; G2, where the provider 'meets our governance requirements but needs to improve some aspects of its governance arrangements to support continued compliance'; G3, where the provider 'does not meet our governance requirements' and there are 'issues of serious regulatory concern and in agreement with us the provider is working to improve its position'; and G4, where the provider 'does not meet our governance requirements' and there are 'issues of serious regulatory concern and the provider is subject to regulatory intervention or enforcement action'.

11. As to financial viability, the Standard provides as follows:

'2.4 Registered providers shall ensure that they have an appropriate, robust and prudent business planning, risk and control framework.

2.4.1 The framework shall ensure:

(a) there is access to sufficient liquidity at all times

(b) financial forecasts are based on appropriate and reasonable assumptions

(c) effective systems are in place to monitor and accurately report delivery of the registered providers plans

(d) financial and other implications of risks of the delivery plans are considered

(e) registered providers monitor, report on and comply with their funders' covenants.

…

2.5 In addition to the above registered providers shall assess, manage and where appropriate address risks to ensure the long-term viability of the registered provider, including ensuring that social housing assets are protected. Registered providers shall do so by:

(a) maintaining a thorough, accurate and up to date record of their assets and liabilities and particularly those liabilities that may have recourse to social housing assets

(b) carrying out detailed and robust stress testing against identified risks and combinations of risks across the range of scenarios and putting appropriate mitigation strategies in place as a result

(c) before taking on new liabilities, ensuring that they understand and manage the likely impact on current and future business and regulatory compliance.'

12. As with governance, there are four possible grades for financial viability: V1, which is awarded where the provider 'meets our viability requirements and has the financial capacity to deal with a wide range of adverse scenarios'; V2, where the provider 'meets our viability requirements' and has the 'financial capacity to deal with a reasonable range of adverts scenarios but needs to manage material risks to ensure continued compliance'; V3, where the provider 'does not meet our viability requirements' there are 'issues of serious regulatory concern' and 'in agreement with us, the provider is working to improve its position'; and V4, where the provider 'does not meet our viability requirements', there are 'issues of serious regulatory concern' and the provider 'is subject to regulatory intervention or enforcement action'.

13. At §4.9 of Regulating the Standards, the following guidance is set out:

'Providers at V2 can often share some of the following characteristics, amongst others:

- A material reliance on relatively uncertain cash flows, often relating to the type of activities being undertaken (for example, sales versus rental products) or the types of markets in which the provider operates

- A material change in the business model being pursued by the provider, this involves taking on more risk. This could be moving into new business areas or scaling up existing operations, including taking a step change in new development aspirations or significant increase in debt levels

- A significant financial event in the short term (typically one to two years) that could change the profile of the organisation, for example a refinancing requirement or a material peak in sales exposure

- A business plan that is built on assumptions that are difficult to achieve or justify on the basis of past experience or current operating conditions

- A weaker financial profile with less headroom against covenants or insufficient cash generation for the level of risk being undertaken. Using debt or sales income to meet interest costs is a concern for the regulator

- A business plan that does not cope with severe but plausible adverse stress testing: and/or can't absorb a limited amount of stresses without enacting mitigations.'

14. At §4.10, it is said that providers at V3 will have been 'unable to provide the regulator with sufficient assurance that they meet the requirements of the Standard' and will be 'working closely with the provider to try and remedy the issue as soon as possible'.

15. The matters set out in the standards are amplified in the Governance and Financial Viability Standard Code of Practice published in April 2015 ('the Code'). It provides, materially, as follows:

'2…The Code fits with the co-regulatory regime by allowing registered providers to innovate and develop their own approaches to achieve the outcomes and expectations set out in the standard.'

16. By way of amplification of the financial viability required outcome, the Code provides as follows:

'10. The regulator recognises every business decision will carry risk and sometimes those risks will crystallise. There is, however, a difference between managed risk and uncontrolled loss. The regulator expects boards to manage the business to promote the former and avoid the latter. In addition, the regulator does not intend that all social housing assets should remain in the sector forever. However, the value in the assets should not be lost to the sector. Under the Value for Money Standard, registered providers are expected to consider how to make best use of their assets.'

17. By way of amplification of §2.5(b) of the Standard, the Code provides as follows:

'The regulator expects registered providers, as part of the risk management approach, to stress test their plans against different scenarios across the whole group. The scenarios used to vary according to the size, type and structure of the organisation. Registered providers should go beyond simple sensitivity testing and include multi-variate analysis which tests against potential serious economic and business risks. Registered providers should explore those conditions which could lead to failure of the business, even if planned

mitigations and controls are successfully implemented. They should assure themselves that the scenarios are consistent with what they consider to be acceptable levels of risk and their obligations. Stress testing should employ scenarios that are designed to assess resilience.'

18. Section 22 of the Legislative and Regulatory Reform Act 2006 authorises the making and revision of a code of practice in relation to the exercise of regulatory functions. Any person exercising a regulatory function to which s. 22 applies must have regard to the code in determining any general policy or principles by reference to which the person exercises the function. Regard must also be had to the code by any such person in the exercise of the function of setting standards or giving guidance generally in relation to the exercise of other regulatory functions. Section 24 confers power on a minister of the Crown by order to specify regulatory functions to which s. 22 applies. It is common ground that s. 22 applies to the functions now exercised by the regulator, though the latter points out that the duty imposed by s. 22 applies only when determining general policy or principles and when setting standards or giving guidance generally in relation to the exercise of other regulatory functions.

19. A Regulator's Code was made under s. 22 in April 2014. It provides as follows at §2.2:

'In responding to non-compliance that they identify, regulators should clearly explain what the non-compliant item or activity is, the advice been given, actions required or decisions taken, and the reasons for these. Regulators should provide an opportunity for dialogue in relation to the advice, requirements or decisions, with a view to ensuring that they are acting in a way that is proportionate and consistent.

This paragraph does not apply where the regulator can demonstrate that immediate enforcement action is required to prevent or respond to a serious breach or where providing such an opportunity would be likely to defeat the purpose of the proposed enforcement action.'

20. In April 2018, the regulator's predecessor issued a document entitled Regulating the Standards , outlining its operational approach to assessing providers' compliance with the economic and consumer standards. At §2.30, it provides:

'Where our assessment has changed or if the [in-depth analysis] confirms a providers existing non-G1/V1 grades, then we will discuss this with the provider and publish a report explaining the reasons for the assessment.'"

14. Other relevant provisions of the Code of Practice, for the purposes of this case, can be found in paragraph 8, 21, 25 and 29, which state:

> "8 Registered providers should take all such steps as are reasonably necessary to ensure that any activities they undertake do not place social housing assets, activities relating to the provision of social housing or their own financial viability at undue risk. The regulator recognises that registered providers should have the flexibility to consider risks in light of their individual circumstances. Boards of registered providers have the responsibility to satisfy themselves and provide assurance to the regulator that:
>
> they have considered the requirement appropriately in relation to their own external and internal operating environment
>
> they are satisfied they will comply with regulatory requirements now and in the foreseeable future.
>
> …
>
> 21 Registered providers need to ensure their business planning, risk management and control framework is effective. It should cover all areas of the registered provider's business. This should demonstrate the registered provider fully understands and has considered its operating environment, so it can deliver its business plan and organisational objectives. It does not need to be captured in a single document…
>
> 25 Registered providers need to build their business on robust and prudent assumptions. Registered providers should assure themselves the assumptions used are reasonable. For example these may be based on:
>
> past performance
>
> market conditions
>
> deliverability and forecasts of possible future condition
>
> …
>
> 29 Boards are the custodians of social housing assets and the financial viability of the registered providers that hold those assets. The responsibility for managing risks, and specifically risks to social housing assets, lies with boards. As social housing is a long term asset, normally funded by long-term debt, it follows that boards need to maintain a longterm perspective on managing risk. They need to ensure that their decisions do not put short-term gains ahead of the long term sustainability of the business and the security of their social housing assets."

15. So far as compulsory de-registration is concerned, this is dealt with in section 118, which provides, in relevant part:

> "118 **De-registration: compulsory**
>
> (1)The regulator may remove from the register a private registered provider which the regulator thinks—
>
> (a) is no longer eligible for registration,
>
> …
>
> (2) Before removing a body under subsection (1)(a) … the regulator must—
>
> (a) take all reasonable steps to give the body at least 14 days' notice, and
>
> (b) consider any representations it makes in that period.
>
> (3) After removing a body under subsection (1)(a) … the regulator must take all reasonable steps to notify the body.
>
> …"

16. There is no dispute in the present case that the procedural steps in section 118(2) were complied with.

17. Provision is made for an appeal against de-registration by section 121, which provides, again in relevant part:

> "121 **Appeal**
>
> (1) A body may appeal to the High Court against a decision of the regulator—
>
> (a) to refuse to register it,
>
> (b) to de-register it, or
>
> (c) to refuse to de-register it.
>
> (2) The regulator shall not de-register a body while an appeal is pending.
>
> …"

18. As I have said, in addition to the statutory right of appeal, the Regulator provides a non-statutory internal appeal scheme, pursuant to which certain decisions of the

Regulator, including a decision to de-register, can be subject to review. An application under this scheme must be made within 10 working days of receipt by the social housing provider of the notification of the decision made by the Regulator. If the review panel considers that the decision under challenge was flawed, it is able to remit the matter back to the decision-maker for a further decision. The internal appeal scheme expressly recognises that the internal process is not intended to substitute or undermine the statutory right of appeal. In the present case, Larch exercised its right of internal appeal, and the review panel concluded that there were no errors in the decision to de-register, and that the decision was reasonable.

The approach to this appeal

19. The parties were in agreement as regards the approach that the Court should take to this appeal. It was set out in Ms Broadfoot KC's skeleton argument.

20. Section 121 of the 2008 Act provides for a right of appeal, but it does not specify the scope or nature of the appeal. I agree with the parties that the function of the judge is not to re-take the decision under section 118, or to substitute his or her decision for the decision that was taken by the Regulator. Section 118(1)(a) provides that the Regulator may remove from the Register a private registered provider which the Regulator thinks is no longer eligible for registration. The use of the word "thinks" makes clear that it is for the Regulator to exercise its judgment and to take the decision. It follows, in my judgment, that the test that the High Court should apply to an appeal is essentially (and subject to the "proportionality" point, below) the same as it would apply to the judicial review of an administrative decision. An appeal should succeed if the Regulator has acted irrationally, or if there has been a procedural irregularity which means that there has been a breach of natural justice. The appellate Court should also consider whether the Regulator took into account some irrelevant matter or had disregarded something to which they should have given weight. See **John Dee Limited v Commissioners of Customs & Excise** 1995 WL 1081889 (CA), at page 11, per Neill LJ, approved by Lord Reed PSC, giving the judgment of the Supreme Court, in **R(Begum) v SIAC** [2021] AC 765, at paragraph 48. In the **John Dee** case, the statutory provision in question was similar to section 118(1)(a), in that it made clear that the decision should be based on the view of the Customs & Excise: "Where it appears to the Commissioners requisite to do so for the protection of the revenue".

21. In conducting an irrationality assessment, the Court must bear in mind that the decision-maker, the Regulator, has a specialist expertise. The significance of this was explained by Chamberlain J in **Inclusion Housing** at paragraph 88:

> 88. It is well established that, when entertaining a rationality challenge by way of judicial review to a decision that involves a judgment, the court is not the primary decision-maker. This point has been given special emphasis in challenges to specialist regulators: see e.g. **R v Director General of Telecommunications** [1999] ECC 314, [26] (Lightman J); **Fraser v NICE** [2009] EWHC 452 (Admin) , [47]-[48] (Simon J). However, it is also important not to erect so unrealistically high a hurdle as to render success in an irrationality challenge effectively impossible. As Sedley J said

> in **R v Parliamentary Commissioner for Administration ex p. Balchin** [1996] EWHC 152 (Admin):
>
> '[Counsel for the claimant] does not have to demonstrate, as respondents sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic.'

22. In R (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin), Green J said, at paragraph 144:

> "144 … It is an error to suggest that simply because the subject matter of a decision, or the evidence used to justify it, is "economic" or "technical" that courts should recoil in terror and move gratefully into judicial reticence mode by reference to "margin of appreciation". If this were the judicial default position courts would find it hard indeed to hold in favour of claimants in clinical negligence cases where, almost invariably, the case turns on complex scientific evidence. In **R (Rotherham MBC)** [2015] PTSR 322 the Supreme Court recognised the dangers of "judicial timidity": para 65, per Lord Neuberger of Abbotsbury PSC. Decisions of the utmost importance to individuals, to companies and to society are routinely "economic" and "technical" and errors in those decisions should be as much susceptible to judicial review as other equivalent but less technical decisions. There should be no lacuna in judicial review simply because the nature of the decision under challenge is a difficult one."

23. Nevertheless, I agree with the Regulator that considerable weight should be given to the Regulator's views because it is a specialist regulator exercising a judgment in an area in which it is expert and the Court is not.

24. There is an additional consideration that must be taken into account in relation to decisions that are taken by the Regulator. As decision-making in relation to de-registration is one of the Regulator's statutory functions, the Regulator must, in taking a decision under section 118(1)(a), act (so far as is possible) in a way that is proportionate, consistent, transparent, and accountable (see section 92K(5)(b)). There is, therefore, an express statutory duty to act proportionately when taking de-registration decisions. The proportionality duty is qualified by the words in parentheses in section 92K(5)(b), "(so far as possible"), but this has no significance in relation to a decision under section 118(1)(a): I do not see why it would not be possible for the Regulator to act proportionately in taking a decision under section 118(1)(a). Accordingly, in an appeal under section 121, the appeal may be allowed on the basis that the decision to de-register was disproportionate. This is an obligation of result, in contrast to statutory provisions which merely require a public authority to "have regard" to the principle of proportionality. I agree with the observation of

Chamberlain J in **Inclusion Housing,** at paragraph 108(c), that even where, as here, it is for the court to assess whether regulatory action is proportionate, the weight to be given to the decision-maker's view will depend on the context, and may be considerable.

25. Finally, there is one other statutory provision that is potentially relevant. This is section 108 of the Deregulation Act 2015. This requires regulators to whom the duty is applied to have regard to the desirability of promoting economic growth and, in that regard, to consider the importance of exercising their regulatory functions in a way which ensures that (a) regulatory action is taken only when it is needed, and (b) any action taken is proportionate. The obligation in section 108 applies to the functions performed by the Regulator (see **Inclusion Housing** at paragraph 95). Mr Gajjar did not specifically rely upon section 108. In my view, he was right not to do so. I agree with Chamberlain LJ, at paragraph 96 of **Inclusion Housing**, that section 108 was not intended to preclude regulatory action where the regulator considered it necessary in the public interest. In any event, section 108 does not add much, if anything, to the statutory framework in the 2008 Act, and, in particular, to section 92K(5)(b).

The facts

26. There are 1400 registered social housing providers, not including local authorities. Of these, only a relatively few operate the long-term lease model that is operated by Larch, and which is described below. The sector is generally well-managed.

27. Larch is a small registered provider. In 2021 it submitted a Statistical Data Return which reported that it provided a total of 266 units of housing accommodation. Of these, only five were general needs social housing, and only three of them were occupied. The remaining 261 units consisted of supported, non-social housing. These units were spread across 87 properties in England.

28. It will be seen, therefore, that only a very small proportion of Larch's housing units were social housing, as defined in the 2008 Act (although Mr Gajjar said in oral argument that these figures may have underestimated somewhat the number of units that were social housing units in 2021 and that the numbers have increased in 2022). Social housing, as defined in section 68 of the 2008 Act, is low cost accommodation which is provided below market rate. Other social housing, in the broader sense, consists of supported housing which is generally provided at above market rents and which is provided to recipients of Housing Benefit. This does not count as "social housing" for the purposes of the 2008 Act.

29. Nevertheless, regardless of the small proportion of Larch's units that were social housing, it is not in dispute that Larch's place on the register of social housing providers is very important to it. This is primarily because registration makes it easier to deal with local authorities: whilst local authorities are not legally obliged to place their supported housing (ie non-social housing) tenants with registered social housing providers, in practice many local authorities seek to engage only with those who are on the Register. They will only place tenants on their waiting lists with registered providers. This is partly because registration provides comfort and assurance to local authorities that providers meet certain minimum standards and are subject to regulation. It is also because registered provider status makes it easier for the supported housing to be classed as "exempt accommodation", as defined in Schedule

2 of the Housing Benefit Regulations 2006. Since the accommodation is exempt, the maximum eligible rent for Housing Benefit purposes is based on the contractual rent charged (subject to determination by a rent officer if, for example, it is considered to be unreasonably high). Usually, this means that 100% of the rent charged will be covered by Housing Benefit, in respect of which the local authority can claim 100% subsidies from the Department of Work and Pensions (DWP) . In contrast, the level of DWP subsidy that a local authority can claim in respect of Housing Benefit expenditure on tenants occupying Private Rented Sector accommodation, which is not provided by a Registered Provider is determined by a Rent Officer Determination. This may not amount to 100% of the Housing Benefit. Put simply, therefore, it can be financially beneficial for local authorities to deal with Registered Providers.

30. This is important to providers because local authorities are, of course, a very important source of tenants, and because the rent of those tenants who are placed by local authorities are, at least in the main, paid for by Housing Benefit, and so, in principle, the provider can have a good degree of confidence that funds will be available. In addition, lenders and ratings agencies take comfort from providers being subject to registration and regulation.

31. The Regulator takes a "co-regulatory" approach to its relations with registered providers. This means that responsibility is placed with providers to demonstrate their compliance with the regulatory regime. The co-regulatory approach has been successful, and it is very rare for the Regulator to take formal enforcement action. Registered providers which own fewer than 1,000 social housing units are, generally, subject to a different and less intensive level of regulatory engagement than those which own 1,000 or more social housing units.

32. Larch operates the long-term lease model of social housing provision. The long-term lease model was explained in Mr Brown's first witness statement. It involves property funds, private equity investors, and individuals providing property on long term leases (typically 20 years or more) to a registered provider, which then lets accommodation to a tenant via nomination arrangements with a local authority. The local authority or NHS commissioners usually commission an individual care package for the tenant alongside the accommodation. Generally, the commissioning of the care package and the accommodation happens on a three- to five-year cycle. Typically, the registered provide makes a charge for rent – for the right to occupy the property – and also levies service charges for specific property related services, such as maintenance of communal areas and security. The service charge should reflect the actual cost of the services provided. The care package is arranged with a care provider (not normally the registered provider), and the care package is funded separately.

33. The individual tenants are responsible for paying the rent and service charges to the registered provider, their landlord. The rents, including service charges, that can be charged on supported social housing properties are generally higher than those for general "needs" properties. Tenants are often eligible to receive Housing Benefit to cover their housing costs. The local authority administers the Housing Benefit payments on behalf of the Department of Work and Pensions, and can review claims to ensure that they are not unreasonably high. This means that Housing Benefit is often assumed by investors to underwrite the rental stream and reduce the risk of non-payment. However, for any part of the gross rent not covered by the Housing

Benefit, the landlord is exposed to non-payment by the tenant (or to the credit risk of the tenant).

34. Under the long-term lease model, the lessee, i.e. the registered provider, takes on all the costs for repairs and insurances of the properties. This is paid for by the rental inflows from the tenants and from Housing Benefit, and the business should be run so that there are sufficient funds left over after the registered provider's lease payments to manage and maintain the properties over the long term and to cover the registered provider's overhead.

35. The amount of income that is received by registered providers which operate this model is linked to four variables: the rent charged; the number of units that are available and in a fit condition to let; the occupancy rate; and the amount that local authorities will agree to pay towards the required rent through Housing Benefit. It is a feature of this model, as I have said, that registered providers are subject to long-term lease obligations with head landlords, so, if something goes wrong with any of these variables, the consequences for the registered provider can be very significant. If a provider does not receive rent, or does not receive sufficient rent, in relation to properties, the provider is still under a long-term obligation to make payments to the lead lessor. Registered providers such as Larch did not have the ability unilaterally to exit the head lease.

36. Larch was registered pursuant to a decision taken at the Regulator's Registration Advisory Committee (RAC) meeting in July 2012, and Larch's registration was approved on the basis that it intended to provide 30 units of social housing within 12 months of registration. Larch was registered on the basis that it was on a path to compliance with the governance element of the Governance and Financial Viability Standard – which the registration criteria allowed in 2012.

37. Larch's properties were held on long-term leases predominantly from two main superior landlords, Henley and SLIL. As stated above, the Henley properties formed the Devon Portfolio. The leases were on a full repairing and insuring basis, with no break clause.

38. The problems in relation to Larch first became apparent to the Regulator in the Summer and Autumn of 2019. There were complaints about breach by Larch of the consumer standards, and in particular that it was in breach of governance and viability aspects of the standards. There were allegations that Larch's head landlords had not been paid since April 2019. The Regulator conducted an investigation and came to the conclusion that there was compelling evidence that Larch's Board had not managed Larch's affairs with an appropriate degree of skill, diligence, effectiveness, prudence, and foresight. The Regulator was particularly concerned that, as Larch had not kept up with its lease payments, it was reliant, in order to remain financially viable, upon the continued support of its head landlords in agreeing to forego lease payments.

39. After a period of engagement with Larch, the Regulator issued a Regulatory Notice in November 2019. The Notice stated that:

> "a) Larch is non-compliant with the Governance and Financial Viability Standard. Larch has not managed its resources

effectively to ensure its viability can be maintained, and has not ensured its governance arrangements deliver an effective risk management framework.

b) Larch has not been able to demonstrate that it has managed its affairs with an appropriate degree of skill, independence, diligence, effectiveness, prudence and foresight.

c) Larch has failed to ensure that it has an appropriate, robust and prudent business planning, risk and control framework that ensures sufficient liquidity at all times.

…

Larch's business model relies on continued cash income at the right level, and at the right time, to enable it to meet its obligations. The regulator has evidence that Larch has been unable to achieve its income forecasts and this has placed significant stress on its cashflow. As a result, Larch has been unable to meet its obligations under its lease arrangements as and when they fall due. Larch is currently reliant on the continued support of its head landlords forgoing lease payments while solutions are explored.

A required outcome of the governance element of the Governance and Financial Viability Standard is that a registered provider shall ensure it has an effective risk management framework. We lack assurance that Larch has an appropriate risk management framework in place.

One of Larch's key risks is it not receiving the required rental levels from relevant local authorities in order to meet its lease obligations as they fall due. This risk has crystallised and Larch has been unable to achieve its planned rental income. The risk management framework which Larch has in place has not been effective and the lease terms it has entered into mean it has been unable to effectively mitigate and control the impact of this cashflow risk crystallising.

These outcomes mean we lack assurance that Larch is managing its affairs with an appropriate degree of skill, independence, diligence, effectiveness, prudence and foresight.

Larch has committed to work with the regulator to address the issues outlined in this Regulatory Notice and to develop a recovery strategy. The regulator will continue to engage with Larch and is considering whether further action should be taken, including whether to exercise any of its powers."

40. Following the Regulatory Notice, the Regulator continued to engage intensively with Larch to assist it to achieve compliance with the standards. The two largest creditors provided Larch with stays on lease payments, one until 30 November 2019 and one until 31 December 2019. In an email to the Regulator on 30 October 2019, Mr Feltham stated that these stays would give Larch time to catch up on all outstanding rent payments with Devon councils which will clear all outstanding rent obligations to SLIL and Henley. However, on 29 November 2019, West Devon Borough Council emailed the Regulator to say that the Council had a number of concerns about Larch, which meant that Housing Benefit claims were still pending. In summary, West Devon Borough Council was concerned that the properties for which Larch was responsible in West Devon had been sold to a Jersey company at an inflated value, with the properties then being leased to Larch for rents which the Council believed were vastly above the market value. The Council was concerned that these transactions had been contrived to take advantage of the Housing Benefit Scheme ("contrivance"). As a result of these concerns, Larch experienced the non-payment or reduced payment of Housing Benefit claims across Devon. On 7 February 2020, the Regulator was advised that West Devon Borough Council had decided to refuse 69 Housing Benefit applications on the primary grounds of "contrivance". These difficulties did not relate only to the very small number of units of social housing, strictly so called, that were provided by Larch. The Regulator was also advised that other outstanding claims for Housing Benefit were 'dead' due to a lack of information.

41. Subsequently, in May 2021, the Regulator was informed that an agreement had been reached in April 2021 whereby West Devon Borough Council would pay Housing Benefit to Larch to cover a significantly lower core rent of £156 (instead of the rent sought by Larch, which was in the range of £260-£315 per unit per week).

42. In the meantime, in May 2020, the Regulator received notice that a winding up petition had been issued against Larch for non-payment of debts. Larch's sole shareholder, Mr Feltham, granted Larch a loan and Larch also used its cash reserves to reach a settlement with the creditor.

43. On 26 June 2020, the Regulator notified Larch that the Regulator had taken a decision to issue an Enforcement Notice under sections 219-225 of the 2008 Act. This would have been the first time that the Regulator exercised its statutory power to issue an Enforcement Notice. In response, Larch proposed a Voluntary Undertaking under s125 of the 2008 Act which committed Larch to completing similar actions to those set out in the draft Enforcement Notice, and provided an action plan with timescales. The Regulator accepted the Voluntary Undertaking on 24 July 2020. The Regulator appreciated at the time that this was not without risk.

44. The Voluntary Undertaking committed Larch to carry out an action plan which involved:

• Appointing a reputable consultant to undertake an independent financial review of Larch's financial standing and non-financial housing management systems;

• Commissioning a Statement of Affairs which would provide the Board with a detailed snapshot of Larch's financial status at a specific date;

• Obtaining formal written advice from Devonshires Solicitors LLP on compliance with insolvency laws; and

• Recruiting two additional board members.

45. Larch did not comply with the Voluntary Undertaking. There were significant delays in Larch commencing work on achieving the commitments set out in the Voluntary Undertaking, and Larch failed to meet any of the deadlines that it had committed to. The Regulator wrote to Larch on 27 August 2020, 18 December 2020, and 18 January 2021 about its failure to comply with the Voluntary Undertaking. In a letter to Larch dated 12 February 2021 the Regulator set out its detailed assessment of the material provided so far and invited representations on that analysis. A key problem identified by the Regulator was that its analysis of rent and service charge income on leases entered into by Larch for non-social housing showed that core rent income was lower than lease payments. The letter emphasised the Regulator's concern over Larch's on-going viability and ability to manage and mitigate the risks associated with entering into long term full repairing and insuring leases.

46. Following this letter, the Regulator continued to engage intensively with Larch on its ongoing viability position, action plan and governance arrangements, including following the resignation of two board members and an advisor to the board in September 2021. There was a great deal of correspondence between the parties. Further concerns were raised by third parties. For example, Wolverhampton Council raised concerns about letting practices and Housing Benefit claims on 11 March 2021, which Ms Malyon, then Chair of Larch, was asked to investigate. Ms Malyon reported back on the results of her investigation into the Wolverhampton matter. She found that the sharing of pre-signed documents and poor communication had led Larch unwittingly to enter into arrangements that were not subject to Board consideration, as was required. As basic internal governance controls were not observed, Ms Malyon concluded that this represented a failing of the Chief Executive, Mr Feltham. In addition, Ms Malyon advised the Regulator that progress in resolving the "Devon portfolio issues" had been frustrated by the Chief Executive's failure to fulfil requests made by the Board, ultimately leading to a breakdown in trust. The letter confirmed that as a result of this, Mr Feltham would step down as Chief Executive, but this would not affect his shareholder rights.

47. A conference call was held between the Regulator and Larch on 12 May 2021. The Regulator reiterated its concerns in relation to the viability of Larch, namely that there were a significant number of leases in which the core rent was lower than lease costs. The Regulator confirmed that it was considering its future regulatory engagement strategy with Larch. Larch responded on 24 May 2021, acknowledging the Regulator's concerns regarding the viability risk of core rents not being in line with lease costs, and confirming that Larch would continue to manage this risk by entering into rent reviews, and negotiating with head landlords.

48. A further set of allegations about Larch was received on 14 June 2021 from Devon County Council. The Council advised that bailiffs had been attending Larch properties over non-payment of utility bills and that Larch was claiming that payment of them was not Larch's responsibility.

49. Following a further exchange of letters, the Regulator wrote formally to Larch on 12 August 2021. This letter expressed concern with the lack of progress across the key risk areas and explained that Larch's on-going registration as a social housing provider required it to comply with the regulatory standards. The letter said that long-term non-compliance without a coherent route to achieve compliance was not acceptable. The letter further said that this may call into question Larch's eligibility to be registered. In the letter, the Regulator set out its detailed assessment of the material that Larch had provided so far, and invited representations on that assessment. Larch responded on 31 August 2021, stating, inter alia, that the Board noted the Regulator's concerns regarding financial viability and that the Board was operating on the basis that a reasonable settlement would be reached with regard to the Devon Portfolio.

50. At this stage, according to Mr Brown, the Regulator considered Larch's position to be precarious. It continued to operate with low levels of cash (set out in the management accounts reported to the Board) – as at the end of May 2021 it was circa £19k in credit. Furthermore, there was an increase in debtors and creditor balances which indicated that cash was not being received and payments were not being made. There was also a lack of evidence on how the Board was assured on the accuracy of the debtor balances reported. Rent and service charge were reported as one income figure, which is contrary to good practice, and Larch had not provided the Regulator with an adequate response to the concern expressed in its letter of 12 February 2021 about the core rent income appearing to be lower than lease costs. Larch acknowledged that there was a lack of transparency in relation to income.

51. By this stage, the Regulator was also concerned that the problems with the Devon Portfolio had not been resolved, despite assertions by Larch in 2019 that they would be resolved by the end of that year. On 21 September 2021, the Regulator spoke to the Chief Executive of Larch, Wayne Feltham, and was notified that two directors had resigned; one of the directors was the Chair, Joy Malyon. Mr Feltham confirmed that they were seeking to recruit new board members but was unable to provide a timescale for this.

52. On 30 September 2021, at a Reactive Engagement Decision ("RED") meeting, the Regulator carried out a detailed review of its regulatory strategy in relation to Larch and a decision was taken to explore steps towards compulsory de-registration. The core reason for this decision was that Larch was no longer able to meet the eligibility criteria for voluntary registration set out in section 112 of the 2008 Act, because it could not demonstrate that it could sustain its financial viability on an ongoing basis. A significant factor in this was Larch's long-term lease operating model, through which the viability issues had arisen, primarily as a result of Larch's non-social housing provision. The Regulator also considered that Larch's engagement with the Regulator was characterised by very limited progress, a lack of transparency, missed deadlines, and broken commitments. In addition, the Regulator had on-going concerns about governance, with there being a repeated pattern of board members being appointed and then resigning. Half of the Board had resigned within the last few weeks, citing an inability to work with Mr Feltham.

53. The viability issues that were identified in relation to Larch were summarised in a paper for the RED meeting on 30 September 2021 as follows:

> "It is our judgement that Larch is unable to demonstrate it can sustain viability on an ongoing basis. A significant factor in this is the operating model Larch has chosen to adopt where its viability issues are caused by the non-social housing provision being on long term Full Repairing and Insuring leases; the risks of which it cannot adequately control or mitigate, and where it is not in receipt of HB income for a significant proportion of units. Evidence that supports Larch not being able to demonstrate viability on an ongoing basis is:
>
> • An absence of a business plan based on reasonable and appropriate assumptions.
>
> • The independent financial review reported that c92% of gross rental income is paid as lease costs – which means an inherent low margin on its non-social housing activity.
>
> • This is further amplified by our recent analysis of rent and service charges income on leases entered into for non-social housing identifying core rent income is lower than lease payments.
>
> • For the Devon portfolio HB has not been paid for a significant period – dispute on-going since September 2018. (please note there was a short period of time between April and July 2021 where a small number of units were put into payment at a lower HB rate, but these have been subsequently suspended due to an alleged contrivance matter where self-payers are charged lower rents than those who claim HB)
>
> • The current financial situation where Larch is reliant on ongoing third-party support and forbearance of creditors; a situation that has been the same since 2019. Larch is unable to provide written evidence of third-party support, and one significant creditor confirmed on the 22 September 2021 that there is no written agreement in place.
>
> • The independent financial review questioning the accuracy of the debtors' balance, and the reliance on debtors being settled on the HB dispute for the non-social housing stock at almost full levels and the board unable to effectively control this scenario."

54. The Regulator commenced compulsory de-registration proceedings on the 25 October 2021. This was communicated to Larch's CEO in a phone call on the 25 October 2021, which was followed by a letter sent to Larch on the same date. In addition, the Regulator published a further Regulatory Notice on the 8 November 2021, reflecting its updated position.

55. Larch was given 16 days to make representations, and this period was extended, at Larch's request, to 22 November 2021. Representations were received from Larch on

22 November 2021. These included a written statement from Mr Feltham; a High Level Financial Review prepared by Begbies Traynor Group, a firm of independent accountants ("the Begbies Report"); a draft profit and loss and balance sheet as at 30 September 2021; Company unaudited accounts for 2018/2019 and 2019/2020; a 2-year cashflow forecast and rent register; aged debtors and creditors report; Larch's risk register; and the CV of a proposed new Chair.

56. The key points made in Larch's representations were:

(1) Larch expected to resolve the issues relating to the Devon Portfolio in a satisfactory manner. Larch said that it expected the agreement with Henley to include a write-off of £4.7m in lease payments owed to Henley in return for the transfer to Henley of some £4.8m which Larch considered to be owed to it by tenants on these properties;

(2) Larch's ongoing viability was demonstrated by the 2-year cashflow forecast. Larch said that this had been subjected to independent review (the Begbies Report); and

(3) Larch said that in future it would not be dependent on the forbearance of its creditors. This was because the agreement with Henley (referred to at (1)) would eradicate its indebtedness to Henley, and because it had entered into an agreement with the other head landlord, SLIL, pursuant to which SLIL would advance a loan to Larch to cover outstanding indebtedness.

57. The matter was considered, and Larch's representations were taken into account (including further representations that had been received on the date of the meeting), at a further RED meeting on 8 December 2021. The RED meeting considered a detailed assessment that had been undertaken by the Regulator of Larch's representations. The Regulator noted that there was no business plan, nor any scenario analysis, nor stress testing. Larch had acknowledged in its representations that it operates under the terms of various long-term leases which are on a full repairing and insuring basis with no break clauses. The paper for the RED meeting on 8 December 2021 said:

> "Larch fundamentally lacks control over the ability to renegotiate or exit leases, and the lease terms means that c85% (based on Larch's representations) of gross rental income is paid as lease costs to head landlords. Larch has sought to renegotiate in the past without success, and it is our view that Larch lacks a credible plan to become a compliant provider. We also consider Larch has been non-compliant for a significant period of time and has had ample opportunity to resolve these issues, with little material progress made."

58. In relation to the representations made by Larch, the view of the Regulator was as follows: As for (1), no binding agreement had been reached with Henley. The Regulator had not been provided with written Heads of Terms, let alone a binding agreement. As for (2), the Regulator took the view that the 2-year cashflow forecast that had been put forward by Larch was based on unverified and unsubstantiated assumptions, which had not been stress tested, and was not supported by an

"appropriate, robust and prudent business planning, risk and control framework", and so did not meet the requirements of the Standard. The Begbies Report had made clear that the writers had not verified the information and assumptions provided by Larch. The Begbies Report said that if Larch failed to achieve its growth forecast, it would be unable to meet the capital loan repayments with SLIL that were scheduled to commence in March 2022, and this would result in a monthly cashflow deficit. As for (3), no documentary evidence had been supplied to support an agreement with SLIL. Furthermore, Larch acknowledged in its representations that if its predicted growth forecast was not achieved, it would be reliant upon SLIL's further forbearance in agreeing to delay the start of the capital repayments.

59. The Regulator concluded that Larch's representations did not demonstrate how it could meet and manage the risks associated with its long-term lease obligations, and so how it could sustain its on-going viability. The Regulator took the view that, on the basis of its extensive engagement with Larch since the non-compliant judgement in November 2019, and Larch's failure to address the issues identified in the Regulator's letter of 25 October 2021, weaknesses in Larch's governance had resulted in a position where the provider did not demonstrate ongoing viability. The Board had failed to maintain a long-term perspective on managing risk and to ensure that its decisions did not put short-term gains ahead of the long-term sustainability of the business. This meant that Larch was not compliant with the requirements of the Code of Practice in respect of risk management (paragraph 29) and stress testing (paragraph 39), and was not compliant with the viability required outcome of the Standard (section 1.2) as amplified by paragraphs 8 to 10 of the Code of Practice.

60. The Regulator accepted that if points (1) to (3) bore fruit, i.e. if Larch successfully wiped out all liabilities associated with the Devon Portfolio, entered into a loan agreement with SLIL, and met all of the cashflow assumptions in the 2-year cashflow forecast, then this would provide a path to resolution of Larch's immediate solvency issues. However, the Regulator did not consider that this would be sufficient to demonstrate Larch's ongoing viability and so that it did not demonstrate Larch's compliance with the financial viability requirements of the Standard. Accordingly, even if the assumptions put forward in Larch's representations were correct, Larch could not demonstrate its on-going financial viability and so could not satisfy Condition 2 for registration, as set out in s112 of the 2008 Act, namely that the body satisfies any relevant criteria set by the regulator as to (a) its financial situation, (b) its constitution and (c) other arrangements for its management.

61. In its representations, Larch had also invited the Regulator to consider the use of less severe powers. This was also considered at the RED on 8 December 2021, which concluded that further use of powers, even in combination, would be unlikely to be effective in addressing the breadth of issues or assist Larch in demonstrating that it could sustain its ongoing viability.

62. A decision was taken at the RED meeting on 8 December 2021 to de-register Larch. The reasons for the Regulator's decision to de-register were set out in a letter to Larch dated 17 December 2021.

63. In light of the Christmas period, the Regulator agreed to extend the time limit for Larch's internal appeal and said that it would not object to an extension to 22 January 2022 for Larch's statutory appeal.

The grounds of appeal

(1) The decision to de-register Larch on 17 December 2021 in the full knowledge that it was on the cusp of settling the problems with the Devon Portfolio was irrational, disproportionate, premature and improper.

Larch's submissions

64. Larch submits that the decision to de-register was premature. Larch contends that it was irrational and disproportionate to de-register Larch just before Larch managed to extricate itself from the difficulties relating to the Devon Portfolio.

65. The resolution of the Devon Portfolio issue was plainly capable of having a material impact upon the Appellant's financial viability, because it was likely to mean that its short- to medium-term financial viability was secured. Prior to the difficulties with the Devon Portfolio, Larch's relations with the Regulator had been good. The agreement with Henley would clear Larch's liabilities in relation to the Devon Portfolio and would mean that there would be no future liabilities in relation to the Portfolio. The Begbies' Report said that non-Devon Portfolio properties would generate an annual surplus income of about £100,000, allowing the company to meet any liabilities as they fell due. Moreover, Larch had negotiated Heads of Terms for three contracts to provide property management services for (eventually) 813 units, and would retain £20 per week as its service fee. The agreement would not cover the full 813 units from the outset, but would grow at 40 units per month. When the Devon Portfolio liabilities were jettisoned, Larch would be able to trade without further funding in the short- to medium- term.

66. Larch's submissions of 22 November 2021 had expressly asked for a decision not to be taken until after the agreement with Henley had been formalised, and indicated that this was expected to occur in late December 2021 or January 2022. The Regulator jumped the gun. Larch was not asking the Regulator to wait for an indefinite period. The Regulator had been kept regularly appraised of the ongoing negotiations with Henley since March 2020. There was no urgency about de-registration and the Regulator should have waited for the deal to be done between Larch and Henley before coming to a decision about financial viability. This would have been consistent with the Regulator's obligation to exercise its functions in a way that minimises interference and is proportionate (see sections 95K(a) and (b) of the 2008 Act).

67. Moreover, de-registration would have a draconian impact on vulnerable members of society, because of the substantial benefit to society that Larch provides by providing housing solutions to the elderly and vulnerable for whom market rates of rent are unattainable. In those circumstances, it was wholly unreasonable and disproportionate for the Regulator to behave as it did. In practice, local authorities will only enter into agreements for supported accommodation with registered providers.

68. Mr Gajjar submitted that the notion that there was no documentary evidence of an agreement with Henley should be treated with caution. The Regulator was told in

Larch's representations that Devonshires Solicitors was in the process of drawing up Heads of Agreement. The Begbies Report said that Begbies Traynor had been shown correspondence between Larch, Devonshires and Henley, including Henley's response to initial proposed heads of terms. Much of the information that Larch disclosed to the Regulator on 22 November 2021 was commercially sensitive and confidential, but Larch had offered in its representations to let the Regulator see email correspondence with Henley in which Henley had agreed to the reduced Housing Benefit offered by West Devon Council, following the conclusion of the contrivance allegation. The Regulator did not take up this offer. Moreover, in the (undated) letter from Mr Feltham which was received on 8 December 2021, Mr Feltham said, "Heads of Terms (on the basis set out in the Submission) have now been agreed and signed with Henley." The Regulator did not ask to see the Heads of Terms.

69. Mr Gajjar submitted that, in so far as the Regulator seeks to justify the timing of the decision to de-register by reference to the history of the matter, this paints an inaccurate picture. Previous difficulties were either irrelevant, or were the result of Mr Feltham's actions and not reflective of the Board. Mr Feltham is no longer a member of Larch's Board. An example of the problems caused by Mr Feltham is the failure of Larch to comply with the commitment in the Voluntary Undertaking in July 2020 to appoint a reputable independent consultant to undertake an independent financial review of Larch's financial standing and non-financial housing management systems. A firm of consultants, the David Tolson Partnership (DTP), was duly appointed, but was unable to complete its work adequately because of Mr Feltham's attitude and unwillingness to share the information needed to complete the report. The Regulator could have exercised its powers under sections 266-269 to remove Mr Feltham (and other members of the Board) and to replace them or supplement them with statutory directors, who would have enjoyed the protection of being able to operate unencumbered by threats of removal by Mr Feltham.

70. The decision to de-register Larch was disproportionate, because it had always been clear that many of the negotiations with third parties to improve Larch's financial situation (including the new property management agreements) were contingent upon it retaining its registered status. The impact of the Regulator's decision to de-register was profound and was capable of plunging an otherwise financially viable and solvent company into insolvency or, at least, serious financial difficulties.

Discussion

71. In my judgment, the Regulator did not act irrationally, disproportionately, prematurely or improperly in taking a decision to de-register Larch on 17 December 2021, even though Larch had assured the Regulator that Heads of Agreement had been reached with Henley, pursuant to which Larch would hand back the properties and would wipe out its debt to Henley by transferring the outstanding debts due to Larch from tenants in relation to the properties to Henley.

72. There are two reasons why I take this view.

73. The first, and principal, reason is that the submissions on behalf of Larch do not reflect, or engage with, the central basis upon which the Regulator decided to de-register Larch. In the 17 December 2021 decision letter, the Regulator said as follows:

> It is our judgement that Larch has failed to supply sufficient evidence to support the Representations or the assumptions on which they are based. Furthermore, even if Larch successfully negotiates the cancellation of all liabilities associated with the Devon Portfolio (point 1 above), successfully negotiates a loan with its corporate landlord (and possible delayed payments) (point 3 above), and all of its cash flow assumptions are achieved (point 2 above), this at best makes out a path to the resolution of Larch's immediate solvency issues. That is not the same thing as demonstrating on-going viability.

74. It is clear from this passage that, whilst the Regulator had grave doubts about the three main points made in Larch's representations, the Regulator considered the question of de-regulation on the basis of assumptions that (1) Larch would reach an agreement with Henley that would have the effect of wiping out Larch's liabilities in relation to the Devon Portfolio; (2) the 2-year cashflow forecast was a reliable forecast; and (3) Larch would reach an agreement with SLIL pursuant to which SLIL would provide Larch with a loan. Put another way, the Regulator took the view that, even if all of these assumptions were made in Larch's favour, Larch had still not demonstrated its ongoing financial viability. Accordingly, a delay would have made no difference: the decision was taken on the basis that the outcome would be the same whether or not Larch was right that it had reached agreement or would shortly enter into agreement with Henley.

75. It is clear that the Regulator carried out a very careful analysis of the information about Larch and the notes of the RED meetings show that the Regulator thought long and hard about whether to de-register. It was not a precipitate decision. The Regulator was fully entitled (and indeed bound) to take account of the events and the nature and extent of the engagement from 2019-2021. The Regulator engaged with Larch for a long period and gave Larch an opportunity to make representations and to provide information in response to the notification of a provisional decision to de-register Larch. Larch made full use of this opportunity by filing written representations and evidence on 22 November 2021. It is clear, therefore, that the Regulator took account of all relevant considerations, and did not take account of irrelevant considerations. It is similarly clear that the Regulator complied with its obligations in relation to procedural fairness.

76. In my judgment, it is equally clear that there is no valid basis upon which the Court could hold that the conclusion that Larch did not satisfy the on-going financial viability requirement was irrational or disproportionate. I accept Ms Broadfoot's submission that the fact that points (1) to (3) would potentially provide a path to resolution of Larch's immediate solvency issues did not mean that Larch had satisfied the requirement for on-going financial viability. The operating model that was adopted by Larch was a risky one. The effect of the long leases was that Larch was at grave financial risk if it could not find tenants for all of its units, or could not obtain rents which exceeded the lease payments that were due on the properties. Problems with Housing Benefit were likely to mean shortfalls on rents. The experience of the last few years had shown that Larch was liable to fall short in terms of income from its properties and was liable to go into debt with its head landlords. This problem was

not unique to the Devon Portfolio, nor, indeed, to Larch. The Regulator identified the risk that comes from only having long-term, low-margin, inflation-linked leases as a source of finance in a Note issued by the Regulator, as an Addendum to the Sector Risk Profile 2018, in April 2019, entitled, "Lease-based providers of specialised supported housing". The Note referred, amongst other things, to the risk that comes from only having long-term, low-margin, inflation-linked leases as a source of finance; thin capitalisation; a lack of assurance about whether appropriate rents are being charged; poor risk management and contingency planning undertaken by some of the registered providers; and some inappropriate governance practises that have led to poor decision making. Paragraph 5.23 of the Note said:

> " The RSH [the Regulator] is concerned that weak governance at many of these organisations has led to them to develop business models that are unsustainable in the longer term and cannot withstand foreseeable downside risk. It is currently hard to see how a provider of SSH which is substantially financed by long-term leases and subsequent tight margins can meet the requirements of the Governance and Financial Viability Standard."

77. A loan agreement with SLIL would not have provided for sufficient long-term financial security, because the success of the arrangement was dependent upon Larch obtaining sufficient income to make the repayments. There was a danger that if the projected income did not materialise, Larch would fall into debt again with SLIL. The proposed property management agreement would not produce large amounts of revenue, as Larch's payment was only £20 per week per unit, and it was not at all clear how many units would be covered by the arrangement, though it was clear that it would not involve anything like as many as 813 units for a considerable period.

78. Furthermore, the Regulator was entitled to take into account the problems with management that had manifested themselves over the last few years. The accounting controls and financial information were inadequate. For example, the company had not distinguished between core rent and service charges (the latter of which was designed only to cover costs), and so it was difficult to tell how much rent was being received that could be put towards the costs of the lease with the head landlords. There was a history of resignation of directors. Larch had been predicting a resolution of the problems with the Devon Portfolio since 2019, but this had not happened. Whether or not these problems were the fault of Mr Feltham was largely beside the point. He was still Chief Executive Officer of the company when the decision to de-register was taken.

79. In my judgment, the decision of the Regulator in December 2021 to de-register Larch was one that was very carefully considered and was one that cannot be characterised as irrational. There was ample material before the Regulator to justify the decision to de-register.

80. For the same reasons that justify the conclusion that the decision was not irrational, the decision was not disproportionate. It would not have been in the interests of tenants, potential tenants, local authorities, or the general public for Larch to have continued on the register of social housing. Mr Gajjar's submission that the de-registration was disproportionate because it will reduce the number of social housing

providers, and so may reduce the amount of accommodation available to vulnerable tenants, is misconceived. The logical consequence of this submission would be that the Regulator should never de-register any provider. In fact, however, Parliament has vested power in the Regulator to impose financial and governance standards upon providers and has allocated responsibility to the Regulator to review the status of providers in order to ensure that only those providers which meet the standards should continue to be registered. It is clear, therefore, that part of the statutory purpose of the relevant provisions of the 2008 Act is to ensure that only bodies that meet minimum standards should operate as social housing providers. Furthermore, as Mr Brown pointed out in his second statement, it does not follow that tenants will be made homeless simply as a result of a de-registration decision. The security of tenure of residents is determined by their contractual position, and the legislative rules applicable to their particular type of tenancy. There are clear economic benefits to both Larch, and to the head landlords, to tenants remaining in their homes (whether with Larch or an alternative provider). However Larch and the head landlord are independent entities and make their own decisions over the commercial reality. Mr Brown said that the Regulator considered this issue carefully in its decision making.

81. I take into account that the Regulator is a specialist regulator and so that considerable weight should be accorded to its views. This reinforces my conclusions that the decision was neither irrational nor disproportionate, but, even if that had not been the position, my conclusions would have been the same.

82. As the Regulator's decision was not dependent on the proposition that Larch was wrong to expect to reach an agreement with Henley in a month or two, it follows that the question whether Larch was right about this was not relevant to the Regulator's decision to de-register. There was no need to delay as the Regulator gave Larch the benefit of the doubt on this matter.

83. Is it true, however, that in the decision letter, the Regulator said that "Larch has not… provided satisfactory evidence to support and corroborate these assertions [i.e. the three points in the Representations]." Even if, contrary to my view, the decision reached by the Regulator was dependent upon the conclusion that Larch had failed to supply sufficient evidence to support the representations or the assumptions on which they were based, it was not irrational or disproportionate to have proceeded to a decision in December 2021, without delaying the decision to see whether an agreement was reached with Henley. As I have said, the Regulator did not act precipitately. The Regulator engaged with Larch for over two years before the decision to de-register was taken. I agree with Ms Broadfoot KC that it was open to the Regulator to conclude that suggestion in the representations that Larch was on the cusp of resolving the outstanding issues relating to the Devon Portfolio was wildly optimistic. It was not consistent with the evidence before the regulator:

(1) Since 2020, if not before, Larch had been saying that it expected to reach an agreement with Henley to wipe the slate clean, but nothing had materialised;

(2) No written evidence was provided of an agreement in the representations;

(3) The Begbies Report did not state unequivocally that a settlement had been reached with Henley. The Begbies Report said, having summarised the proposed agreement:

> "As part of this review, we have been provided with certain correspondence between the Company, Devonshires and Henley. The most pertinent of these documents is a response from Henley to the initial Heads of Terms document.4. This suggests that points 1-3 above are broadly agreed by Henley but that a cash payment would be made by Henley in respect of point 4, but limited to certain specific items."

This suggested that Heads of Agreement had not been agreed, and that one matter, at least, was still being negotiated.

(4) The Report also said:

> Whilst no formal agreement is yet in place between the parties, the correspondence does suggests that a desire exists between the parties to reach a settlement position and that such a settlement could be reached within the next 7-10 days subject to both sides acting reasonably.

By the time the Regulator came to take its decision, it was apparent that this had been an over-optimistic estimate. More than 7-10 days had passed (as the Report was provided on 22 November 2021) but no agreement had been reached.

(5) It is true that Mr Feltham informed the Regulator, on or about 8 December 2021, that Heads of Agreement had now been signed, but he did not send them a copy, and, in any event, Heads of Agreement are not legally binding. I do not accept Mr Gajjar's submission that it was incumbent upon the Regulator to call for a copy. If there were Heads of Agreement, then Mr Feltham should have provided them.

84. The Regulator was entitled to come to the conclusion that it had waited long enough to reach a decision on the question of de-registration. Larch was not able to give a date by which the agreement with Henley would definitely be entered into. The approach adopted by the Regulator was consistent with paragraph 2.2 of the Regulator's Code (set out at paragraph 13, above), which states that "Regulators should provide an opportunity for dialogue in relation to the advice, requirements or decisions, with a view to ensuring that they are acting in a way that is proportionate and consistent." The Regulator gave an ample opportunity for dialogue with Larch, lasting over two years. During this period, there were at least 12 detailed substantive letters from the Regulator, numerous emails and phone calls, 7 RED meetings, 3 Regulatory Notices, and one Voluntary Undertaking which was accepted as an alternative to enforcement action. As Ms Malyon, accepted the Voluntary Undertaking was immediately and consistently breached.

85. I emphasise, however, that this is all essentially beside the point: the central point is that the Regulator's decision was not dependent on the Regulator's view that Larch had provided insufficient evidence of the proposed agreement with Henley. The Regulator decided that, whether or not such an agreement was reached, it could not be satisfied as regards Larch's ongoing viability and, for the reasons I have already given, this decision was neither irrational nor disproportionate.

86. As for the submission that the Regulator should have taken the less drastic step of appointing statutory directors, I do not accept that this rendered the decision to de-register either irrational or disproportionate. This question was considered and rejected at the RED meeting on 30 September 2021. This is evidenced by the minutes, which state as follows:

> "Consideration was given to making statutory appointments to the Board of Larch. It was noted that we may only have the power to appoint the minimum (one person) and because of the insolvency risk it is likely that there would be difficulties in obtaining suitable indemnity for any potential appointee. This may also be a reputational risk for anyone we approached to assist. Furthermore, it was noted that previous board members have stepped down from their position, citing an inability to work with the CEO and shareholder. In conclusion, the meeting agreed that a statutory appointment of a single board member would be unlikely to resolve the serious issues Larch continues to face. Appointing individuals to an organisation with no infrastructure and a dysfunctional board would be in limited ability to reach a satisfactory outcome."

87. This is also germane to the suggestion, made in Ms Malyon's witness statement, that de-registration was unnecessary, because Larch's problems could all be laid at the door of one rogue individual, Mr Feltham. The position was plainly more complicated than this, and the Regulator was right to decide whether Larch met the long-term viability criterion in light of all the material before the Regulator, which included the history of events so far. Moreover, Mr Feltham was still CEO at the time when the de-registration decision was taken.

88. I should add that I do not need to decide the question whether (as Mr Gajjar asserted and Ms Broadfoot KC disputed) Larch and all its officers had been exonerated of any wrongdoing in relation to the allegations by West Devon Council of contrivance is essentially irrelevant. The allocation of blame for this matter played no part in the Regulator's decision.

(2) <u>The Regulator was plainly wrong to find that no sufficient evidence had been put forward as to its loan agreement with its senior landlord and creditor, SLIL, or alternatively, it should have asked for further information, rather than proceeding to de-register Larch</u>

89. The answer to this ground is the same as to Ground 1, namely that the decision to de-register would have been the same, whether or not the Regulator had been provided with satisfactory evidence of a loan agreement between Larch and SLIL. It follows that even if the Regulator was wrong to consider that there was insufficient evidence of a loan agreement with SLIL, this does not mean that its de-registration decision was either irrational or disproportionate.

90. By the same token, the Regulator did not act irrationally or disproportionately or unfairly in failing to ask Larch for further information about the agreement. Mr Gajjar submitted that the procedurally fair and correct course of action would have been for the Regulator to call for evidence or to alert Larch to its concerns about the lack of evidence.

91. Mr Gajjar relied on observations of Saini J in **R (Karagul and others) v Secretary of State for the Home Department** [2019] EWHC 3208. At paragraph 103(1), Saini J said:

> "(1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision."

92. In my judgment, this principle has no application to the present case. As the above extract from the **Karagul** judgment makes clear, the common law principle to which Saini J was referring applies where there is an allegation of dishonesty or bad faith. No such allegation was made against Larch in the decision communicated on 17 December 2021. The issue was ongoing financial viability, not dishonesty or bad faith. Outside the context of dishonesty or bad faith, the question whether a public authority has a duty to point out gaps in the material provided by a party, so as to give it an opportunity to remedy the omission, is a matter of fact and degree which depends upon the particular circumstances. In the present case, Larch was given every opportunity to make representations and to provide information.

93. In the circumstances that applied in November and December 2021, when Larch was well aware that its registration was at risk and it had been given (and taken) the opportunity to make representations, the Regulator was entitled to assume that if clear documentary evidence of the loan agreement was available, Larch would have provided it. The Regulator had been engaging with Larch for over two years, and Larch was in no doubt about the Regulator's concerns about Larch's financial viability.

94. Moreover, to repeat, the question whether an agreement had been reached with SLIL was not material to the decision to de-register. The loan did not solve the problem of unacceptable financial risk relating to the properties leased from SLIL to Larch. As the decision letter of 17 December 2021 pointed out,

> "It is also noted that Larch acknowledged in its Representations that if its predicted growth forecast is not achieved, it will be reliant upon its corporate landlord's forbearance in agreeing to delay the start of the repayment of the loan."

95. In fact, there was a written and signed loan agreement (entitled Repayment Deed) between Larch and SLIL, dated 4 July 2020. This provided for the arrears in lease rental payments owed by Larch to SLIL to be treated as a loan from SLIL to Larch repayable over a 10 year period. For reasons that are unexplained, whilst Mr Feltham mentioned it (though not its date) in his statement as part of Larch's written representations of 22 November 2021, Larch did not provide a copy to the Regulator. I should add that it appears from the format and content of Mr Feltham's statement that it was written with some form of professional assistance, which makes it all the more surprising that a copy of the document was not provided.

96. In any event, as I have said, further information could have made no difference: the decision would have been the same even if there had been clear evidence of an agreement with SLIL.

(3) A series of factual findings made by the Regulator were incorrect and, therefore, flawed

97. Larch makes three points under this ground.

The 2-year growth forecast

98. The Regulator's decision letter dated 17 December 2021 said that the 2-year cashflow forecast provided on behalf of Larch included a growth forecast, but there was no supporting evidence for this forecast, nor information about the assumptions on which it was based. The decision letter also said that the independent review of the 2-year cashflow forecast by Begbies Traynor (in the Begbies Report) made clear that the information and assumptions provided by Larch (on which the cashflow forecast was based), were not verified as part of the review.

99. Mr Gajjar made four points about the growth forecast.

100. First, he submitted that any gaps in the Begbies Report were the result of short time constraints unreasonably maintained by the Regulator, and that the author of the Begbies Report had written to the Regulator on 2 December 2021, offering to discuss any aspect of the Report but this was not taken up.

101. This is not a valid ground for allowing the appeal, for two reasons. The first applies to all of the submissions made about the forecast, and is the same point as I have made in relation to the other two grounds of appeal. The Regulator decided that Larch would not satisfy the ongoing financial viability test, even if the forecasts had been accurate and verified. It follows that even if the Regulator should have accepted the growth forecast in the 2-year projection at face value, it would have made no difference to the outcome.

102. The second reason is this: Mr Gajjar did not dispute that the Regulator was right to say that Begbies Traynor did not verify the information and assumptions underlying the growth forecast. There are no valid grounds for criticising the deadline of 22 November 2021 that was given to Larch to provide its representations about the proposed de-registration. Section 118(2) of the 2008 Act provides that a provider must be given at least 14 days notice of deregistration. Larch was given longer than this, as the Regulator agreed to an extension of time. It cannot be said, in my view,

that the Regulator acted irrationally or unfairly in declining to give a further extension, especially given the length of time that had elapsed since the Regulator had started to engage with Larch. In any event, there is no reason to think that, if a further extension had been granted, this would have enabled Begbies Traynor to verify the information and assumptions. Similarly, there is no reason to think that the writer of the report would have been in a position to verify the assumptions if the offer to speak to the Regulator had been taken up. The writer did not say that they were in a position to do so.

103. Second, Mr Gajjar submitted that the Regulator acted unfairly because it was aware that Begbies Traynor and been instructed to undertake a further scenario analysis and stress test, as is evidenced by the note of the RED meeting on 8 December 2021.

104. In fact, the note of the meeting says as follows:

> "Larch has not provided any scenario analysis or stress testing showing how it can appropriately mitigate and control the downside risk crystalising – it states that it plans to commission Begbies to undertake this at a future point once a business plan is complete."

105. Accordingly, the most that can be said is that Larch indicated an intention to commission Begbies Traynor to carry out a scenario analysis and stress test at some unspecified date in the future, and only after Larch had prepared a business plan. It was not unfair for the Regulator to proceed to a decision in the face of this very vague statement that something more might be forthcoming at some point in the future.

106. Third, Mr Gajjar submitted that the Regulator failed to view Larch's position "holistically". By this he meant that the Regulator did not take sufficient account of the fact that all of Larch's financial difficulties arose from the Devon Portfolio and so everything will change once the Devon Portfolio is removed. However, as I have already said, the Regulator took full account of all of the relevant considerations, including Larch's assertion that it was going to divest itself of the Devon Portfolio, and the Regulator still came to the conclusion that the company could not satisfy the ongoing financial viability standard. This was neither irrational nor disproportionate.

107. Finally, in relation to the growth forecast, Mr Gajjar pointed out that Begbie Traynor's update dated 13 January 2022 recorded Larch's income, excluding the Devon Portfolio, to be slightly ahead of its forecasts.

108. This can have no relevance. The decision of the Regulator must stand or fall on the information known to the Regulator on 17 December 2021. In any event, a single snapshot of income, several weeks later, cannot verify the 2-year growth projection.

Core rental income lower than lease payments

109. Larch challenges the assertion by the Regulator that the core rental income of non-social housing was lower than the lease payments that were payable to landlords because (a) the Regulator did not explain the basis for this conclusion and it was challenged in the representations dated 22 November 2021; (b) the Begbies Report reviewed that the Cashflow Forecast and Rent Register and concluded that the rental

income was sufficient to cover lease payments and generate an overall substantial surplus; the Regulator did not deal with this; and (c) Mr Feltham's statement for the purpose of the 22 November 2021 representations said that for 2021, only 85% of rent receipts were paid out to landlords.

110. Once again, the answer to this is that the Regulator decided that the on-going financial stability standard would not be met, even if Larch's cashflow forecasts, which assumed that rental income would be higher than lease outgoings, were accurate. Also, the Regulator had referred in its letter of 12 February 2021 to an "apparent shortfall of core rental income against lease costs". This conclusion was based on data that had been provided to the Regulator by Larch in January 2021, and Larch did not challenge or gainsay this until the representations of 22 November 2021.

Low margin on non-social housing

111. Mr Gajjar submitted that the Respondent had wrongly relied on the DTP interim report to conclude that around 92% of Larch's gross rental income on non-social housing would be payable as lease payments. This was only an interim report, and the figures were not approved by Larch.

112. Yet again, this is a side-issue. The decision would have been the same even if Larch's growth projections of its business, which took into account the projected margins on non-social housing, had been accurate. It follows that a dispute about the likely gross margins on non-social housing makes no difference. Put another way, the Regulator's assessment of Larch's rent and service charge for non-social housing was not a deciding factor when it made its decision to de-register Larch. In any event, Larch's position as communicated to the Regulator in relation to the DTP report was that it accepted the report's interim recommendations, whilst noting that they remained subject to management comments.

Conclusion

113. For these reasons, the appeal is dismissed.