

Insolvency of Registered Providers of Social Housing – Housing Administration

There are more than 1700 registered providers of social housing in the UK¹, with over 2.5 million units². For large registered providers (those owning 1,000 or more units of social housing), only 1.1% of their stock was vacant³, thus illustrating the high demand for social housing.

Companies, registered societies⁴ and charitable incorporated organisations⁵ who provide social housing (referred to as ‘registered providers’) are required by the Housing and Regeneration Act 2008 to be registered with the Regulator of Social Housing. While the Regulator aims to “*ensure providers are financially viable and properly governed*”⁶ by using codes of practice and regulatory standards, it cannot prevent the possibility of financial distress or insolvency of a registered provider, and the powers it had under the HCA were no longer considered sufficient to engineer a rescue package.

The societal importance of social housing, and the serious consequences that the loss of housing stock from the social housing sector to the private sector would present, plus the high profile rescue of Cosmopolitan HA was the catalyst for the establishment through the Housing and Planning

Act 2016⁷ (“**the 2016 Act**”). The Insolvency of Registered Providers of Social Housing Regulations 2018 and the Housing Administration (England and Wales) Rules 2018 (together “**the 2018 Regulations and Rules**”) of a special insolvency regime – housing administration – under which the affairs, business and property of the registered provider are to be managed by an appointed housing administrator. The 2018 Regulations and Rules are in force as of 5 July 2018.

The housing administration regime

The housing administration regime differs in significant respects from the ‘ordinary’ administration regime under Schedule B1 of the Insolvency Act 1986 (“**Schedule B1**”) (“**IA 1986**”) and impacts on the secured and unsecured creditors of registered providers, as well as the registered providers themselves, in terms of the accessibility of the various insolvency and enforcement procedures.

In relation to registered providers:

- (i) A housing administration order can be made by the court only⁸; and
- (ii) An application for a housing administration order may be made by the Secretary of State or, with his consent, by the Regulator of Social Housing only⁹.

¹ Homes & Communities Agency data, 1 June 2018

² Homes & Communities Agency, Private Registered Provider Social Housing Stock in England: Statistical Data Return – 2016/17

³ Homes & Communities Agency, Private Registered Provider Social Housing Stock in England: Statistical Data Return – 2016/17, 31 March 2017

⁴ Within the meaning of the Co-operative and Community Benefit Societies Act 2014

⁵ Within the meaning of Part 11 of the Charities Act 2011

⁶ Homes & Communities Agency Guidance, A guide to regulation of registered providers

⁷ Part 4, Chapter 5

⁸ S.95 of the 2016 Act

⁹ S.99 of the 2016 Act

Any person who has appointed, or who is entitled to appoint, an administrative receiver of the registered provider, or who would be entitled to appoint an administrator¹⁰ of the registered provider by reason of being the holder of a qualifying floating charge, is entitled to notice of the application.

The court hearing the application may make the order sought, dismiss the application, adjourn it with or without conditions, make an interim order, or may treat it as a winding up petition. In the latter event, the court may make any order it would be entitled to make under section 125 IA 1986. The court may only make a housing administration order if satisfied that the registered provider is unable, or is likely to be unable, to pay its debts, or that it would be just and equitable in the public interest to wind up the registered provider. Conversely, the court has no power to make a housing administration order in relation to a registered provider which is in administration under Schedule B1 or which has gone into liquidation¹¹.

Objectives

Once appointed, the housing administrator has two objectives:

- Objective 1: 'normal administration', to (a) rescue the registered provider as a going concern; (b) achieve a better result for the registered provider's creditors as a whole than would be likely if the registered provider were wound up (without first being in housing administration); or (c) realise property in order to make a distribution to one or more secured or preferential creditors.
- Objective 2: keeping social housing in the regulated sector, namely its ownership by a private registered provider.

The 2016 Act makes clear that while the housing administrator must, so far as possible, work towards both objectives, Objective 1 (and, as with ordinary administration, in an order of priority) takes priority over Objective 2. That means that in pursuing Objective 2, the housing administrator must not do anything that would result in a worse

distribution to creditors than would be the case if they did not need to pursue Objective 2.

The housing administrator, who must be qualified to act as an insolvency practitioner, is required to aim to achieve the objectives of the housing administration as quickly and as efficiently as is reasonably practicable. The provisions of Schedule B1 apply, with modifications, in relation to the conduct of the housing administration. It is important to note that the 2016 Act grants a housing administrator a power to dispose of land that is the subject of a planning obligation¹², which imposes restrictions or requirements that are expressed not to apply in the event that the land is disposed of by a mortgagee, free from those obligations, so that they are not binding on any successor in title.

Restrictions on other insolvency procedures

The housing administration regime also imposes restrictions on other insolvency procedures. The court may not exercise its powers on a winding up petition unless at least 28 days' notice of the petition has been given to the Regulator, who in turn must give notice to the Secretary of State.

A registered provider that wishes to pass a resolution for voluntary winding up requires the permission of the court to do so. As with winding up, at least 28 days' notice of an application for permission must be given to the Regulator, who is in turn required to give notice to the Secretary of State.

Any application for an ordinary administration order must be dismissed if a housing administration order has been made or is in force. If a housing administration application or order has been made, or is in force, a person is not entitled to take any step to make an out of court appointment of an administrator under paragraph 14 or 22 of Schedule B1. In the event that an appointment is not precluded, an appointment of an administrator will not take effect unless at least 28 days' notice of the appointment has been given to the Regulator, who must in turn notify the Secretary of State. In the case of an application to court for an ordinary administration order, the court must not exercise its paragraph 13, Schedule B1 powers unless the Regulator has been given at least 28 days' notice of the

¹⁰ Under paragraph 14 of Schedule B1

¹¹ Within the meaning of s.247 of IA 1986

¹² Under s.106 of the Town and Country Planning Act 1990

application. Moreover, the interim moratorium provisions of paragraph 44 of Schedule B1 do not prevent the making of an application for a housing administration order before the appointment takes effect.

The restrictions on other insolvency procedures are extended into the area of enforcement of security. Security cannot be enforced over property of a registered provider unless at least 28 days' notice of the intention to do so has been given to the Regulator who, in turn, must give notice to the Secretary of State.

The requirement to give notice ensures that the Secretary of State (or, with his consent, the Regulator) are afforded an opportunity to apply to court for a housing administration order before a winding up petition, voluntary winding up application, or ordinary administration application is heard, or security is enforced.

Where a housing administration order is made, the Secretary of State has power under the 2016 Act to make grants or loans available to the registered provider to support the achievement of the objectives of the housing administration¹³, to provide indemnities in respect of liabilities incurred or loss or damage sustained in connection with the housing administrator's carrying out of their functions¹⁴, and provide guarantees in respect of financial obligations of the registered provider¹⁵.

Sea change

To date very few registered providers have found themselves in financial difficulties and no funder in the housing association sector has suffered a loss.

The most well-known cases are Ujima, Presentation and more recently, Cosmopolitan which were all successfully resolved by the Regulator using its powers within the moratorium pursuant to the Housing and Regeneration Act 2008 through a transfer of engagements to another registered provider. However following the issues raised by the Cosmopolitan situation it was felt that as registered providers have now become much larger and more complex a more robust insolvency regime for the sector was

required. Hence the housing administration has been introduced.

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¹³ S.109 of the 2016 Act

¹⁴ S.100 of the 2016 Act

¹⁵ S.112 of the 2016 Act