



# New Insolvency Regime for Registered Social Housing

## Introduction

The new Insolvency regime for private registered providers of social housing (“**RPs**”) is set out in the Housing and Planning Act 2016 and has been brought into force by two statutory instruments, *The Insolvency of Registered Providers of Social Housing Regulations 2018 (2018 No.728)* and *The Housing Administration (England and Wales) Rules 2018 (2018 No.719)*.

The previous insolvency provisions for RPs were contained in the Insolvency Act 1986 (“**IA**”) and also the Housing and Regeneration Act 2008 (“**HRA**”). Under the IA, for RPs which were incorporated under the Companies Acts 1985-2006, an administration order of a RP, or the appointment of an administrative receiver of a RP could be triggered by certain parties, including directors and creditors. For RPs established under the Co-operative and Community Benefit Societies Act 2014, the administration provisions were not available and directors and creditors had to rely on receivership and winding-up procedures.

Under the HRA when specified insolvency procedures were set in motion in relation to a RP an automatic moratorium was triggered during which the Regulator could make proposals for the management of the RP’s property. If the Regulator’s proposals were agreed by all of the secured creditors which the Regulator could locate, such proposals would bind all creditors. The period of the moratorium was 28 working days but this could be extended with the consent of all secured creditors which the Regulator could locate. At the end of the moratorium secured creditors could enforce their security and exercise their power of sale. Any charged or mortgaged property which was disposed of pursuant to the secured creditor’s power of sale would be sold subject to any tenancy of the property that existed at the time.

Many RPs have diversified into different areas of business and taken on more debt to finance building more homes. Their increased level of market exposure means that there needs to be a robust system in place to handle a potential financial failure of a RP. Following the experience of the Cosmopolitan collapse it was concluded that the existing insolvency provisions would not be sufficient if a large and/or complex RP got into financial difficulty. The Housing and Planning Act 2016 (“**HPA**”) gives the power to the Secretary of State and the Regulator for Social Housing to apply for a housing administration order, under which a housing administrator will be appointed in the event of a RP becoming insolvent.

## The Housing and Planning Act 2016

Chapter 5 of Part 4 of the HPA introduces a special administration regime for RPs which are at risk of entering insolvency proceedings and provides for the making of housing administration orders whereby an RP’s affairs, business and property are managed by a housing administrator.

Schedule 5 of the HPA applies the provisions of Schedule B1 to the IA, with certain other enactments, to housing administration orders.

Schedule 6 of the HPA amends the moratorium provisions for RPs in the HRA to align them with the new housing administration provisions.

The changes under the HPA reduce the period of the moratorium to 28 days (instead of 28 working days) and add an additional tool for the Regulator and the Secretary of State in relation to a potentially insolvent RP through the housing administration order. Following the implementation of these changes under the HPA, the provisions of the HRA moratorium still apply until either (1) the expiry of 28 days, (2) the appointment of a housing administrator or (3) the cancellation of the moratorium if the Regulator is satisfied it does not need to make any proposals.

It is generally expected now that the HPA provisions are in force, appointment of a housing administrator will be the preferred route of the Regulator and Secretary of State in relation to an insolvent RP, particularly for larger RPs. However the Regulator can still make proposals under the HRA (as above) if it thinks it can reach agreement with each identified secured creditor within 28 days and if the Secretary of State has not applied for a housing administration order. No consent is required from any creditors to the granting of a housing administration order. However, the Housing Administration Rules state that a notice of a housing administrator's appointment must be gazetted as soon as reasonably practicable and may be advertised in such other manner as the housing administrator thinks fit. The Rules also state that the notice of appointment must be delivered to certain specified individuals.

### 1) Objectives of a Housing Administrator

A housing administrator has two objectives:

- Objective 1 – normal administration:
  - To rescue the RP as a going concern.
  - To achieve a better result for the RP's creditors as a whole than would be the case if the RP was wound up without being in housing administration.
  - To 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
  - To ensure that the RP's social housing remains in the regulated sector for so long as it is owned by a RP.
  - Objective 1 takes priority over Objective 2 but the housing administrator must, as far as possible, work towards both objectives, and must not do anything which would result in a worse distribution to creditors than would be the case if the administrator did not need to pursue Objective 2.

### 2) Housing Administration Order

- A housing administration may only be commenced by an order of the court. Only the Secretary of State or the Regulator of Social Housing (the "**Regulator**") (only with the consent of the Secretary of State) can make an application for a housing administration order.
- When applying for a housing administration order the applicant must give notice to every person who has appointed or is entitled to appoint an administrative receiver of the RP, every person (as a holder of a floating charge) who is entitled under the S.14 of Schedule B1 of the IA to make an appointment of an administrator (appointment of administrators by holders of floating charges) and any other person specified by the housing administration rules. Notice must be given as soon as possible after making the application.

- The court hearing such an application may make the administration order, dismiss the application, adjourn the hearing, make an interim order, treat the application as a winding up petition and make an order under S.125 of the IA, or make any other order it considers appropriate.
- The court may only make a housing administration order if it is satisfied that:
  - The RP is unable, or is likely to be unable, to pay its debts; or
  - On a petition by the Secretary of State under S.124 of the IA it would be just and equitable (disregarding the objectives of the housing administration) to wind up the RP in the public interest. The Secretary of State must certify to the court that such a petition would be appropriate.
- The court cannot make a housing administration order if the RP is already in administration (under Schedule B1 IA) or has gone into liquidation.
- An administration order will expire after one year, unless it is extended by the court following an application of the housing administrator or with the consent of all the creditors. At the end of the administration order the housing administrator can make a recommendation to the court what should happen to the RP. The court will decide what order it will make in accordance with the objectives set out above. If during the administration order any creditor considers that the housing administrator is failing to carry out his/her duties, they can apply to the court to replace the administrator or to end the administration.
- If at the end of the administration order the court decides a winding up order should be made the usual insolvency provisions in the IA will apply to the RP. There is no statutory requirement for the transfer of property and liabilities to another RP. The secured creditors will be able to enforce their security and assuming that the level of security is sufficient and all such liabilities have been met, the remaining assets of the RP will be distributed to its other creditors.

### **3) The Housing Administrator**

- A housing administrator of a RP is an officer of the court and is the RP's agent when carrying out functions relating to the RP. The housing administrator must be a qualified insolvency practitioner. During a housing administration order the housing administrator will manage the RP's affairs, business and property and must aim to achieve the objectives of the housing administration as quickly and efficiently as possible.
- During the housing administration order there will be a moratorium on the enforcement of security without the consent of the administrator or the permission of the court. During a housing administration order only the court will have the power to make a winding up order for a RP. A housing administrator may dispose of land free of S.106 planning obligations where any restrictions or requirements imposed by the planning obligation are expressed not to apply if the land is disposed of by a mortgagee.

### **4) Restrictions on other insolvency procedures**

- There are provisions which prevent a housing administration from being frustrated by prior orders being granted before the Secretary of State or the Regulator have been given the opportunity to apply for a housing administration order, or by other steps being taken when a housing administration order has been made or an application is outstanding.
- If a person other than the Secretary of State petitions for the winding-up of a RP, the court may not exercise its powers on a winding-up petition unless notice of the petition has been given to the Regulator and at least 28 days has elapsed since the notice was given, or the Regulator (with the

consent of the Secretary of State) has waived the notice requirement. The notice and 28-day period are intended to avoid a winding-up order being granted before the Secretary of State and the Regulator have been given an opportunity to seek a housing administration order.

- Similar provisions apply to a voluntary winding-up, ordinary administration orders, appointments of an administrator by secured creditors, directors or other applicable officers of a RP, and the enforcement of security. None of these other insolvency measures can take place if a housing administration order is in force, or has been made but not yet in force or an application for a housing administration order is outstanding.

#### **5) Financial support for RPs in housing administration**

- The Secretary of State may make grants or loans to a RP in housing administration in amounts which he/she considers appropriate to achieve the objectives of the housing administration.
- The Secretary of State may also agree to indemnify certain specified relevant persons (e.g. the housing administrator, his employees, partners, fellow employees) in respect of liabilities incurred or loss or damage sustained in connection with the carrying out of the functions of the housing administrator.
- The Secretary of State can determine the amount of any repayment by the RP when a sum has been paid by the Secretary of State in respect of any such indemnity.
- The Secretary of State may also give guarantees in relation to a RP in housing administration, in respect of the repayment of any sum borrowed by the RP while the order is in force, the payment of any interest on any sum borrowed, and the discharge of any other financial obligation related to any borrowing while the order is in force.
- As with any indemnity if any sum is paid out by the Secretary of State under any guarantee the RP must repay to the Secretary of State such amounts, including interest on such amount, as the Secretary of State may require.

#### **6) Conduct of Housing Administration and the application of Schedule B1 of the IA**

- Schedule 5 of the HPA applies the provisions of Schedule B1 of the IA, and certain other enactments to a housing administration. Schedule B1 sets out the framework for administrations conducted under the IA.
- Part 1 of Schedule 5 makes modifications to a number of the provisions of Schedule B1 in order to adapt them to the housing administration regime, whereas Part 2 makes further modifications to adapt the Schedule as it applies to foreign companies.
- Part 3 of the Schedule makes modifications to other provisions in the IA to adapt them to the housing administration regime and to ensure that any provisions in the IA relating to company voluntary arrangements do not interfere with the conduct of a housing administration. The Secretary of State is granted the power to make further modifications to the insolvency law where he/she considers such modifications appropriate in relation to the housing administration regime.

#### **7) Amendments to the Housing Moratorium and other amendments**

- Schedule 6 of the HPA amends the moratorium provisions for RPs in the HRA to align them with the new housing administration provisions.
- Both Schedules 5 and 6 of the HPA have been brought into force on 5 July 2018 by the Statutory Instrument titled "*The Insolvency of Registered Providers of Social Housing Regulations 2018*"

(No.728)” under sections 102, 213 and 214 of the HPA together with the new rules relating to housing administration set out in the Statutory Instrument titled “*The Housing Administration (England and Wales) Rules 2018 (No.719)*”.

- Regulation 4 of *The Insolvency of Registered Providers of Social Housing Regulations 2018* makes amendments to the Land Registration Rules 2003 requiring that, on the application of a housing administrator, the Registrar make an entry against the registered title of an estate or charge of a RP subject to a housing administration order as to the making of the order and the appointment of the housing administrator.

To date very few RPs have found themselves in financial difficulties and no funder in the sector has suffered a loss. The most well-known cases are Ujima, Presentation and Cosmopolitan, which were successfully resolved by the Regulator using its powers within the moratorium through a transfer of engagement to another RP. However, as RPs become larger and more complex, a more robust insolvency regime was required.

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