



L E A S E

**THE LEASEHOLD
ADVISORY SERVICE**

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

THE RIGHT TO MANAGE



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This leaflet is not meant to describe or give a full interpretation of the law; only the courts can do that. Nor does it cover every case. If you are in any doubt about your rights and duties then seek specific advice.

The right to manage (RTM)

The Commonhold and Leasehold Reform Act 2002 provides a right for leaseholders to force the transfer of the landlord's management functions to a special company set up by them – the right to manage company. The right was introduced, not just as a means of wresting control from bad landlords, but also to empower leaseholders, who generally hold the majority of value in the property, to take responsibility for the management of their block.

The right to manage is available to leaseholders of flats, not of houses.

The process is relatively simple. The landlord's consent is not required, nor is any order of court. There is no need for the leaseholders to prove mismanagement by the landlord. The right is available, whether the landlord's management has been good, bad or indifferent.

The right is exercised by the service of a formal notice on the landlord. After a set period of time, the management transfers to the right to manage company (the RTM company) which has been set up by the leaseholders. Once the right to manage has been acquired, the landlord is also entitled to membership of the company.

However, there are important issues to consider and a substantial amount of work to be done before service of the notice, if the takeover of management is to be successful. This leaflet sets out the issues and the practical operation of the right, from first considerations to full management of the building.

Preparation

Perhaps the very first consideration should be what the leaseholders want to achieve by taking over the management of the building.

Clearly, it makes sense for the leaseholders to take general control of the upkeep of their most valuable assets - the flats - but to do so will bring with it duties and liabilities. In acquiring the power to make approvals and to enforce of the covenants of the leases, the leaseholders become wholly responsible for all decision-making in terms of budgets and reserve funds, standards of management and provision of services, repairs and major works, and with the overall function of the building.

Whatever the motivation, there are a number of basic issues which should be considered prior to taking any action.

RTM does not necessarily mean self-management. At its most basic, the right to manage is simply a transfer of responsibility and decision-making. There is only a transfer in the practical day-to-day management of the building if the RTM company decides there should be. Leaseholders should not be tempted to view RTM just as a route to do-it-yourself management, although this is, of course, an option.

Unless the building is small (no more than, say, six flats) the day-to-day management may be best left to a professional managing agent. Management is a job which requires certain skills and experience and

carries with it great responsibility. Dissatisfaction with the present managing agent may result more from the leaseholders' feelings of impotence in the decision-making process than from any real shortcomings in the manager's abilities. The same managing agent, working to the instructions of the RTM company, may deliver a satisfactory service without the upheaval of a change of management.

One of the major motivations may be to save money on maintenance and repair works. While this is a sensible objective, the RTM company must adopt a responsible attitude to the long-term maintenance aspects – the building remains in the landlord's ownership and the flats remain the leaseholders' principal financial assets. The RTM company cannot save money

by reducing essential services or by allowing the block to deteriorate. The covenants in the lease (which will not be changed in the exercise of the right) should specify service provision and require the property to be maintained as it becomes necessary, not when convenient.

The RTM company will be required, like any other landlord, to comply with a Government-approved code of management practice. There are two such codes at present, one produced by the Royal Institution of Chartered Surveyors (RICS), and one by the Association of Retirement Housing Managers (ARHM) which refers specifically to purpose-built retirement property. While compliance with the codes is not mandatory, failure to do so is one of the grounds for an application to the Leasehold Valuation Tribunal to appoint a new manager or to end the right to manage.

Taking over the management will bring responsibilities and it is important to consider these at an early stage:

- the leaseholders will manage the building through a company and will need to learn about company procedures or to employ someone to advise them on such matters.
- people must be found to be officers of the RTM company, not just initially, but on an ongoing basis, as far into the future as anyone can see;
- the officers will have all the normal responsibilities of company directors as well as of landlords of residential property;
- the RTM company will be as vulnerable to criticism from lessees and residents as was the landlord. Some leaseholders are irrational in their expectations;
- there will need to be regular (but not necessarily frequent) meetings;
- there will be many technical matters to be dealt with, such as budgets and accounts, specifications and legal requirements;
- there will be a need to keep the RTM company solvent, so leaseholders who routinely default on payment will prove a headache;
- there may be difficult and sensitive issues in dealing with neighbours and fellow leaseholders;
- the company and its directors will be legally required to comply with a wide range of company, housing and health and safety law.
- In considering exercising RTM one should be aware of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). TUPE is designed to protect the rights of employees when a transfer situation arises, ensuring that the terms and conditions of employees are preserved, with continuity of employment. Whether TUPE will apply depends on the particular facts of the case, and it is advisable, where a building is served by employees of the landlord or management company, to seek specialist advice as to whether it would apply in the event that RTM were exercised.

Having said all this, the right to manage is an opportunity for those owning most of the value in the building – the leaseholders – to run their own affairs and to make their own decisions about the management and upkeep of their flats.

Qualification for RTM

The building must meet certain conditions and a minimum number of leaseholders is required to take part.

- at least two-thirds of the flats must be let to ‘qualifying tenants’*;
- it can be part-commercial but the non-residential part must not exceed 25% of the total floor area.
- RTM does **not** apply where the premises fall within the **Resident Landlord Exemption**. To fulfil this exemption would require the following:
 - The premises must be other than a purpose-built block;
 - They must comprise not more than four flats;
 - One of the flats must be occupied by the freeholder or an adult member of their family as their only or principal home for the last twelve months.

*A ‘qualifying tenant’ is a leaseholder whose lease was originally granted for an original term of more than 21 years. There is no requirement for any past or present residence in the flats, nor any limit on the number of flats which can be owned by one person.

The right to manage may only be exercised by a right to manage company and the members of the RTM company must comprise a sufficient number of qualifying tenants. **The required minimum number of qualifying tenants must be equal to at least half the total number of flats in the building.**

The right relates to a building, so, in an estate of separate blocks, each block would need to qualify separately and an individual RTM notice served. In the case of an estate of flats under the same management, it would be sensible to take over the management of the whole estate, but this would have to be accomplished by application in respect of each separate block.

The RTM company

The right to manage is exercised by the company, not by the individual leaseholders, and so cannot be put into practice without the formation of the company. It is the company which obtains the right to manage and which then takes responsibility for the management; the individual leaseholders may change over time, but the company remains in place.

The RTM company must have an Articles of Association which govern the purpose and running of the company. The Articles are prescribed by law and a company will not be a valid RTM company for the purposes of the Act if it does not match these provisions.

At registration a Memorandum of Association is required which is a short statement from the subscribers setting out their intention to incorporate the company together with a list of their names.

The prescribed Articles are set out in Statutory Instrument 2009 No 2767, obtainable from The Office of Public Sector Information or accessible on the OPSI website www.opsi.gov.uk

Forming the RTM company is a relatively simple operation and can be done by a solicitor, by a company agent or by the qualifying leaseholders themselves.

- Companies House produces several free explanatory leaflets:
 - (a) *Directors and Secretaries Guide (GBA1)*
 - (b) *Annual Returns (GBA2)*
 - (c) *Resolution (GBA7)*
 - (d) *Accounts and Accounting Reference Dates (GBA3)*

Contact: The Registrar of Companies, Companies House, Crown Way, Cardiff CF14 3UZ. Tel: 0303 1234 500 www.companieshouse.gov.uk

Any number of qualifying leaseholders may set up the RTM company; it does not require the full number of participants at this initial stage, simply enough participants to provide a chairman, some directors and a secretary. Obviously the very first step is to identify those leaseholders of the building who will be prepared to take on this responsibility – the exercise of the right to manage is not possible without the input of a dedicated group prepared to run the company.

Once the RTM company has been registered, with its original members, it must then formally invite the rest of the qualifying leaseholders to join.

Note: Between 9 November 2009 and 30 September 2010 existing RTM companies can continue to operate under their existing Memorandum & Articles of Association or they can choose to adopt the new Articles set out in Statutory Instrument 2009 No 2767. If RTM companies want to adopt the new Articles between 9 November 2009 and 30 September 2010 then they will need to file with Companies House amended Articles together with a special resolution passed by the company. After 30 September 2010 the new Articles will automatically apply to all companies.

The Notice Inviting Participation

All qualifying leaseholders are entitled to become members of the RTM company; no-one may be excluded for any reason. This is not a matter of choice – the legislation opens the membership to all qualifying leaseholders.

It is also important to remember that, once the right to manage has been acquired, the landlord is also entitled to membership of the company (*this is covered later, see page 13*).

The Notice Inviting Participation must be in writing *and in the prescribed form* and must be served on all qualifying leaseholders who are not, at the time of service, members of the RTM company or who have not already agreed to be members. It must:

- state that the RTM company intends to acquire the right to manage;
- state the names of the members of the RTM company;
- invite the recipient to become a member of the RTM company;
- provide other information required by regulations:
 - the RTM company's registered number and the address of its registered office;
 - the names of its directors and, if applicable, the secretary;
 - the name of the landlord, plus the name of any other person who is party to the lease other than the leaseholders.

The notice must also state:

- that the RTM company will take over the landlord's management functions under the lease, including the enforcement of tenants' covenants and the granting of approvals. In the case of buildings containing flats under the control of the landlord, or commercial units, the notice must make it clear that the management powers obtained through RTM will not extend to those flats or units.
- that each member of the RTM company may be liable for the landlord's reasonable costs arising from service of the notice to exercise the right to manage. (This is to ensure that everyone is aware of the potential financial implications of involvement in a RTM application.)
- whether or not the RTM company intends to employ a managing agent to manage the building (and, if a prospective agent has been identified already, his name and address); or, alternatively, whether

the company intends to appoint the current managing agent. If the RTM company does not intend to appoint an agent but to manage the building itself, the notice must give details of the management experience, if any, of the existing members of the company.

- The notice must be accompanied by a copy of the Articles of Association of the RTM company or state where the Articles may be inspected and copies taken; **the notice is considered not to have been served if it does not include the Articles of Association or state where it can be found.** The legislation says that the notice 'is not invalidated by any inaccuracy in the particulars', but this should not be taken as a licence for carelessness. This is a formal notice and care should be taken that it fully complies and is properly served.

The prescribed form is set out in a Statutory Instrument (2010 No 825) obtainable from The Stationery Office Ltd or accessible on the OPSI website www.opsi.gov.uk

The notice may be served by post, or by simply delivering it to all the flats; the legislation provides that it may be addressed to the leaseholder at the flat in the building (his qualifying address) unless the leaseholder has previously notified the company of a different address in England and Wales at which he wishes to receive notices. If the leaseholder is living permanently abroad, the secretary of the RTM company should make reasonable attempts to send the notice but is not obliged to serve it outside England and Wales.

The procedure of service of the Notice Inviting Participation is important. Firstly, the legislation requires that all of the leaseholders should have the opportunity to take part in the exercise of RTM. However, the adequacy or otherwise of the procedure may provide an opportunity to the landlord to challenge the eventual action of obtaining RTM on the basis that the RTM company is not properly constituted, in that it failed to comply with the service of the notices. Therefore, the secretary of the RTM company should ensure that evidence of the satisfactory delivery of, or posting of, the notices is retained, in case of any subsequent challenge from a qualifying leaseholder or the landlord.

All of those qualifying leaseholders who respond to the notice and who ask for membership must be enrolled as members of the RTM company and the membership noted in the company records. Indeed it would be prudent, although not compulsory, to include an application form for membership with each Notice Inviting Participation. The wording of the application form can be found in Article 26(1) of Statutory Instrument No.2009 No.2767 being the prescribed form of Articles of Association.

Obtaining information

Although the RTM company is now legally equipped to proceed, it would be unwise to do so without some detailed investigation into the present management arrangements and the implications for the company of taking on the management. The legislation provides rights both to information from the landlord and access for inspection of the premises, but it is of the greatest importance that the RTM company takes stock to ascertain what information it requires, ie **to know what it needs to know.**

The management of any but the smallest building can be complicated and for large buildings, or estates, can be comparable to the management of a sizeable business. The RTM company should not be tempted to start the process of taking over the management without a clear idea of what is involved.

- The joint LEASE/ARMA leaflet *Appointing a Managing Agent* sets out the basic duties of management and the general responsibilities of a manager (or a managing agent).

Information requirements will vary for each building. In the case of larger buildings, it may be prudent to obtain professional advice from a managing agent or surveyor on what is required. The following is suggested:

- the proper name of the leaseholders' immediate landlord and its address for service of notices. This should appear on all rent and service charge demands;
- the name and address of any other landlords with interests over the immediate landlord. For example, the landlords may comprise the freeholder plus the head lessee, or the freehold may be split in its ownership;
- the full names and addresses of all the leaseholders in the building;
- details of any non-residential or commercial use in the building;
- the current arrears position;
- the insurance arrangements for the building;
- how the building is presently managed and, where the building is managed by an agent, the name and address of the managing agent;
- details of all contracts presently in force for the maintenance of the building or fittings and for the provision of services (*contracts are covered more fully on page 15*);
- the overall state of repair of the building and any identified requirements for major works, repairs or improvements, including copies of any recent survey reports.

Some of this information will already be known; the remainder can be obtained by a number of means: through rights to information under Landlord and Tenant legislation; from the records of the Land Registry; or by the service of a notice under the RTM legislation:

- **Landlord and Tenant legislation** – you are entitled to obtain details of the name and address of your landlord under rights provided by the Landlord and Tenant Act 1985. The information, if requested, must be provided within 21 days and failure to so provide is an offence.

The same Act provides a right to an annual statement of the service charge account for the building and for investigation of the documents, receipts and other information on which the charges are based.

- **Land Registry** – as long as the property is registered (most are), you are entitled to inspect the register and to obtain copies of the Land Registry certificate to the freehold. The entry will provide the name and address of the registered owner(s) and details of any other interests in the freehold, including other freeholders, leases registered against the freehold title and mortgagees. There is a small fee for copies of the certificate.

There are a number of District Land Registries around the country, not all of them serving the area in which they are located; you should contact the nearest office to find the Registry serving the area in which your property is located.

- **Information notice** – Section 82 of the 2002 Act provides a right for the RTM company to serve a notice on the landlord (s) requiring any information '*which the company reasonably requires for ascertaining the particulars to be included in a claim notice for claiming the right to acquire the right to manage*'. The wording is quite precise – the power is to

require information sufficient to serve the claim notice; it is not a general power to obtain information other than for this purpose. Where the required information is contained in 'documents', for example, accounts or bank statements, contracts or specifications, the notice can require the landlord to allow access for inspection and copying of documents or to supply a copy of the document.

A landlord served with a notice under Section 82 must comply within 28 days.

Section 83 provides a right of access, after service of the Notice of Claim; *this is dealt with on page 11.*

Plans and budgets

The legislation does not require the RTM company to produce, or submit to the landlord, any form of business plan or budget, nor to provide any information as to how the company proposes to manage the building. The Notice Inviting Participation requires a statement of whether the company proposes to self-manage or to appoint professional management, but there is no statutory requirement for employment of a manager, or for any prior management experience by the company – there are, after all, no such requirements for landlords.

Nevertheless, a prudent group will want to look ahead and to examine how the building should be managed, what advantages might be achieved (or achievable) and what cost savings or other benefits might be gained. At this stage, before commitment to the action, it is worth the group clarifying the motives for obtaining management. It could be to save money, to improve standards, to take control of the decision-making process or simply to oust a bad landlord. It is around the motivation that the management strategy should be based.

There is no requirement to prepare a draft budget, but it would be useful to produce one. It is most likely that recipients of the Notice Inviting Participation will want to know how the action will affect their costs and what the embryo RTM company expects to deliver in terms of management standards.

It is sensible to consider the employment of a managing agent and to look at the costs of this and the service delivery objectives that could be achieved. It may be, for example, that the present managing agent is labouring under inadequate or defective instruction, but that a service in accordance with the wishes of the leaseholders could be delivered if the agent were instructed by them. The members of the RTM company should, if possible, interview a number of agents.

It should be remembered that, although the management passes to the leaseholders' company, no ownership passes and all leases remain unaltered. Thus the fabric of the building remains in the ownership of the landlord. The RTM company will have a duty to the landlord not to allow a depreciation in the value of the landlord's interest through neglect, mismanagement or deliberate underspending on the building.

One of the first steps, for larger buildings, should be the drafting of a planned maintenance programme and this will require professional help. The programme should, ideally, be for at least a 25-year period, so it covers all the building elements that need periodical renewal. It should include budget costs (including fees and VAT), so that both routine and irregular costs can be properly programmed to spread expenditure. This will form the basics for the establishment of a reserve fund.

One of the continuing problems of leasehold system is the difference in expectations and objectives between the landlord and the leaseholders. For the landlord, the building is usually a long-term investment. On the other hand, many leaseholders view their ownership of the flats as short term – they may have no long-term view and wish to limit their short-term costs.

Exercise of the right

The Notice of Claim

It must be a prerequisite of the acquisition of the right to manage that the RTM company will manage the building sensibly, in accordance with the terms of the lease.

The claim may only be exercised where:

- the building complies;
- the RTM company meets the statutory requirements; and
- membership of the company comprises the qualifying leaseholders of at least half of the flats in the building.

The claim may not be served until 14 days after the service of the Notice Inviting Participation.

The right is exercised by service on the landlord of a Notice of Claim; there is no requirement to prove default or bad management by the landlord, and there is no requirement for approval by a court.

The Notice of Claim must be served on:

- the landlord of the whole or any part of the premises;
- any intermediate landlords;
- any parties to the lease other than the leaseholders (eg a management company named in the lease) and any manager who has been appointed by a court or tribunal under the provisions of Part 2 of the Landlord and Tenant Act 1987. A copy must also be sent to the relevant court or tribunal where a manager has been so appointed.

A copy of the Notice of Claim must also be sent to each qualifying tenant in the building and to the relevant court or tribunal where a manager has been so appointed.

The form for the Notice of Claim is prescribed: it must be in writing and must:

- specify the premises and include a statement of the grounds on which the premises comply with the qualification for RTM;
- state the full names and address of each person who is both a qualifying tenant of the building and a member of the RTM company;
- in respect of those persons, provide sufficient details of his or her lease to identify the flat and to show:
 - the date on which the lease was entered into;
 - the term for which it was granted;
 - the date of commencement of the term;
- state the name and registered office of the RTM company;
- specify a date, not earlier than **one month** after date of service of the Notice of Claim, by which each person who was given the notice may respond by giving a counter-notice;
- specify a date, at least **three months** after the date for the counter-notice, on which the RTM company intends to acquire the right to manage the premises.

The regulations require the inclusion of three further points:

- a statement informing the landlord that he may alert the RTM company to any inaccuracies in the notice. (As with the Notice Inviting Participation, the legislation provides that ‘a claim notice is not invalidated by any inaccuracy in the particulars’, but this is not an invitation for fraudulent statements);
- a reminder in the notice for a landlord who has no objection to the claim to serve the ‘contract’ and ‘contractor’ notices (*see page 15*);
- a statement to remind the landlord of his statutory right to membership of the RTM company (*see page 13*).

The prescribed form for the Notice of Claim is set out in the Statutory Instrument (2010 No 825) and a suitable form is obtainable from The Stationery Office Ltd or accessible on the OPSI website www.opsi.gov.uk.

It is this Notice of Claim which brings the exercise of the right to manage into being and sets the date for the RTM company to take over the management. In being able to set their own date, the members of the RTM company are in a position to plan ahead and to prepare for the transfer. While the legislation provides a minimum period of three months (four months in total from the service of the claim, in order to allow for the opportunity to serve a counter-notice), this need not necessarily be taken as a maximum; it may be prudent in some circumstances to provide a longer period in order to engage a new managing agent and to put other arrangements in place to ensure that the transfer of the management function is as seamless as possible.

Absent landlords

If the landlord, or any of the other parties to the lease on whom the notice of claim must be served, cannot be found, this will not present an obstacle to exercise of the right. An application may be made to the Leasehold Valuation Tribunal for an order entitling the RTM company to acquire the right.

Before making the application, the RTM company must take all reasonable steps to find the missing landlord and, if unsuccessful, must inform all the qualifying leaseholders of the building (not just the members of the company) of the intention to seek the order from the LVT.

The LVT may require the company to carry out further investigation or may simply make the order. Should the missing landlord be found before the order is made, then the Tribunal will decide how the matter should be dealt with.

There is no prescribed form for the application to the LVT but the Tribunal has produced its own form, available from the LVT.

Right of access for inspection

As mentioned earlier (*see page 9*), there is a statutory right (Section 83 of the 2002 Act) for the RTM company to require access to 'any part of the premises if that is reasonable' in connection with the claim. This is a right to inspect areas and facilities not generally accessible to the leaseholders. The right provides for access to 'any person authorised to act for the RTM company'. The right may be exercised by giving **not less than ten days notice**. There is no prescribed form for the notice.

Unlike the request for information, which can be served at any time, **this right is only available after service of the Notice of Claim.**

It will be most important, in all but the smallest buildings, for the RTM company to exercise this right and to arrange for professional inspection of the fabric of the building, the plant and facilities, for example, the lift motor room, the communal heating boilers, the water tanks and the roof space, the electrical installations; the company needs to know the state of all these things and to evaluate any necessary repairs or renovations.

The equivalent right is also available to the landlord and to other recipients of the Notice of Claim who may require access to the flats in the building, at the same period of notice.

The landlord's counter-notice

No later than the date specified by the RTM company in the Notice of Claim, the landlord(s) may serve a counter-notice. The counter-notice can do one of two things: either agree to the RTM or to allege reasons why the RTM company is not entitled to proceed. **The counter-notice does not provide an opportunity to raise queries or to dispute the RTM on any other ground.**

The counter-notice must be in the prescribed form and is limited to one of the two following statements:

- admitting that the RTM company is entitled to acquire the right to manage; or
- alleging that the RTM company is not so entitled and giving reasons to support the allegation.

If the landlord admits the right, the management will pass to the RTM company on the date specified in the Notice of Claim. Where the landlord does not serve a counter-notice, then the acquisition date for the right will be the date specified in the notice.

Where the landlord disputes the claim, the grounds for dispute are limited to:

- the building does not qualify; or
- the RTM company does not comply with the legislative requirements; or
- the members of the RTM company do not represent half the flats in the building.

The counter-notice must specify the reason for the alleged non-qualification by reference to the specific requirement of the Act and must state that:

- the RTM company may apply to the Leasehold Valuation Tribunal for a determination of the issue;
- the RTM company will not acquire the right unless the LVT determines in favour of the company or the landlord subsequently agrees.

The RTM company must make the application to the LVT **within two months** of the date of the landlord's counter-notice. **If the application is not made within this time, the claim is deemed to be withdrawn.** *There is no prescribed form but an application form, with explanatory notes, is available from the LVT.*

The Tribunal determines whether the RTM company is or is not entitled to the right to manage. There is a right of appeal to the Lands Tribunal, by leave of the LVT or the Lands Tribunal. The LVT's decision becomes final following any appeal or at the end of the period during which an appeal could have been made.

The landlord's costs

The RTM company must reimburse the landlord for any costs he has incurred in the process. There is, perhaps, need for constant reminder that the right is not default-based and may be exercised against the best or most competent landlords; there is, therefore, no justification for the landlord to suffer any financial loss from the process (other than any subsequent loss of management fees).

The Act refers to costs 'in respect of professional services' for which the landlord was 'personally liable'. This may generally be taken to mean the landlord's legal expenses in dealing with the notice, any accountancy or audit costs arising from provision of accounts or transfer of monies and the costs of his solicitor or managing agent in the hand-over of management records and functions. The landlord cannot recover any

costs of an LVT hearing on entitlement to RTM, except where the Tribunal finds against the RTM company. The costs are only recoverable by the landlord to the extent that they are 'reasonable' and, where the costs are disputed, either party may apply to the LVT for a determination of what shall be considered reasonable.

Costs are still recoverable if the RTM does not proceed, for example, if the claim notice is withdrawn by the company, or deemed to be withdrawn; if the RTM company is wound up; or if the LVT determines that the company is not entitled to acquire the right. It must be appreciated that the liability for the landlord's costs extends to all members of the RTM company; the liability for costs of an unsuccessful application cannot be avoided by winding up the company.

Information on making the application to the Tribunal is included in our leaflet 'Application to the LVT'. There is no prescribed form, but an application form with explanatory notes for completion is available from the LVT.

Taking over The acquisition date

The acquisition date is the date on which the RTM company formally takes control of the management from the landlord:

- where the landlord has not disputed the claim in any way, the acquisition date will be the date specified in the company's Notice of Claim;
- or
- where there was a dispute which was determined in favour of the RTM company by the LVT, then the acquisition date is a date three months after the determination becomes final;
- or
- if the landlord originally disputed the claim but subsequently agreed in writing that the company was entitled to the right, the acquisition date is three months after the date of that agreement.

However, before the company takes over there are a number of other steps to be dealt with.

Landlord's membership of the RTM company

Immediately upon the RTM company taking over on the acquisition date, the landlord becomes entitled to membership of the company, with full voting rights as a company member (if he wishes to take it up). The landlord's votes are, in the first instance, determined according to the units he holds in the building, flats or non-residential parts. In cases where he holds no units, and therefore would have no votes, he is allocated one vote as the landlord.

As the right to manage is not default-based, there is no reason why the landlord, who retains an interest in the building, should not have some input to the practicalities of its management. It is different where the manager has been appointed by a Tribunal to replace a poor or incompetent manager – there the landlord is removed entirely as a consequence of his mismanagement. With the right to manage, it is assumed that the landlord is not necessarily at fault and so there is no justification for his exclusion from the management process.

The right is not limited to the immediate landlord, but includes any intermediate landlords under the lease. For example, the landlords may comprise the freeholder plus the head lessee, or the freehold may be split

in its ownership and the two or more owners of the split freehold will be entitled both to membership of the company and to a vote.

However, there is no danger of multiple landlords being able to outnumber the flat-owners' votes. The votes will be allocated pro-rata to the number of landlords. For example, if there are a number of inter-mediate interests in a building which results in, say, five landlord members, then each flat-owner would be allocated five votes to reflect this. All of this must be set out in the prescribed Articles of Association of the RTM company.

The landlord has voting rights in respect of each unit he holds. The units may be flats let on periodic tenancies, the caretaker's flat or any non-residential units. This is best illustrated by example:

Example 1

A block of 20 flats, 16 of the flats are leasehold, four of the flats are held by the landlord and let by him on shorthold tenancies. In this case, the 16 leaseholders may be members of the RTM company with one vote each, the landlord has one vote as the flat-owner for each of his four flats. Thus he has four votes in total.

Example 2

Again, a block of 20 flats, but in this example there is not only a freeholder, but also a head-lessee who holds four of the flats. In this case, there are two landlords entitled to membership. The votes would be weighted to reflect the two landlords, with two votes being allocated to each of the flats. Now the leaseholders have $16 \times 2 = 32$ votes. The freeholder, who owns no units himself, will have one vote as a landlord, while the head-lessee has two votes in respect of each of his retained flats. Therefore the landlords' total votes are $1 + 8 = 9$.

The situation becomes a little more complicated where the landlord's retained units are non-qualifying, that is, where they are commercial or otherwise non-residential units. Although the RTM company's management does not include these non-residential units, their overall management of the building will have some impact on the general operation of the commercial parts. Therefore the landlord will also be able to exercise votes in respect of these units.

The votes allocated in respect of the non-residential parts will be proportional to the relative internal floor areas of the residential and non-residential parts of the building, excluding the common parts.

This is calculated by taking the total votes allocated to the residential parts and multiplying that number by the formula A/B , where A is the total floor area of the non-residential parts, and B is the total area of the residential parts (the areas are to be calculated in square meters – fractions of less than half a square meter are ignored). Again, this requires an example:

Example 3

A six-storey block of flats with a single landlord; five floors are residential, comprising 20 leasehold flats; the ground floor of the building is non-residential, a mix of shops and storage. Assume the internal area of each floor is 1,000 sq.m, or, say, 950 sq.m to exclude the staircase, corridors, entrance hall and other common parts. Therefore the non-residential internal floor area is 950 sq.m and the total residential floor area is $(5 \times 950) = 4,750$ sq.m.

The landlord's votes for the non-residential parts will be the total votes allocated to the residential flats multiplied by the relative floor areas. Assume the 20 flats each have one vote, then the calculation is:

$$\begin{array}{r} 20 \times 950 \\ \underline{\quad\quad} 4750 \\ = 4 \text{ votes} \end{array}$$

So, in this case the leaseholders have 20 votes and the landlord has four votes for the non-residential parts.

Management contracts

If there is a dispute on the measurement of the floor areas, the prescribed Articles of Association provide for this to be referred to an independent chartered surveyor. The surveyor will act as an expert, not an arbitrator, and his decision, based on his own measurement, will be final and binding upon the RTM company. The surveyor should be selected by agreement between the parties or, if this is not possible, by the President of the RICS; his fees will be payable by the RTM company, but the surveyor has the discretion to direct that some or all of his fee be reimbursed by the individual member(s) of the RTM company who raised the initial question.

The landlord will probably have a number of contracts in place relating to the building. It is important that the RTM company is aware of them and that the relevant contractors are given adequate warning of the impending transfer of management. Contracts may be with the managing agent for the overall management of the building, for the maintenance of the lift, the boilers and central heating, the door-entry system, for cleaning, gardening, caretaking or other direct services, or for the provision of supplies.

Because all responsibility for management passes to the RTM company, the landlord will no longer be able to fulfil his part of the contract and the RTM company will need to make decisions on whether to renew the contracts or to look elsewhere for the service(s).

It is extremely important that steps are taken in good time to ensure the continuity of management services; it would be very unfortunate, for example, if someone were trapped in the lift on the day of hand-over and the RTM company did not have the lift maintenance contract in place.

It is the **landlord's duty** to ensure that parties are aware of the contracts through the service of notices – the **contractor notices** and the **contract notices**.

● **Contractor notice** – this must be served on all contractors appointed by the landlord and include the following information:

- identity of the relevant contract;
- a statement that the right to manage is to be acquired by a RTM company;
- the name and registered address of the RTM company;
- the acquisition date;
- a statement advising a contractor who wishes to continue to provide services to the building to contact the RTM company.

Where any of the services are sub-contracted, then the contractor who receives the contractor notice must send a copy to the sub-contractor.

● **Contract notice** – this must be served on the RTM company and include the following information:

- the particulars of each existing contract and the name and address of the contractor;
- a statement advising the RTM company to contact those contractors whose services it wishes to retain.

The landlord is not required, within service of the contractor notice, to provide a copy of the contract, but simply to inform the RTM company of its existence and the party to it.

Both the contract and contractor notices should be served by the landlord as soon as possible after he receives the Notice of Claim from the RTM company, but no later than 'as soon as is reasonably practicable' after the determination date. This is enforceable through the county courts.

The **determination date** is the date specified in the Notice of Claim for the service of the landlord's counter-notice, or, if the claim is disputed by landlord, the final date of the determination by the LVT, or the date of any subsequent agreement by the landlord.

Because there is a gap of three months between the determination date and the acquisition date, the notices should be served well before the management is transferred.

Ideally, a well-organised RTM company would already have obtained these details at a much earlier stage and have made important decisions on retaining or obtaining new contractors. However, it must not be assumed that all existing contractors will necessarily be prepared to contract with the RTM company, and the company should investigate alternative providers. Because an existing contract is broken by the process, it gives the company the opportunity to review contracted services to the building and to re-specify or re-negotiate accordingly.

Landlord's duty to provide information

The RTM company will not be able to manage the building without detailed information and records and the company may require the landlord to provide whatever the company '*reasonably requires in connection with the exercise of the right to manage*'. This is a different provision from the request for information. Whereas the earlier right required information for the purpose of serving the Notice of Claim, this right is for information necessary for the management of the building. As with the earlier comments on requests for information, the company must be quite clear on its requirements and it may be prudent to obtain professional advice.

While the landlord has a statutory obligation to provide the information requested, he is not obliged to volunteer information and the company must be clear and precise in its notice to him. The company may require sight and inspection of documents, or copies of them – for example, contracts, the accounts for the building and the service charges, any proposals or specifications for future works, maintenance schedules etc.

Where the company is appointing a new managing agent, then the new agent will be able to advise on the information and records to be obtained.

The notice may be served on the landlord at any time, but he is not obliged to act on it before the acquisition date. He must comply within 28 days of service of the notice, but cannot be compelled to do so before the acquisition date.

For example, if the RTM company serves the notice on the acquisition date, the landlord must comply within 28 days of the notice. If the notice is served, say, 20 days before the acquisition date, the landlord must comply within 8 days of the acquisition date.

This timing allows the landlord sufficient time to assemble the information but does not require him to release potentially sensitive or confidential material before the RTM company actually takes over the management. In that the RTM company needs the information from the first day of taking up management, the general intention of the provision is that the company should serve the notice at least 28 days before the acquisition date with a view to the landlord providing the information on, or immediately after, the acquisition date.

Delaying service of the notice until the acquisition date could create a difficult situation. The company would not be able to manage fully without proper information, but a landlord could, quite legally, delay its provision until 28 days after the company takes over.

A reasonable landlord will be concerned with maintaining proper management of what remains his long-term asset – the property – and

will provide the required information and records in due time. However, in other cases, arrangements must be put in place to ensure continuity of management without the information during the notice period, or for a longer period if the landlord fails to comply and the matter has to be referred to the court for enforcement. This is, again, an area where a professional managing agent will be able to advise.

Landlord's duty to transfer funds

Where the landlord has collected service charges in advance but not yet spent them all and is holding the remainder in a trust account, he is under an obligation to hand over all the unspent sums to the RTM company. These will not only include unspent service charges but also any reserve account or sinking fund. This does not require a notice from the RTM company – the legislation requires the landlord to act and to make a payment to the RTM company equal to those uncommitted sums held by him on the acquisition date or 'as soon after that date as is reasonably practicable'.

The amount to be paid is the sum of:

– monies paid by leaseholders as service charges;

plus

– monies invested from service charge payments (and any interest);

less

– the landlord's outgoings on the provision of services up to the acquisition date.

The RTM company is not required to have any capital, so it may be important to gain control of these funds as soon as possible in order to maintain service provision to the leaseholders of the building. The difficulty likely to arise lies in agreeing what the sum should be, as accounts are not always up to date.

The Act provides that an application may be made to the Leasehold Valuation Tribunal to determine the amount to be paid; some landlords may simply rely on the LVT to fix the sum; other landlords may pay what they consider appropriate, only to find the RTM company challenging this through the Tribunal. It may be sensible, in all cases, for the RTM company and the landlord to agree to an external audit of the service charge accounts and for the RTM company to cover the costs of this. An audit will ensure fair play for the RTM company and provide surety for any agent of the landlord. It is most unlikely that a managing agent acting for the landlord would be prepared to take responsibility for handing over sums to the RTM company without some independent verification, nor could he reasonably be expected to.

In cases of dispute, the LVT provides a final route for determination, but this should not be considered the first port of call – the Tribunal is under constant pressure and determinations inevitably take time.

As with the provision of information, the RTM company will be in a difficult position if the hand-over of monies is delayed; it may be sensible to anticipate such a delay and to make some other financial provision for the first few months of operation, for example, by the members of the RTM company making a special contribution or by the company seeking a loan. Alternatively, the landlord may be prepared to make a partial payment on account, subject to a final agreement later.

There is no prescribed form for application to the LVT for determination of uncommitted service charges, but a suitable form, with explanatory notes for completion, is available from the LVT.

Registration of Right to Manage

A right to manage claim notice is not registrable. However, where a right to manage (RTM) company has *acquired the right to manage*, it may apply for an entry to be made in the proprietorship register of the affected title (Rule 79A Land Registration Rules 2003).

Application must be made using form AP1. The application must be accompanied by evidence to satisfy the registrar that:

- the applicant is a RTM company;
- the right to manage is in relation to the premises comprised in the registered estate;
- the registered proprietor of the registered estate is the landlord under a lease of the whole or part of the registered estate; and
- the right to manage the premises has been acquired, and remains exercisable, by the RTM company.

A fee of £50.00 is payable under article 12 of the current Land Registration Fee Order.

Management functions and responsibilities

On the acquisition date, the RTM company takes over all of the management functions for the premises under the lease. Normally these will be the functions directly exercised by the landlord, but in some cases may have been delegated to another party to the leases or to a management company. However, no matter who is responsible for managing the property, the functions pass to the RTM company on the acquisition date.

What is included

‘Management functions’ are defined in the legislation as ‘functions with respect to services, repairs, maintenance, improvements, insurance and management’ – that is, the delivery of all the duties reserved to the landlord under the lease. Typically these will include:

- repairs, redecorations and maintenance of the structure of the building and the common parts, including cyclical or seasonal maintenance and the maintenance of plant and facilities, lifts, central heating boilers etc;
- improvements to the building (where this is included in the lease);
- provision of services – the lighting of the common parts, heating, cleaning, grounds maintenance, caretaking and porterage, warden services in the retirement sector etc;
- arranging the insurance for the building;
- levying and collection of service charges, accounting and the provision of statutory and other information;
- compliance with all statutory requirements relating to the management and fabric of the building;
- the day-to-day management of the building.

The transferred functions also include approvals and enforcement of the covenants under the lease and these are considered below.

The right to receive the ground rents does not pass to the RTM company but remains with the landlord. The landlord might, however, employ the RTM company’s managing agent to collect the ground rents for him.

What is not included

- the management of any non-residential parts of the building or any non-qualifying flats;
- functions relating to forfeiture and possession

These issues requires further explanation

Non-residential parts

If the building contains non-residential or commercial units, shops or offices, garages or storage not included in the leases, then the management of these parts remains the responsibility of the landlord. It is

possible, however, that disputes may arise in consequence and there is no provision in the legislation to deal with this.

For example, access to the units may be shared with the common parts of the building under the control of the RTM company, or the landlord may have concerns about the effect of any neglect of the external appearance of the building by the RTM company on the value of the commercial lettings. In other cases, the signage for a shop may be affixed to the structure of the building which lies within the responsibility of the RTM company, and the company's consent or co-operation required for its renewal.

All these cases will need to be resolved through sensible negotiation or, in the last resort, through arbitration or the court.

Non-qualifying flats

Where the landlord owns and lets flats in the building, other than on long leases, he will be responsible for the general management of the tenants of the flats but will be liable to the RTM company for the service charges on those flats. Where repairs need to be carried out, the landlord will be responsible for works within the flat, but where the repair relates to the structure of the building, this will generally be a matter for the RTM company.

Forfeiture and possession

This is a specific remedy of the landlord and cannot be exercised by the RTM company. Therefore, the RTM company cannot institute forfeiture proceedings in furtherance of recovery of arrears of service charges; if the arrears cannot be recovered through other means, the company will have to seek the co-operation of the landlord.

It is important to be clear as to the powers that are transferred. The day-to-day functions and responsibilities of the management of the building pass to the RTM company and, as a consequence, the original manager is no longer entitled to perform those functions. The landlord is still, however, the landlord under the lease and is therefore responsible for the performance of the landlord's covenants outside the general duties of management, for example, for providing quiet enjoyment and rights of support of the flats.

In this context it should be emphasised that monies due to the landlord prior to the acquisition date, but yet not paid, remain payable to the landlord, and collectable by him, not the RTM company.

Approvals

Most leases contain provisions requiring the consent of the landlord to certain actions by the leaseholder; these can include sub-letting, assigning the lease and making alterations to the flat. **The power to issue such approvals passes to the RTM company, although the company must keep the landlord informed.** Before granting any such approval, the RTM company must give notice to the landlord:

- for approvals relating to assignment, sub-letting, placing a charge on the unit, parting with possession, making structural alterations or improvements or changing the use of the unit, the RTM company must give **30 days notice**.
- for all other approvals, **14 days notice**.

The RTM company does not require the specific consent of the landlord, and if he does nothing, the company may grant the approval. Where the landlord objects, consent may not be granted until the landlord withdraws his objection, or the matter is decided by the Leasehold Valuation Tribunal. Where the landlord wishes to object, he must do so by notice to the RTM company and to the leaseholder concerned (and, if the case concerns a sub-letting, to the sub-tenant). Applications to the LVT may be made by any of the parties.

There are no prescribed forms for application to the LVT for determination of the grant of an approval, but a suitable form, with explanatory notes for completion, is available from the LVT.

Enforcement of covenants

The leaseholders' covenants, or obligations, under the lease become the responsibility of the RTM company; the company must ensure that all covenants are complied with and must keep the landlord informed. The company has a statutory duty to review all the leaseholders' compliance with their covenants and to take steps requiring the remedy of any breaches. Any breaches which have not been remedied must be reported to the landlord (unless he has specifically notified the RTM company that it need not do so). The landlord then may proceed to enforce the covenant through the remedy of forfeiture.

Where the lease provides a right of access into the flats by the landlord for purposes of compliance or enforcement of covenants, this right is available to the RTM company.

Ending the right to manage

The right to manage, once acquired, is not subject to any time limit and will continue until it is terminated; it is not subject to review by time.

There are three circumstances where the right may be terminated:

- by agreement with the landlord – the RTM company may simply agree to return the management to the landlord. However, this is a joint matter, and the landlord must agree to take it back; it cannot just be imposed on a landlord reluctant to take on the responsibility for the building.
- through collapse of the RTM company – if the company is wound up, is taken into receivership, goes into voluntary insolvency or is struck off, then the right to manage ceases to be exercisable and the management responsibility is restored to the landlord. (In this context, it is imperative that the secretary of the RTM company fully complies with the requirements of Companies House in the provision of annual returns and accounts).
- through the appointment of a manager – Part 2 of the Landlord and Tenant Act 1987 provides that a Leasehold Valuation Tribunal may appoint a manager to take over and run the building. Such an order may be in response to an application by any of the leaseholders, or by the landlord. Alternatively, the Tribunal may simply make an order that the right ceases to be exercisable by the RTM company.

The grounds for an application under Part 2 are quite specific and are that the landlord, or the RTM company:

- is in breach of an obligation under the lease;
- has demanded, or is likely to demand, unreasonable service charges;
- has failed to comply with any relevant provision of an approved code of management practice.
- other circumstances exist which make it just and convenient for the order to be made.

The procedures for an application under Part 2 of the 1987 Act are included in our booklet 'Application to the LVT'. There is no prescribed form for such actions, but suitable forms, with explanatory notes for completion, are available from the LVT.

Where the right to manage is terminated, for any reason, no further application for the right may be made for another four years, other than with the consent of a Leasehold Valuation Tribunal.

Procedures and statutory time limits

- Leaseholders form RTM company and register at Companies House.

- RTM company serves S82 Right to Information Notice (discretionary).

- Landlord must respond within 28 days.

- RTM company must serve a S78 Notice Inviting Participation on all qualifying leaseholders who are not members of the RTM company.

- RTM company may not serve S79 Notice of Claim until at least 14 days after service of the Notice Inviting Participation.

- RTM company serves S79 Notice of Claim, which:

- must allow at least one month from date of service for landlord to serve a counter-notice (the determination date);
- must propose a date of acquisition at least three months after the date proposed for the landlord's counter-notice (the acquisition date).

- ● RTM company, or the landlord, serves the S83 Right of Access Notice, requiring access for inspection (discretionary).

- ● Parties must respond within 10 days.

- Landlord *may* serve a S84 counter-notice, which either:

- accepts the claim; or
- disputes the claim on grounds specified in the counter-notice.

- Where landlord disputes the claim, RTM company must apply to the Leasehold Valuation Tribunal within two months of the date of the counter-notice.

- Landlord must serve S92 Contractor Notices and Contract Notices on the determination date, or 'as soon as is reasonably practical' after that.

- RTM company serves S93 Duty to Provide Information Notice.

- Landlord must respond within 28 days of the notice, subject to the proviso that he is not obliged to do so until after the acquisition date.

continued overleaf

The acquisition date will be:

- where the landlord served a counter-notice agreeing the claim, or did not serve a counter-notice, **the date set in the Notice of Claim;**
- where a disputed claim is confirmed by the Leasehold Valuation Tribunal, **three months after the final date of the LVT determination;**
- where a landlord disputes the claim but subsequently agrees, **three months after the date of the landlord's agreement.**

- Landlord may take up membership of the RTM company.
- RTM company to allocate votes to landlord according to his holding in the building.

- Landlord must transfer all uncommitted service charges on the acquisition date or 'as soon after that date as is reasonably practicable'.

- RTM company must give landlord notice of an intention to grant an approval under the lease for:
 - assignment, sub-letting, placing a charge, parting with possession, structural alterations or change of use – 30 days;
 - all other approvals – 14 days.

Useful addresses

Leasehold Valuation Tribunals

Residential Property Tribunal Service (RPTS) National Helpline:

Tel: 0845 600 3178 Website: www.justice.gov.uk

Wales

1st Floor, West Wing, Southgate House, Wood Street, Cardiff CF10 1EW

Tel: 029 2092 2777 Fax: 029 2023 6146

Email: rpt@wales.gsi.gov.uk Website: <http://wales.gov.uk>

Other useful addresses

Her Majesty's Stationery Office (HMSO)

Copies of all legislation regulations and other official publications can be downloaded from www.legislation.gov.uk.

Alternatively printed copies can be purchased from:

The Stationery Office Ltd (TSO),

PO Box 29, Norwich, NR3 1GN)

Tel: 0870 600 5522

Online ordering: www.tsoshop.co.uk

Association of Residential Managing Agents (ARMA)

178 Battersea Park Road, SW11 4ND

Tel: 020 7978 2607 Fax: 0207 498 6153

Email: info@arma.org.uk Website: www.arma.org.uk

Association of Retirement Housing Managers (ARHM)

Southbank House, Black Prince Road, London SE1 7SJ

Tel: 020 7463 0660 Fax: 020 7463 0661

Email: enquirers@arhm.org Website: www.arhm.org

The Royal Institution of Chartered Surveyors (RICS)

12 Great George Street, Parliament Square, London SW1P 3AD

Tel: 0870 333 1600 Email: contactrics@rics.org Website: www.rics.org

The Federation of Private Residents' Associations

PO Box 10271, Epping CM16 9DB

Tel: 0871 200 3324 Email: info@fpra.org.uk Website: www.fpra.org.uk



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Email: info@lease-advice.org Website: www.lease-advice.org