Law Commission
Reforming the law

Leasehold home ownership: exercising the right to manage

Consultation Paper

Consultation Paper 243

Law Commission
Reforming the law

Consultation Paper No 243

Leasehold home ownership: exercising the right to manage

Consultation paper

January 2019

This publication is available at www.lawcom.gov.uk.

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Hon Mr Justice Green, *Chairman,* Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: The law relating to leaseholders' "right to manage". This consultation paper sets out options for reforming the existing right for leaseholders to take control of the management of their own building and seeks consultees' views on those options. You do not have to answer every question.

Geographical scope: This consultation paper considers the law of England and Wales.

Availability of materials: The Consultation Paper is available on our website at https://www.lawcom.gov.uk/project/right-to-manage/.

Duration of consultation: We invite responses from 28 January 2019 to 30 April 2019.

Comments may be sent:

Using an online response form, which can be found at www.lawcom.gov.uk/project/right-to-manage. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to RTM@lawcommission.gov.uk

By post to RTM team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 3100

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

Our website also includes a short survey which we invite individual leaseholders and RTM company directors to complete in order to share with us their experiences of the RTM process.

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission

We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the General Data Protection Regulation, which came into force in May 2018.

Any queries about the contents of this Privacy Notice can be directed to general.enquiries@lawcommission.gov.uk.

Contents

Glossary and abbreviations

2002 Act: Commonhold and Leasehold Reform Act 2002.

acquisition date: the date on which the RTM company acquires the RTM.

appurtenant property: in relation to a building or part of a building or a flat, any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat.

articles of association: the rules governing how a company operates.

building: a built or erected structure with a significant degree of permeance, which can be said to change the physical character of the land. We discuss a more restricted meaning within this paper. A building might be a house, a block of flats or commercial units.

collective enfranchisement / collective freehold acquisition: the purchase of a freehold interest of a building containing flats by a majority of leaseholders. The former phrase is used in the current legislation. The latter phrase is the phrase proposed in our enfranchisement consultation paper.

commonhold consultation paper: Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241. The consultation paper was published in December 2018.

counter-notice: a notice that the landlord, or other relevant third party, may give to the RTM company in response to receiving an RTM claim notice. We refer to "negative counter-notices" where the counter-notice states that the RTM company is not entitled to acquire the RTM, and "positive counter-notices" where the counter-notice admits the RTM company's entitlement.

claim notice: the document served on the landlord by the RTM company to begin an RTM claim.

determination date: where the RTM is not disputed, the determination date is the date specified in the claim notice for service of a counter-notice. Where the RTM is disputed, the determination date is either the date when the tribunal determines entitlement to RTM, or when the parties agree that it can be acquired.

ECHR: the European Convention on Human Rights.

enfranchisement: we use "enfranchisement" as a generic term to refer to claims to buy the freehold or extend a lease under the Leasehold Reform Act 1967 or the Leasehold Reform Housing and Urban Development Act 1993.

enfranchisement consultation paper: Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238. The consultation paper was published in September 2018.

estate: a development containing multiple buildings with appurtenant property shared between them. A development may contain a mixture of flats and houses.

exclusive appurtenant property: appurtenant property the ownership or enjoyment of which is exclusive to the occupiers of a building (or multiple buildings) included within the same RTM.

flat: a separate set of premises (whether or not on the same floor) which forms part of a building, which is constructed or adapted for use as a dwelling, and either the whole or material part of which lies above or below another part of the building.

freeholder: the owner of the freehold interest in any property. The freeholder is at the top of any chain of leases of a given property.

house: a building designed or adapted for living in (whether structurally detached or not), so long as it can reasonably be called a house. A house may be held on a freehold or leasehold basis.

intermediate landlord: a landlord who has a leasehold interest in the property that is superior to that of the leaseholder's interest. An intermediate landlord holds a lease of the property and has sub-leased it onto an inferior leaseholder. An intermediate landlord is distinct from the freeholder because they only own a leasehold interest in the property.

landlord: a person (either an individual or a company) who grants a leasehold interest out of their property interest. A landlord may be the freeholder of the property or may hold a leasehold interest in the property.

lease: the document that grants the leaseholder a leasehold interest in their property and sets out the rights and responsibilities of the leaseholder and landlord.

leasehold: a form of property ownership which is time limited (for example, ownership of a 99-year lease), where control of the property is shared with, and limited by, the landlord.

leaseholder: a person who holds a leasehold interest in property. We use the term leaseholder instead of "tenant" because it is typically used to denote those holding long leases of properties, whereas "tenant" is generally used to refer to those with short leases (such as a one-year "assured shorthold tenancy"). However, the 2002 Act uses the word "tenant" and we adopt that usage when referring to the legislation, for example, when referring to a "qualifying tenant".

lease consent: an approval given by the landlord or RTM company to a leaseholder to do some act for which the lease requires consent to be given. Examples might include consent to undertake alterations or to sub-let.

long lease: a lease that is granted for a term of 21 years or more, subject to some qualifications.

managing agent: an agent employed by a landlord, management company or RTM company to exercise management functions on their behalf.

MHCLG: Ministry of Housing, Communities and Local Government.

non-exclusive appurtenant property: appurtenant property the ownership or enjoyment of which is not exclusive to the occupiers of a building (or multiple buildings) included within the same RTM.

non-participating leaseholder: a leaseholder who qualifies to participate (see qualifying tenant) in an RTM claim but does not do so.

notice inviting participation: the notice served by an RTM company before it makes an RTM claim, to all qualifying tenants who are not already members of the RTM company (or have not already agreed to become a member), inviting them to become a member. These notices are currently mandatory.

participating leaseholder: a leaseholder who qualifies for the RTM (see qualifying tenant), and who opts to participate in the RTM by becoming a member of the RTM company.

prescribed articles: articles of association which are prescribed by law. Currently an RTM company's articles of association are prescribed by the 2009 Regulations (England) and the 2011 Regulations (Wales).

qualifying premises: a building (or part of a building) or buildings which qualify for the RTM.

qualifying tenant: a leaseholder who holds a long lease and is eligible to participate in an RTM claim.

residential unit: (under our proposals) a unit which has been constructed or adapted for the purposes of a dwelling (even where there might also be some non-residential use).

right to participate: the right, available to all qualifying tenants, to become a member of the RTM company, either before or after the RTM claim is made.

RTM: right to manage.

RTM company: the company which qualifying tenants must set up in order to make an RTM claim.

service charge: charges payable by a leaseholder to the landlord, management company or RTM company for services provided under the lease which typically relate to the building in which the leaseholder's flat is situate and, often, appurtenant property.

shared appurtenant property: appurtenant property the ownership or enjoyment of which is shared between the occupiers of two or more buildings. It may or may not be exclusive to those buildings.

shared ownership lease: a lease under which the leaseholder purchases a "share" of a house or flat (usually between 25 and 75%) and pays a normal rent on the remainder of the property. The lease generally permits the leaseholder to acquire additional shares in the property over time, usually up to 100%.

tenancy: see “lease”.

tenant: see “leaseholder”.

the tribunal: the First-tier Tribunal (Property Chamber) in England and the Residential Property Tribunal Wales in Wales.

tripartite lease: a lease made between three parties: the landlord, leaseholder and a third party. We use this term where the third party is a separate entity with obligations in the lease to manage the premises.

uncommitted service charges: service charges which have been demanded and paid by leaseholders but not yet spent or allocated to particular work or services.

unit: (under our proposals) a separate, independent set of premises (whether or not on the same floor), which must form all or part of a building. A unit can either be a residential unit or a non-residential unit.

ONLINE CONTENT

All websites and electronically available materials referenced in this document were last accessed on 18 January 2019.

Chapter 1: Introduction

1.1 In England and Wales, nearly all flats, and some houses, are owned on a leasehold rather than freehold basis. In the leasehold context, the leaseholder does not own the property outright, but rather takes a long lease (typically for anywhere between 99 and 999 years) granted by the landlord who usually owns the freehold of the land. "Leasehold" is a right to occupy rather than outright ownership of property, and the lease governs the terms of that occupation.

1.2 The landlord usually has responsibility under the lease for providing management services for the communal benefit of all the occupiers in the building. Typical examples include repairing the structure and exterior of the building and obtaining insurance against damage by fire, flood and similar risks. These services are often, but not always, provided by a managing agent selected by the landlord. The costs of these services are usually recoverable from each of the leaseholders by way of a service charge.

1.3 Landlords also often retain responsibility for wider management decisions affecting the block and the individual flats. Common examples include deciding which supplier should provide the utilities and, in the case of individual flats, the giving of consent before a leaseholder can make alterations or sub-let.

1.4 The right to manage ("RTM") was introduced in 2002 to give leaseholders the opportunity to take over the management of their building in certain situations. It is sometimes described as a stepping stone on the way to enfranchisement (which allows leaseholders to purchase the freehold). However, it is also a standalone option for leaseholders who may not be able to buy their freehold (for example, because they cannot afford the purchase price).

1.5 The purpose of our project is to review the existing RTM regime and recommend reforms to give leaseholders easier access to the RTM, and with fewer costs, while safeguarding the interests of landlords to the extent appropriate to protect their interest in the property. This is in line with our Terms of Reference agreed with the Government.[1] In this consultation paper, we set out provisional proposals for reform and ask consultees for their views. After our consultation, we will analyse responses and decide on our final recommendations for reform which will be published in a report.

1.6 This consultation paper is accompanied by a shorter summary document, available on our website.[2]

---

1 We set these out in full at paras 1.19 to 1.21 below.

2 https://www.lawcom.gov.uk/project/right-to-manage/.

WHAT IS THE RTM?

1.7 The RTM was introduced by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). It gives leaseholders the right to acquire the "management functions" in respect of their building, these being functions relating to services, repairs, maintenance, improvements, insurance and management. [3]

1.8 It is a "no-fault" right, which leaseholders can exercise without the need to prove a complaint against their landlord or managing agent.[4] The RTM can only be exercised by certain types of leaseholder[5] in relation to certain types of premises as provided in the 2002 Act.[6] Notably, the RTM cannot currently be exercised over premises where more than 25% of the floor area of the building is non-residential.

1.9 The 2002 Act provides that the leaseholders must first set up an RTM company, of which the leaseholders are members. The 2002 Act then sets out a detailed statutory procedure for the RTM company to follow to acquire the RTM from the landlord.

Problems with the current law

1.10 The "simple" RTM process envisaged in the original consultation which led to the 2002 Act[7] has not come to pass. The requirement for strict compliance with the statutory procedures, such as the service of certain notices on particular parties, can be unforgiving to leaseholders. In many cases, small mistakes made by the RTM company have afforded landlords opportunities to frustrate or delay otherwise valid claims.[8]

1.11 The Court of Appeal described the problem in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* as follows:

> I have drawn attention to the Government's policy that the procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. That policy has not been implemented by the current procedures which still contain traps for the unwary…[9]

1.12 Stakeholders have told us about numerous problems with the existing RTM legislation, including:

---

3 Commonhold and Leasehold Reform Act 2002, s 96(5).

4 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 25-02.

5 Commonhold and Leasehold Reform Act 2002, s 75.

6 Commonhold and Leasehold Reform Act 2002, s 72.

7 Department of the Environment, Transport and the Regions, *Commonhold and Leasehold Reform* (August 2000), section 3, ch 1, para 10.

8 See the comments of Lewison LJ in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [8], approving the comments of Martin Rodger QC (Deputy President of the Upper Tribunal (Lands Chamber)) in *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

9 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] by Lewison LJ.

(1) the impact of seemingly small errors, leading to lengthy technical arguments about whether the process has been carried out correctly, and wasted costs and failure of the process if not;

(2) restrictive preconditions to exercising the right, such as the inability of an RTM company to manage multiple blocks on an estate, the maximum percentage of non-residential space and the exclusion of leasehold houses;

(3) information about the building and management functions being provided to the RTM company too late in the process to allow them to manage effectively from the date that the RTM is acquired;

(4) legislative provisions that put the landlord's costs on to the RTM company, including the landlord's litigation costs in some circumstances;

(5) uncertainty as to the extent of the obligations that transfer to an RTM company, particularly in relation to appurtenant property (such as gardens and car parks) and services shared with other buildings; and

(6) concerns about the adequacy and validity of the insurance taken out by RTM companies.

BACKGROUND TO THE PROJECT

1.13 Our work on the RTM is part of a wider project on residential leasehold and commonhold reform announced in the Law Commission's 13th Programme of Law Reform, published in December 2017.[10] Although the RTM was not itself included in our 13th Programme, the Government asked us in July 2018 to include this additional workstream.

1.14 The project is supported by the Ministry of Housing, Communities and Local Government ("MHCLG") as required by our statutory Protocol with Government.[11] The project is also supported by the Welsh Government insofar as it relates to devolved matters.

MHCLG call for evidence

1.15 On 18 October 2017, the then Secretary of State, the Rt Hon Sajid Javid MP, announced "new measures to help create a fairer property management system that works for everyone".[12] Pursuant to this announcement, MHCLG published a call for

---

10 13th Programme of Law Reform (2017) Law Com No 377, available at https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/.

11 Protocol of 29 March 2010 between the Lord Chancellor (on behalf of the Government) and the Law Commission (Law Com No 321), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/247864/0499.pdf; Protocol of 10 July 2015 between the Welsh Ministers and the Law Commission, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/07/Law_Commission_Welsh_Protocol.pdf

12 Speech at the annual conference of the Association of Residential Managing Agents ("ARMA"); transcript available at https://www.gov.uk/government/speeches/regulation-of-the-managing-agent-market.

evidence,[13] which was open for six weeks from 18 October 2017 to 29 November 2017.

1.16 The call for evidence touched on the RTM but its main focus was the regulation of letting and managing agents. On the RTM, consultees were asked how the Government could make it easier for leaseholders to access the RTM.

1.17 MHCLG received around 1,800 responses to this call for evidence, which were shared with the Law Commission. About 500 of them refer to the RTM and we have sought to take account of them in our work.

1.18 MHCLG published its response in April 2018. In respect of the RTM, MHCLG said they would simplify the process of acquiring the RTM and review the qualifying criteria for mixed-use buildings.

Terms of Reference

1.19 The Government has identified the following general policy objectives for the Law Commission's recommended reforms to residential leasehold:

(1) to promote transparency and fairness in the residential leasehold sector; and

(2) to provide a better deal for leaseholders as consumers.

1.20 These policy objectives apply equally to our review of the RTM.

1.21 In relation to the RTM, the Government asked the Law Commission in July 2018 to conduct a broad review of the existing RTM legislation with a view to improving it. In particular, we were asked to:

(1) consider the use currently made of the RTM legislation and how far it meets the needs of users;

(2) consider the case to improve access to the RTM, including by modifying or abolishing existing qualification criteria; and

(3) make recommendations to render the RTM procedure simpler, quicker and more flexible, particularly for leaseholders.

Issues beyond the scope of our project

1.22 The RTM is a right for leaseholders. Although we are aware of calls for owners of freehold properties on estates to be given equivalent rights to take over management of shared appurtenant property such as gardens and car parks, this is not within the scope of our project. In time, similar calls may also arise for owners of commonhold units. Creating such rights would involve an entirely separate regime, with qualifying

---

13 *Protecting consumers in the letting and managing agent market: call for evidence* (October 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653170/Property_agents_call_for_evidence.pdf.

criteria not based on leasehold arrangements and a regime targeted only at shared appurtenant property.

1.23 Also beyond the scope of our project is any extension of the RTM to properties let directly by a local housing authority on long leases. Local authority leaseholders do not qualify for the RTM.[14] As we discuss in more detail in Chapter 3,[15] long leaseholders and tenants of local housing authorities can establish a tenant management organisation ("TMO") and through that apply to take over the landlord's responsibility for managing housing services, such as repairs, caretaking, and security.

Other Law Commission residential leasehold projects

1.24 The Law Commission's project on residential leasehold and commonhold reform consists of three strands: commonhold; the RTM; and leasehold enfranchisement. Together, these three projects have the potential to improve the options available to leaseholders to gain more control over their properties.

1.25 Where relevant, we have sought to ensure that our proposals concerning the RTM are consistent with the proposals set out in our enfranchisement consultation paper, published in September 2018.[16] We have also sought to be consistent with our commonhold consultation paper, published in December 2018,[17] although there are fewer areas of crossover between the RTM and commonhold. In some cases, different policy considerations apply for the RTM which may justify a different approach.

1.26 We are currently therefore examining three issues, from a list of many that were raised in response to our 13th Programme consultation. We hope that our work on leasehold reform will, in the longer term, extend beyond these three topics and culminate in a project to streamline and consolidate residential leasehold legislation.[18]

The wider context: leasehold in the spotlight

1.27 Residential leasehold has, for some time, been hitting the headlines. It is the subject of an increasingly prominent policy debate and concerns have been raised about many aspects of the leasehold market. These include an increase in houses sold on a leasehold basis, escalating ground rents, unregulated managing agents and a lack of transparency in service charges.

---

14 Commonhold and Leasehold Reform Act 2002, sch 6, para 4.

15 See paras 3.64 to 3.67.

16 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238.

17 Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241.

18 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 1.71 and 1.72, for a list of other issues which have been brought to our attention.

1.28 Following the UK Government's consultation on *Tackling unfair practices in the leasehold market*, the Secretary of State for Communities and Local Government – then the Rt Hon Sajid Javid MP – stated that:

> It's clear from the overwhelming response from the public that real action is needed to end these feudal practices. That's why the measures this government is now putting in place will help create a system that actually works for consumers.[19]

1.29 In a written statement in March 2018 the Welsh Minister for Housing and Regeneration, Rebecca Evans AM, noted the "widespread criticism of poor practice in the use of leasehold". She continued to commit the Welsh Government to responding to the practices in question "swiftly and firmly".[20]

1.30 The All-Party Parliamentary Group on Leasehold and Commonhold Reform ("the APPG") has been active in calling for leasehold reform. Its membership has grown from 35 Parliamentarians in September 2016 to 151 in June 2018.[21] The APPG's work has run in parallel with campaigning for leasehold reform by the Leasehold Knowledge Partnership ("LKP"),[22] which acts as the APPG's secretariat. In response to the publicity concerning doubling ground rents and "fleecehold" covenants, a social media group – the National Leasehold Campaign – has sought to raise awareness of some of the problems being faced by leaseholders, and currently has more than 11,000 members.

1.31 In December 2017, the UK Government announced various reforms, including proposals to ban the sale of houses on a leasehold basis and the reservation of ground rents with any financial value when homes (whether houses or flats) are sold on a leasehold basis.[23] It sought views on how to implement some of these proposals

---

19 Ministry of Housing, Communities and Local Government, *Crackdown on unfair leasehold practices* (December 2017), available at https://www.gov.uk/government/news/crackdown-on-unfair-leasehold-practices--2.

20 Written Statement, Leasehold Reform in Wales, Rebecca Evans, Minister for Housing and Regeneration (6 March 2018), available at https://beta.gov.wales/written-statement-leasehold-reform-wales.

21 See https://www.betterretirementhousing.com/stop-leasehold-rip-offs-joining-appg-fitzpatrick-tells-mps/ and https://www.leaseholdknowledge.com/appglist.

22 The APPG, supported by LKP, published its preliminary proposals for leasehold and commonhold reform in June 2017, available at https://www.leaseholdknowledge.com/wp-content/uploads/2017/04/AllPartyParliamentaryGroupLeaseholdReportApril27.pdf.

23 Department for Communities and Local Government, *Tackling unfair practices in the leasehold market: A consultation paper* (July 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632108/Tackling_unfair_practices_in_the_leasehold_market.pdf, and *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670204/Tackling_Unfair_Practices_-_gov_response.pdf.

in October 2018.[24] In April 2018, it announced plans to regulate managing agents.[25] The proposals included plans for a mandatory code of practice covering letting and managing agents and nationally recognised qualification requirements for letting and managing agents to practise. In addition, an independent regulator was proposed that would oversee both the code of practice and the delivery of the qualifications.

1.32 In October 2018, the UK Government issued new regulations concerning the recognition of residents' associations and the provision of information about leaseholders by landlords to residents' associations.[26] In November 2018, it published a call for evidence on proposals to introduce a specialist Housing Court to provide a single path of redress for property disputes.[27]

1.33 Leasehold has also been debated on various occasions in Parliament and in the Welsh Assembly. In January 2018, the Assembly voted 34 votes to 14 in favour of a motion resolving to abolish the sale of houses on a leasehold basis. In March 2018, Rebecca Evans AM welcomed the UK Government and the Law Commission's review of leasehold.[28] Her remarks were made in the context of the debate on Hefin David AM's legislative proposal for a Bill on the regulation of estate management companies.

1.34 In summary, there is considerable impetus for change from the public, from the media, from Parliament and the Welsh Assembly, and from the UK and Welsh Governments. Both Governments have made, and continue to make, announcements about various measures and proposed leasehold reforms that they are pursuing. Our RTM project is undertaken against the backdrop of that wider picture of leasehold reform.

---

24 Ministry of Housing, Communities and Local Government, *Implementing reforms to the leasehold system in England: A consultation* (October 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748438/Leasehold_consultation.pdf.

25 Department for Communities and Local Government, *Protecting consumers in the letting and managing agent market: call for evidence* (October 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653170/Property_agents_call_for_evidence.pdf, and Ministry of Housing, Communities and Local Government, *Protecting consumers in the letting and managing agent market: Government response* (April 2018), available at https://www.gov.uk/government/consultations/protecting-consumers-in-the-letting-and-managing-agent-market-call-for-evidence.

26 The Tenants' Associations (Provisions Relating to Recognition and Provision of Information) (England) Regulations 2018/1043. The Regulations followed a consultation by the Department for Communities and Local Government, *Recognising residents' associations, and their power to request information about tenants* (July 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf.

27 Ministry of Housing, Communities and Local Government, *Considering the case for a Housing Court: A Call for Evidence* (November 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf.

28 Welsh Assembly, Plenary, Debate on a Member's Legislative Proposal: Estate Management Companies, 14 March 2018, para 229, available at http://record.assembly.wales/Plenary/4913?lang=en-GB#A42375.

THE LAW IN WALES

1.35 The extent of Welsh devolution in this area is unclear. “Housing” was expressly devolved to Wales in the Government of Wales Act 2006.[29] Following the Wales Act 2017, rather than expressly devolving competence in certain areas, competence is devolved unless expressly reserved. The Welsh Assembly cannot modify “the private law”, which includes the law of property.[30] But that does not apply if the modification “has a purpose (other than modification of the private law) which does not relate to a reserved matter”.[31]

1.36 Under the 2002 Act, certain powers in relation to the RTM are exercisable by the Welsh Ministers alongside the Secretary of State. An example is the power to prescribe the content and form of the articles of association of RTM companies.[32]

1.37 Under our Protocol with the Welsh Ministers, the Law Commission will only undertake a project concerning a matter that is devolved to Wales if it has the support of the Welsh Ministers. To the extent that any of the matters in our Terms of Reference are devolved to Wales, the Welsh Ministers have indicated their support for the Law Commission undertaking this project.

1.38 Our project, therefore, is intended to cover both England and Wales, and to result, where reasonably possible, in a uniform set of recommendations that are suitable for both England and Wales.

1.39 We invite the views of consultees as to whether a reformed RTM regime should treat particular issues differently in England and in Wales. Consultees are welcome to share their views on this point in response to our individual questions on particular issues, or to include it under “any other comments” at the end of the online response form.

SCOTLAND AND NORTHERN IRELAND

1.40 The 2002 Act and its RTM provisions do not apply to Scotland or Northern Ireland.[33]

1.41 In Scotland, there is no similar leasehold system. Long leases are not used to deliver home ownership and the RTM does not exist.

1.42 The Northern Ireland Law Commission published a report entitled “Apartments” in 2013. As part of this, it looked at the RTM provisions in the 2002 Act and said that it “does not consider that there is very much of substance in the right to manage provisions in the 2002 Act which are of relevance to [Northern Ireland]”.[34]

---

29 Government of Wales Act 2006, sch 7, Pt I, para 11.

30 Wales Act 2017, s 3 and sch 1 and 2 (and the new sch 7A and 7B).

31 Wales Act 2017, s 3 and sch 1 and 2 (and the new sch 7A and 7B).

32 Commonhold and Leasehold Reform Act 2002, s 74(2).

33 Commonhold and Leasehold Reform Act 2002, s 182.

34 Northern Ireland Law Commission, *Apartments*, NILC 17 (2013), para 7.9, available at http://www.nilawcommission.gov.uk/law_commission_-_report_apartments_-_nilc17_2013.pdf.

IMPACT OF REFORM

1.43 The different options for reform that we present would have financial and non-financial implications for landlords and leaseholders, and for the wider property market and economy. The Government will undertake impact assessments in relation to any reform options that it pursues. This consultation provides an opportunity to gather evidence and data which can be used in the preparation of impact assessments.

1.44 We therefore ask various questions throughout this consultation paper about the potential impact of potential reforms. In addition, we have created an online survey that we are inviting individual leaseholder to complete in order to share their experience of the RTM.

STRUCTURE OF THIS CONSULTATION PAPER

1.45 This paper is structured broadly around the lifecycle of the RTM. In each chapter, we set out the current law and, where we are aware of problems caused by the law, we make proposals for reform.

1.46 Chapters 2 and 3 consider the qualification criteria for the RTM, which concern both the nature of the premises and the nature of the leaseholder's lease. We consider RTM for leasehold houses. In Chapter 4 we consider the RTM in the context of buildings located on estates.

1.47 In Chapter 5, we set out the requirements for the RTM company which leaseholders must set up in order to make an RTM claim. We look at the process of claiming the RTM in Chapter 6, focussing on the notices that have to be served. In Chapter 7, we discuss the sharing of management information, the date on which the RTM is acquired and the handover process.

1.48 Chapter 8 sets out the management functions which are transferred to the RTM company, and Chapter 9 discusses other ancillary rights and obligations which are affected, such as the process for granting lease consents.

1.49 In Chapter 10, we discuss the costs of the RTM process. We also address the disputes which may arise, and consider whether these should be heard by a court or tribunal.

1.50 We finish our paper by considering, in Chapter 11, termination of the RTM, whether at the election of the leaseholders or forced by other events.

1.51 We include our consultation questions within the text of each chapter. We have also produced a separate list of all of the questions in Chapter 12.

ACKNOWLEDGEMENTS AND THANKS

1.52 In the course of our work to date we have held meetings with groups representing leaseholders and RTM companies, landlords, managing agents, the retirement sector, housing associations and local authorities. We have also had a small number of individual calls and meetings, including with the insurance sector. In Appendix 1, we list the organisations we have met or otherwise spoken to. We do not list individual

leaseholders or RTM companies. We are grateful to everyone who has met us or written to us for their time and for allowing us to draw on their experience and expertise.

1.53 We have also set up an Advisory Group of experts. The group has commented on draft proposals and shared their expertise and experience with us. We also list the names of the advisory group members in Appendix 1.

1.54 Finally, we are grateful to our colleagues working on the enfranchisement and commonhold projects for their input and expertise.

THE TEAM WORKING ON THE PROJECT

1.55 The following members of the Commercial and Common Law team have contributed to this consultation paper: Laura Burgoyne (team manager); Daria Gleyze (lead lawyer); Mari Knowles (team lawyer); Justin Bates (team lawyer); Emily Fitzpatrick/Bedford (team lawyer); Olivia Davies (research assistant); Erica Li (research assistant); Tabitha Brown (research assistant); Tanith Horner (research assistant); Sarosh Sethna (research assistant).

Chapter 2: Qualifying criteria for premises

INTRODUCTION

2.1 The Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") sets out certain qualifying criteria which must be satisfied before the RTM can be exercised. There are qualifying criteria determining both the types of buildings which may be subject to the RTM (which we call "qualifying premises") and the types of leaseholder who may make an RTM claim ("qualifying tenants", to use the language of the 2002 Act). These matters are interlinked; for example, premises will only be qualifying premises if they contain a minimum number of qualifying tenants. Finally, a certain number of qualifying tenants must participate in the RTM claim before the RTM can be acquired over qualifying premises. We refer to this as the "participation requirement".

2.2 In this chapter, we consider the qualifying criteria for premises. We set out the current law, and make proposals for change where we, or stakeholders, have identified problems with the current criteria. This includes a proposal to extend the scope of the RTM to include leasehold houses, in addition to flats, and further proposals to remove some existing restrictions so that more buildings will fall within the scope of the RTM regime.

2.3 We also discuss the number of qualifying tenants which a building must contain, and the participation requirement. In Chapter 3, we explain the meaning of "qualifying tenants" in more detail, which covers the qualifying criteria for leases.

QUALIFYING PREMISES: AN OVERVIEW OF THE CURRENT LAW

2.4 The RTM may only be claimed in respect of premises:[35]

(1) which consist of a self-contained building or part of a building, with or without appurtenant property;

(2) which contain at least two flats held by qualifying tenants; and

(3) in which the number of flats held by qualifying tenants amount to at least two-thirds of the total number of flats in the premises.

RTM FOR LEASEHOLD HOUSES?

Current law and problems

2.5 Under the above definition, buildings or parts of buildings must contain flats to qualify for the RTM. Houses are therefore effectively excluded, even when granted on a leasehold rather than freehold basis, although a converted house which contains two or more flats may qualify.

---

[35] Commonhold and Leasehold Reform Act 2002, s 72(1).

2.6 We have not been able to find any principled reason for excluding leasehold houses from the RTM. This matter was not debated in Parliament before the introduction of the 2002 Act. Lord Richard expressed his intention to query why houses were not included but does not appear to have done so in the end.[36]

2.7 The RTM qualifying criteria were intended to replicate the criteria for collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act").[37] We think that this is the most likely reason for houses having been omitted from the RTM. Collective enfranchisement applies only to buildings consisting of flats. The enfranchisement of houses was not dealt with in the 1993 Act because there is a separate regime for it in the Leasehold Reform Act 1967 ("the 1967 Act").

Our proposal

2.8 It appears that, in practice, although leaseholders of houses do not qualify for the RTM, they may be allowed or even required by the lease to self-manage. However, this is not necessarily the case and depends on the terms of the relevant lease. There has been strong support among stakeholders for the inclusion of leasehold houses in the scope of the RTM, particularly where the house is situated on an estate and contributes towards a common estate service charge.[38]

2.9 We do not see any good reason to deny the RTM to leaseholders of houses. Just as any other leaseholders, they usually pay for the maintenance of their premises and, where relevant, the estate on which their house is situated, and they should have the right to manage it themselves if they wish so. The argument is even stronger as leasehold houses, by their very nature, are likely to be separate from other premises and to have individual services, so they would be easier to manage independently. We therefore propose that the scope of the RTM legislation should be expanded to include leasehold houses.

Consultation Question 1.

2.10 We provisionally propose that the RTM should be exercisable in respect of leasehold houses as well as flats. Do consultees agree?

---

36 *Hansard* (HL), 29 January 2001, vol 621, col 473: "At a later stage, I shall certainly wish to raise the issue of qualification for the right being confined to a single building and not available to whole estates or houses.".

37 Department of the Environment, Transport and the Regions, *Residential Leasehold Reform in England and Wales – A Consultation Paper* (November 1998), Summary & Conclusions, para 3.3.

38 We discuss estates in Chapter 4. There, we also consider the position of freehold houses and commonhold properties on estates.

Consultation Question 2.

2.11 Do consultees think leasehold houses qualifying for the RTM would increase the number of RTMs? Do consultees think this would be used by leaseholders of houses to acquire single-building RTMs, or only to join multi-building RTMs on estates?

How would this work in practice?

2.12 We have considered whether leaseholders of houses should go through the same RTM process as other leaseholders, including setting up an RTM company, as described in Chapter 5, and issuing a claim notice, as set out in Chapter 6. We do not consider that there are any reasons for diverging from the claim notice procedure, as the landlord must be informed of the leaseholder's intention to acquire the RTM and the basis on which it would do so.

2.13 It may be considered too burdensome or artificial for the leaseholder of a house to be required to set up a company of which to become the sole member alongside the landlord. As we explain in Chapter 5, we do not envisage that a landlord in this situation would have a vote, but would benefit from being kept informed, in their capacity as a company member, of the RTM company's decisions and management.

2.14 Nevertheless, the company structure provides certain advantages, such as limited liability, and would keep the regime for houses aligned with the existing one for flats. This would in turn facilitate the ability of leaseholders of houses to participate in the RTM on estates. We think that a right for leaseholders of houses to participate in any multi-building RTM is particularly useful, as it would enable them to have a say in the management of shared appurtenant property on an estate. We discuss the RTM on estates in more detail in Chapter 4.

2.15 In addition, as we discuss in the section below, there has been significant contention over what is a "house" in law, as opposed to a "flat" or other residential premises. Our proposed solution to this is to refer to both houses and flats as "residential units". If we were to distinguish between the RTM process for houses and for flats, we would revive this issue.

2.16 These advantages, coupled with the fact that it is relatively inexpensive to set up an RTM company, lead us to propose that leaseholders of houses should have to follow the same RTM process as leaseholders of flats, including having to set up an RTM company.

Consultation Question 3.

2.17 We provisionally propose that leaseholders of houses should follow the same process as leaseholders of flats in order to acquire the RTM. Do consultees agree?

DEFINITIONS OF "FLAT" AND "HOUSE"

Current law and problems

2.18 The definitions of "flat" and "house" have generated substantial debate and case law. Below we briefly discuss each of these to illustrate the difficulties.

Flat

2.19 A "flat" for the purposes of the 2002 Act means:

(1) a separate part of a building;

(2) constructed or adapted to be a dwelling;

(3) which lies wholly or in a material part above or below another part of the building.[39]

2.20 The definition of "flat" is identical to the current law applying to enfranchisement claims.[40] It is comprehensive and includes most premises that someone would commonly refer to as a flat: conventional flats in blocks, converted houses, duplex apartments, and most maisonettes. The "dwelling" requirement means that the premises must be capable of being lived in, but it is not necessary for them to be actually lived in or for them to be a home.[41]

2.21 The last limb of the definition above is intended to exclude houses,[42] but it can also catch structures which would otherwise be regarded as flats, such as a maisonette that occupies the whole of an extension to a house which is split into flats. In this case, the maisonette would not be "above or below" another part of the house. It also arguably catches those premises which are in all respects a house but where the lease excludes certain parts, such as the roof space or basement, to avoid the lease being considered a lease of a house under the 1967 Act.

2.22 Premises which share rooms (usually living rooms and kitchens) with other premises, such as bedsits, hotel rooms, Airbnb rooms and similar holiday lets and student accommodation would not qualify as flats, because they are not constructed or adapted for use as separate dwellings.[43] However, the property which contains the accommodation as a whole (the various bedsits and the shared space) could be a flat.

House

2.23 Because the current RTM provisions do not cover houses, there is no relevant definition of "house" in the 2002 Act. We have therefore looked to the enfranchisement legislation for a definition. "House" is defined in section 2 of the 1967 Act as:

---

39 Commonhold and Leasehold Reform Act 2002, s 112(1).

40 Leasehold Reform, Housing and Urban Development Act 1993, s 101.

41 *JLK v Ezekwe* [2017] UKUT 277 (LC) at [28].

42 *Malekshad v Howard de Walden Estates Ltd* [2003] 1 AC 1013, [2003] Landlord and Tenant Reports 13 at [100].

43 *JLK v Ezekwe* [2017] UKUT 277 (LC).

(1) a building;

(2) designed or adapted for living in;

(3) which is a house reasonably so called.

2.24 It will usually be easy to identify whether a building is a house. However, it is less obvious in some scenarios, and there has been considerable litigation on the issue. We discuss these difficulties in detail in the enfranchisement consultation paper,[44] but summarise the key problems below.

2.25 The greatest uncertainty with this test is as to what can be said to be a "house reasonably so called". The general approach of the courts has been to ask whether the building looked like a house. However, this has led to difficulties where the building looked like a house and could be lived in but because of, for example, commercial use, could not reasonably be called a house. In the enfranchisement consultation paper, we gave the example of a house with a doctor's surgery downstairs and a separate flat upstairs.

2.26 These difficulties have resulted in the Court of Appeal holding that it is necessary to take account of a range of relevant circumstances in deciding whether something is a house "reasonably so called". The circumstances include the terms of the lease in question, the actual use of the building and the relevant proportions of the different kinds of use.[45] The Supreme Court, when asked to revisit the criteria, agreed that the use of the building, rather than its physical appearance, was the principal factor.[46] Even following these decisions from senior courts, it is still very much necessary for there to be a case-by-case assessment as to whether something is a house.

Our proposals

2.27 In the enfranchisement consultation paper, we introduced the concept of a "residential unit".[47] The impetus for the creation of this new concept comes from the problems with the current legislation's reliance on "house" and "flat" as distinct types of premises. We proposed that the enfranchisement legislation should refer to "residential units" rather than "houses" and "flats". Below, we explain the new concept, and propose that it should also be adopted in the RTM context.

---

44 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, from para 7.32 onwards. See also Radevsky and D Greenish, *Hague on Leasehold Enfranchisement*, (6th ed 2014) from para 2-03 onwards.

45 *Prospect Estates Ltd v Grosvenor Estates Ltd* [2008] EWCA Civ 1281, [2009] 1 WLR 1313.

46 *Hosebay v Day* [2012] UKSC 41, [2012] 1 WLR 2884.

47 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 8.37 to 8.56.

What do we mean by "unit"?

2.28 "Unit" is intended as an umbrella term to capture flats, houses, commercial premises and anything in between which is a separate and self-reliant set of premises.[48] It is a physical concept, and requires examining the premises themselves.

2.29 We propose that, to be a unit, premises:

(1) must be a separate, independent set of premises; and

(2) must either constitute a building, or form part of a building.

2.30 By a "separate, independent set of premises", we mean a set of premises which is delineated by some degree of physical separation from other premises, and which can reasonably be used on its own, for its intended purpose, without reliance on other premises. We explain that it does not matter whether the whole of those premises is on the same floor.

2.31 Where the same set of premises is part of a larger structure, the "unit" would always be the smallest set of premises which meets the definition. To take the example of a two-floor building with two flats on one floor and three on the other:

(1) each flat would be a unit, regardless of the fact that they may be of different sizes;

(2) the floors would not be units;

(3) the building would not be a unit.

2.32 We acknowledged in the enfranchisement consultation paper that there are degrees of separation and independence. Our intention is to include any ordinary house or flat within the definition of a residential unit. As for more complex cases of premises sharing common facilities, it would be a question of reasonable interpretation. Rooms in a house share would not be units as they cannot be used independently as a dwelling. On the other hand, we envisage that fully-equipped flats on a luxury development which happen to share additional communal living and eating spaces would be individual residential units.

What makes a unit a "residential" unit?

2.33 In the enfranchisement consultation paper, we proposed that, to be a "residential unit", a unit must be constructed or adapted for use as a dwelling.[49] As we discuss below, this is regardless of whether use of a dwelling is exclusive or in addition to other uses. We did not suggest a general requirement that the unit is actually lived in. Conversely,

---

48 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 8.37 to 8.56.

49 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.46.

a “non-residential unit” would be one which is not constructed or adapted for use as a dwelling, such as a shop unit or office space.

2.34 Although there will always be a certain number of difficult, fact-dependent cases that require the court’s input, we hope that the new umbrella term of “residential unit” will ultimately lead to a reduction in litigation over these kinds of issues.[50]

2.35 Overall, we think that it is desirable to adopt the concept of “residential unit” for the RTM as well as in enfranchisement. It gives a good shorthand for houses and flats and avoids the need to determine whether something is a house or a flat. It also eliminates difficulties with the definition of “house” which have generated extensive litigation in the context of enfranchisement, and which could cause problems for the RTM as well if we include houses, as proposed above. There are also clear benefits in keeping the concepts consistent between the enfranchisement and RTM legislation. We therefore provisionally propose that the concept of a “residential unit” be adopted in the RTM context.

2.36 In Chapter 3, we consider the position of premises which are designed and/or used for both residential purposes and other purposes (“mixed-use” units), or designed for residential purposes but in fact used entirely for non-residential purposes.

Consultation Question 4.

2.37 We provisionally propose to adopt the same approach as in our proposals relating to enfranchisement, so that the RTM will be exercisable over “residential units”. Do consultees agree it should be a consistent approach? If not, how can we justify different terminology and what should it be?

SELF-CONTAINED BUILDING

Current law

2.38 As seen above, a set of premises can currently qualify for the RTM either as a “self-contained building” or as a “self-contained part of a building”. In this section, we set out the law on what is meant by a “self-contained building”.

[50] We discussed the risks of adopting a new concept, over the longstanding concepts of “house” and “flat”, in the enfranchisement consultation paper, including the possibility of more litigation at the outset. See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 8.39 and 8.40.

Building

2.39 For something to be a "building" there must be a built structure or erection[51] which can be "said to form part of the realty and to change the physical character of the land"[52] taking into account its "degree of permanence … size and composition by components".[53]

2.40 This has been described as a test of "common sense" or "objective judgment",[54] so that "a cave, movable caravan, houseboat or boathouse would not be included" but "a well-equipped beach-hut probably is".[55]

2.41 The same structure may be a single building or several buildings. The authors of *Hague* give the example of a terrace of houses, the entirety of which may constitute a single building despite each individual house in the terrace also being a building.[56] However, "building", for these purposes, does not include the plural, so two separate buildings do not fall within the definition.[57]

Self-containment

2.42 A "self-contained" building is a building that is structurally detached.[58] The question of structural detachment is established on the facts of each case and usually requires expert evidence.[59] The following are case law examples of what is and is not "structurally detached".

(1) A building which lay above an underground car park that spanned more than one building was held not to be structurally detached from the car park.[60]

(2) A building which was connected to another building through weathering features to prevent water ingress was held to be structurally detached.[61]

---

51 *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013; Town and Country Planning Act 1990, s 119(1).

52 A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) para 2-03, referring to *Cheshire County Council v Woodward* [1962] 1 All ER 517 which discusses the definition of "building" in the context of the Town and Country Planning Act 1990, s 336.

53 *R v Swansea City Council ex parte Elitestone Ltd* (1993) 66 Property, Planning and Compensation Reports 422, 429.

54 *R v Swansea City Council ex parte Elitestone Ltd* (1993) 66 Property, Planning and Compensation Reports 422, 430.

55 A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) para 2-03.

56 A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) para 2-03; referring to *Malekshad v Howard de Walden Estates Ltd* [2003] 1 AC 1013, [2004] 1 WLR 862.

57 A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) para 2-03; referring to *Dugan-Chapman v Grosvenor Estates* [1997] 1 Estates Gazette Law Reports 96.

58 Commonhold and Leasehold Reform Act 2002, s 72(2).

59 *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC) at [38].

60 *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC).

61 *No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC).

2.43 Structural detachment is a question of degree and type of attachment. A building can be "structurally detached" even where it touches another building.[62]

2.44 If a building is structurally detached, there is no further requirement that it needs to function independently.[63] It is irrelevant that common services or external facilities are shared with other buildings.

Criticisms of the "self-contained building" test

2.45 Where in dispute, structural detachment is a question for expert evidence. We have been told by stakeholders about the cost and delay incurred in obtaining expert evidence to prove that something that is functionally a separate building is in fact structurally detached. Leaseholders have told us anecdotally that landlords sometimes take issue with any feature that connects a building to something else, regardless of how small or incidental the connection.

2.46 One stakeholder gave the example of a residential block which had some underground pipes connecting it to a shop across the road. Although the block had been functioning independently, the leaseholders were required to commission a survey to determine whether the attachment was structural or not.

2.47 We have been told that complex structures are becoming increasingly common, whether because of modern building styles and techniques or because landlords are deliberately trying to avoid RTM claims. Even where there is a structural connection, it can be difficult to identify it by just looking at the building. A common mistake is to assume that several blocks each amount to a separate self-contained building, whilst failing to notice that they are in fact structurally connected (for example, by an underground car park or shared basement).

2.48 Serving separate claim notices in relation to each block, in this case, would result in every claim being invalid. This is because none of the blocks are self-contained buildings (not being structurally detached) and none are self-contained parts of a building (not being vertically divided – see below). The correct claim would have to be for the whole structure formed by the interconnected blocks. However, this issue may come to light only late in the process, when the leaseholders have already incurred the cost of setting up the RTM company, making the claim and applying to the tribunal.

SELF-CONTAINED PART OF A BUILDING

The current law

2.49 If the premises in respect of which the RTM is claimed are a self-contained building within the meaning of the 2002 Act, they qualify for the RTM and the enquiry stops

---

62 The Upper Tribunal has said that, for a building to be structurally detached, "what is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure": *No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC) at [30].

63 *Gala Unity v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988 at [13].

there. If, on the other hand, they only represent part of a larger building, additional requirements must be met. To be "self-contained", the part of the building must:[64]

(1) be vertically divided from the rest of the building;

(2) be capable of being redeveloped independently; and

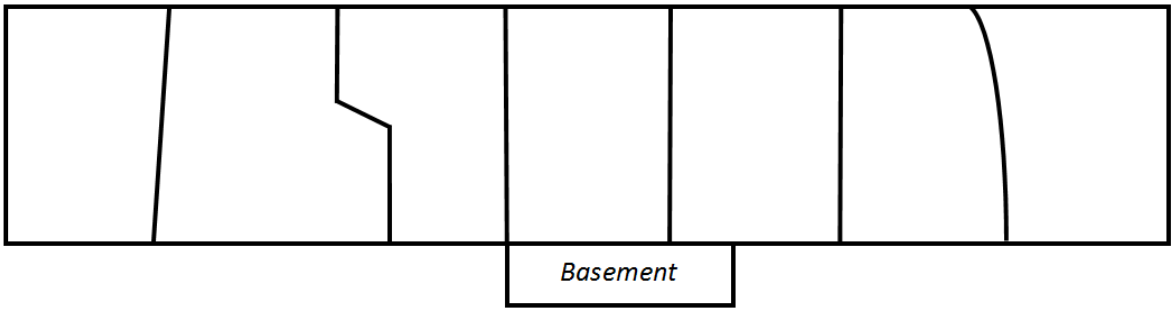
(3) either:

(a) have independent services; or

(b) be capable of being provided with independent services without carrying out works likely to cause a significant interruption of the services to the rest of the building.

A vertical division

2.50 To qualify, the part must be a vertical division of the building, from roof to basement.[65] No deviations, other than minimal ones, are permitted. Below are examples of adjoining flats with possible "deviations":



2.51 In *Re Holding and Management (Solitaire) Ltd*, the Lands Tribunal summarised the position as follows:

> The requirement that, to be a self-contained part of a building, a part of a building must constitute "a vertical division of the building" is unqualified. Deviations from the vertical that are *de minimis* could no doubt be ignored for this purpose …The question, however, it seems to me, is, not whether the area outside a line drawn vertically through the building is minimal in the context of the notice, or very small in relation to the total floor area, but whether, including the area in question, the part of the building was, physically, a vertical division of the building.[66]

2.52 In *Solitaire*, a deviation from verticality comprising 2% of the floor area was held not to be minimal. On the facts, 2% represented two parking spaces and a shutter door which ran under the neighbouring building. Presumably a smaller percentage of flooring, or only a slight angle deviation (for example, 91 instead of 90 degrees), would

---

64 Commonhold and Leasehold Reform Act 2002, s 72(3).

65 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 25-09.

66 *Holding and Management (Solitaire) Ltd v 1-16 Finland St RTM Co Ltd* [2008] 1 Estates Gazette Law Reports 107 at [8] by Mr George Bartlett QC.

meet the threshold. However, the tribunal gave no guidelines on where to draw the line between what is minimal and what is not. Following *Solitaire*, a hypothetical deviation due to two chimneys stacked in the middle of the roof was considered "de minimis".[67]

Redeveloped independently

2.53 To be capable of being redeveloped independently, a part of a building:

> must be capable of being demolished and/or rebuilt without causing damage to the structure of the neighbouring part.[68]

2.54 The above test was derived by the Leasehold Valuation Tribunal (now the First-tier Tribunal) from the definition of "redevelopment" in section 23(2) of the 1993 Act, in the context of enfranchisement.

2.55 In *Parkgate (1-6) RTM Co Ltd v Ground Rents (Regis) Ltd,* the relevant part of the building consisted of four self-contained flats.[69] They shared a chimney stack with the neighbouring premises and the building could not strictly be divided vertically. The question arose as to whether the building could be redeveloped independently, thus allowing the applicant to qualify for the RTM. The First-tier Tribunal considered the fact that the building could be and was divided into self-contained flats was in itself enough to demonstrate that that part of the building could be redeveloped independently.[70]

Has or could have independent services

2.56 As well as being a vertical division, capable of being redeveloped independently, the relevant part of the building must either have, or be capable of having, independent services. Services in this context are those "provided by means of pipes, cables or other fixed installations"[71] so they would include the electricity, gas and water supply but probably not shared vertical lifts or security systems.

2.57 If, on the facts, the part of the building which seeks to acquire the RTM has services which are provided independently of the rest of the building, this part of the test is satisfied without further enquiry.

---

67 *Parkgate (1-6) RTM Co Ltd v Ground Rents (Regis) Ltd* (14 September 2015) CAM/00KF/LRM/2015/0002 & 3 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [50].

68 A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) para 21-03, cited with approval in *Stamford Hill Mansions RTM Co Ltd v Daejan Properties Ltd* (01 October 2007) LON/00AM/LRM/2007/007 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [32] and [36].

69 (14 September 2015) CAM/00KF/LRM/2015/0002 & 3 First-tier Tribunal Property Chamber (Residential Property) (unreported).

70 *Parkgate (1-6) RTM Co Ltd v Ground Rents (Regis) Ltd* (14 September 2015) CAM/00KF/LRM/2015/0002 & 3 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [49].

71 Commonhold and Leasehold Reform Act 2002, s 72(5).

2.58 If the part of the building does not have independent services, the question is whether the services could be rendered independent without significant disruption to the rest of the building.

2.59 This question is purely hypothetical. It is irrelevant whether the leaseholders acquiring the RTM have the intention to separate the services or even the authority or means to do so.[72] Indeed, we understand that works to separate the services are rarely, if ever, carried out by the RTM company once it acquires the RTM. The RTM company would not have the right to separate the services without permission from the landlord.

2.60 To determine whether services could be made independent, case law[73] sets a five-part test, requiring the tribunal or court to:

(1) identify the services which are in issue because they are not provided independently to the part of the building for which RTM is claimed (the RTM part);

(2) consider whether those services can be provided to the RTM part independently of their provision to the remainder of the building;

(3) ascertain the works required to separate the respective parts of the services supplying the RTM part and the remainder of the building;

(4) assess the interruption to the services provided to the remainder of the building which would be caused by carrying out the works;

(5) decide whether that interruption would be "significant".

2.61 "Significant" takes into account the duration of the interruption and the severity of its effects on the non-RTM residents. For example, in *Oakwood Court*,[74] the Upper Tribunal held eight hours of interruption to the heating supply to be "significant interruption", even when considering that the interruption could have been scheduled in summer. In contrast, a more recent decision of the tribunal[75] suggests that an interruption to the water supply for one day would not have been "significant", as a similar interruption had previously been necessary for the water tank to be chlorinated.

---

72 *St Stephens Mansions RTM Co Ltd v Fairhold NW Limited* [2014] UKUT 541 (LC) at [66] and [88].

73 *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541 at [47] to [48]; see also *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 Estates Gazette Law Reports 121.

74 *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 Estates Gazette Law Reports 121.

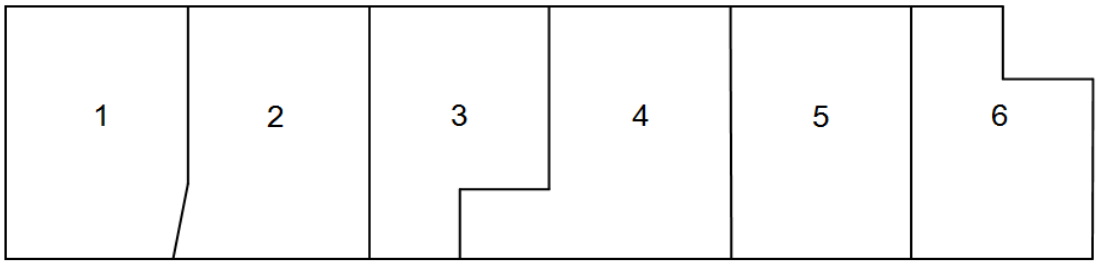
75 *84 – 91 Windmill Gate RTM Ltd v HML Hawksworth Ltd* (27 January 2015) CHI/43UH/LRM/2014/0020 First-tier Tribunal Property Chamber (Residential Property) (unreported).

2.62 Generally speaking, case law has established that services which have separate meters,[76] or where separate meters can be installed without major work,[77] are or can be rendered independent.

An illustration of the different parts of a building

2.63 A "self-contained building" under the 2002 Act is one which is structurally detached. This can be both a wider and narrower concept than "building" in common parlance. For example, in the context of the RTM, a single terraced house would not be a self-contained building (although it may be a self-contained part of a building) but the whole terrace would.

2.64 A "part of a building" can be the smallest part that meets the requirements under section 73(2) of the 2002 Act, or can include other eligible parts. Take the example below, of numbers 1 to 6 of a hypothetical row of mansion blocks, each containing a number of flats (the flats within each of the six blocks are not represented below):



2.65 In this example, none of blocks 1 to 6 are structurally detached so are not each a self-contained building. The division between blocks 3 and 4 deviates from the "vertical division" requirement significantly, whereas that between blocks 1 and 2 deviates minimally. All blocks have the same landlord.

2.66 Blocks 1 to 6 could therefore acquire the RTM as a single building. It does not matter that the edges of block 6 are not all vertical.

2.67 In addition, the following are all self-contained parts of the building which could also acquire the RTM:

(1) each of blocks 1, 2, 5, and 6 individually;

(2) blocks 3 and 4 together; 1 and 2 together; and 5 and 6 together;

(3) blocks 2, 3 and 4 together; and 3, 4 and 5 together;

---

[76] *Parkgate (1-6) RTM Co Ltd v Ground Rents (Regis) Ltd* (14 September 2015) CAM/00KF/LRM/2015/0002 & 3 First-tier Tribunal Property Chamber (Residential Property) (unreported); *Timken Way RTM Company Ltd v Sinclair Garden Investments (Kensington) Ltd* (03 August 2012) CAM/34UF/LOA/2012/0001 Leasehold Valuation Tribunal (unreported).

[77] *Chelsea Bridge Wharf RTM Co Ltd v Fairhold Artemis Ltd* (31 October 2011) LON/00BJ/LRM/2011/0013 Leasehold Valuation Tribunal (London Rent Assessment Panel) (unreported).

(4) blocks 1, 2, 3 and 4 together; 3, 4, 5 and 6 together; and 2, 3, 4 and 5 together;

(5) blocks 1, 2, 3, 4 and 5 together; and 2, 3, 4, 5 and 6 together.

2.68 A number of further permutations are possible, such as block 1 acquiring the RTM separately from blocks 3 to 6, with block 2 remaining under landlord management. However, once one of the blocks is part of an RTM company, it cannot also be part of another with a different combination of premises. Block 1 cannot get the RTM individually and also as part of a joint effort with block 2.

2.69 If the flats within the mansion blocks (not represented in the above diagram) also satisfy the "part of a building" requirements, those flats could also acquire the RTM.

Criticism of the "self-contained part of a building" test

2.70 Many of the leaseholders we spoke to have indicated that the qualifying criteria for "self-contained part of a building" is one of the RTM areas most in need of reform.

2.71 Problems identified include the following.

(1) The "verticality" requirement is unnecessarily strict and would require more guidance from the courts or legislation in any event. Under the current law, it is unclear what proportion of the part of the building can be horizontally divided. It is even unclear if this is a question of proportion only or if other aspects are relevant as well, such as angles, manner of deviation or purpose of deviation.

(2) The requirement for the part of the building to be capable of being redeveloped independently seems unnecessary, given that an RTM company would not have the authority to redevelop the part in any event. Furthermore, the 2002 Act does not, in any event, give a right to the RTM company to redevelop. If the purpose of this requirement is to allow the other parts of the building to be separated from the part which acquires the RTM, then this focus should be reflected in the way the test is formulated.

(3) There is the same criticism as above for the requirement for services to be capable of being separated. This requirement is further rendered superfluous by the fact that the 2002 Act does not in fact require the services to be separated. In practice, it is possible to have an agreement between the relevant parties on how to manage shared services but the landlord or the non-RTM parts of the building do not have a right to demand that the RTM company conducts separation works.

OUR PROPOSALS ON "BUILDING" AND "PART OF A BUILDING"

Overlap with collective enfranchisement

2.72 The qualifying criteria for premises to acquire the RTM are currently the same as for collective enfranchisement under the 1993 Act. The only difference between section 3 of the 1993 Act (qualifying criteria for collective enfranchisement) and section 72 of the 2002 Act (qualifying criteria for the RTM, set out above) is that the latter also expressly mentions "appurtenant property". We deal with appurtenant property in RTM in Chapter 4.

2.73 It appears that the qualifying criteria for collective enfranchisement were simply copied over for the RTM. This may have been part of the intention in 2002 that the RTM should be a "stepping stone" to collective enfranchisement. However, different policy considerations apply to enfranchisement and the RTM.

2.74 For example, the verticality requirement is important in enfranchisement to prevent the creation of flying freeholds,[78] which is not an issue in the context of the RTM, as the landlord's title is unaffected by the RTM. Furthermore, independent redevelopment and separability of services are important when considering the acquisition of a part of the freehold, which needs to be carved out from the existing freehold. The newly created freehold should be capable of being autonomous, whereas RTM companies would not even have the power to engage in separation works to isolate the RTM part of the building from the rest of the building.

2.75 Moreover, the fact that, unlike enfranchisement, the RTM is not a transfer of property rights away from the landlord may justify more flexibility in the requirements in the leaseholders' favour.

2.76 For these reasons, we propose to move away from the current approach whereby the qualifying criteria for the RTM mirrors that provided for a collective enfranchisement. Instead, we consider that there are circumstances where the qualifying criteria for the RTM can be made bespoke for the right.

2.77 As stakeholders have emphasised, the RTM should not be seen solely as a preliminary stage to collective enfranchisement. Many leaseholders who wish to get involved in the management of their buildings do not have the desire or the means to buy the freehold of that building. The RTM is and should be a separate, independent right for leaseholders, potentially exercisable in circumstances where it would not be possible or appropriate to purchase the freehold. The qualifying criteria for the RTM should reflect this distinct purpose of the right.

Our proposals for collective enfranchisement – brief outline

2.78 In the enfranchisement consultation paper, we took the following approach to the issue of qualifying criteria.[79]

(1) For lease extensions, we proposed that "building" should be defined widely, in accordance with the present case law, to be

> a built structure with a significant degree of permanence which can be said to change the physical character of the land.[80]

---

78 A flying freehold is the term given to a freehold property which includes premises that are above or below other premises. The existence of a flying freehold can give rise to difficulties in respect of repair and access as positive covenants (such as a covenant to repair) will not automatically bind successors in title.

79 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, ch 8.

80 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.105.

Any residential unit which would be part of such a structure would be eligible in principle for a lease extension.

(2) For freehold acquisitions, we suggested that the current tests for self-contained building and part of a building, as described above, should be maintained. However, we asked whether the tribunal should be given a narrowly defined discretion to allow freehold acquisition where the premises are not self-contained but where

> the proposed freehold acquisition is not reasonably expected to cause any particular practical problems for any interested party.[81]

2.79 There are good reasons to maintain the law for freehold acquisitions, not least because of the need to ensure that there is no "underhang" or "overhang" with other premises. These are not, however, issues which would arise in the RTM, as the structure and extent of the freehold title is not affected by the acquisition of the RTM.

Our provisional proposal for defining the qualifying premises in the RTM

2.80 In the context of the RTM, we consider that the test should move away from consideration of self-containment and instead focus on the manner in which shared services and common parts (if there are any) can be managed effectively by the various parties responsible for them. The vast majority of stakeholders to whom we spoke prior to the publication of this paper, who represented both leaseholder and landlord interests, agreed that the focal point for the RTM should be the division of management not the physical attributes of the building.

2.81 We envisage that this could be achieved by requiring or encouraging the RTM company and landlord or landlords to share information early in the process and agree on how to divide the management of shared services and appurtenances. These proposals are explained in more detail in Chapters 4 and 7.

2.82 Therefore, we think it is desirable and justifiable to take an inclusive approach to premises which could qualify for the RTM, as long as management functions can be divided between the relevant parties responsible for them.

2.83 Accordingly, we would suggest that a "building" for the purposes of qualifying for the RTM should be defined along the lines of:

> a structure which forms part of the land, changes the physical character of the land and has a degree of permanence.

2.84 This is the existing definition of a building as established in case law, which we also suggested using for "building" in the context of lease extensions. "Changes the physical character of the land" and "has a degree of permanence" are both

---

81 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.107.

requirements intended to exclude moveable structures. Similar considerations apply as when the courts are deciding whether a fixture passes with the land.[82]

2.85 The courts have held that, where "building" was not defined in statute, it should be given its dictionary meaning of "structure with a roof and walls".[83] When it comes to borderline examples, the court would look at all the circumstances and take a common-sense approach, but the ordinary meaning is a block of brick or stone work, covered in by a roof".[84] It normally includes the ground upon which it stands.[85]

2.86 Drawing on this judicial guidance, we think that all blocks of flats and houses would be included in our definition. The "building" would have to run from the ground or, sometimes, underground, to the roof, so disparate flats, or entire floors, which are part of a block would not be "a building" by themselves.

2.87 The "building" would not need to be self-contained, in the way required by the current law. Under our provisional proposal, structural attachment to another structure, the fact that services are shared or that there is a partly non-vertical division would no longer of themselves be able to disqualify a building from the RTM.

2.88 Sometimes a building will have two or more identifiable component parts that could each be treated as a separate building, for instance in rows of mansion blocks, where the whole row could be a building but also each of the individual blocks. The same applies to blocks which are in some way physically connected to other blocks. Stakeholders expressed concern about the reference to "a" structure, saying that this might imply that they always had to count the larger interconnected structure as "the building".

2.89 We wish to give as much flexibility as possible to leaseholders, so that they can obtain the RTM either for the smallest part that would fit the definition of a building or for any of the larger parts. We think that, for the purposes of the definition of a building for the RTM, it should be immaterial whether the building can be considered as forming part of a larger building. Our intention is that this should be made clear through statutory drafting. This eliminates the need to make specific provision for "self-contained" parts of buildings.

2.90 As explained below, to qualify for the RTM, in addition to the very broad characteristics described here, the building would have to contain at least (depending on consultation responses) one or two residential units.

The options

2.91 We acknowledge that our suggested broad approach to "building" would come with a degree of uncertainty, as unique or non-standard cases would still have to be reviewed by the tribunal. However, we consider that the vast majority of buildings which contain residential premises would fall squarely within the suggested definition,

---

82 *Cheshire County Council v Woodward* [1962] 2 QB 126.

83 *Edwards v Kumarasamy* [2016] UKSC 40, [2016] AC 1334.

84 *Moir v Williams* [1892] 1 QB 264; *Customs and Excise Commissioners v Lewis*, The Times, 22 June 1994.

85 *Victoria City v Bishop of Vancouver Island* [1921] AC 384.

without the need for judicial determination. Our proposal would eliminate the need for expert evidence and complex analysis. For example, there would no longer be a need to determine:

(1) whether something could hypothetically be redeveloped; or

(2) whether the flooring surface that forms the horizontal part of the division between two properties is large enough or the angle of division wide enough to render the division non-vertical.

2.92 In the alternative, if stakeholders consider, as some have said to us, that the issues currently caused by the legislation do not justify an overhaul of the existing self-containment requirements, we suggest an approach similar to that proposed in the enfranchisement consultation paper.

2.93 This alternative approach consists of maintaining the current qualifying criteria exactly as they are, with a discretion for the tribunal to allow the RTM over premises which do not qualify where the acquisition of the RTM is not reasonably expected to cause any particular practical problems for any interested party.

2.94 This approach assumes that the parties would undertake litigation as they currently do over whether a building or a part of a building qualifies, but would give the RTM company the right to argue that a minor departure from the qualifying criteria should not prevent the RTM. As with any judicial discretion, it would depend on the tribunal's assessment of the matter, having weighed the prejudice to the landlord and the other leaseholders and occupiers of the parts affected by the acquisition of the RTM.

Consultation Question 5.

2.95 Our provisional view is that the different underlying considerations for enfranchisement and for the RTM justify a divergent approach to the qualifying criteria for premises. Do consultees agree?

Consultation Question 6.

2.96 We provisionally propose that there should be a broader definition of "building" for the purposes of the RTM qualifying criteria for premises. Do consultees agree?

Consultation Question 7.

2.97 Instead of introducing a broader definition of "building", would consultees prefer to retain the existing requirements for a self-contained building or part of a building, with an additional judicial discretion to allow the RTM to be acquired where the qualifying criteria are not met?

Consultation Question 8.

2.98 Do consultees have experience of failing to acquire the RTM because of the current definition of "building"?

NUMBER AND PROPORTION OF RESIDENTIAL UNITS IN THE BUILDING

2.99 To qualify for the RTM, a building must contain a minimum number of flats held by qualifying tenants. In addition, a set proportion of the total number of flats in the building must be held by qualifying tenants. We discuss the current law below, and make proposals for reform.

2.100 We explain the meaning of "qualifying tenant" in more detail in the next chapter, but broadly speaking it means a leaseholder who has a lease of more than 21 years.

Minimum number of residential units held by qualifying tenants

Current law

2.101 At least two flats in a building (or part of a building) must be held by qualifying tenants in order for that building (or part of a building) to qualify for the RTM. This requirement excludes from the RTM:

(1) houses;

(2) buildings containing only two flats of which one is on a long lease to a qualifying tenant and the other is either let to a tenant who is not a qualifying tenant (for example, let on a short lease) or not let at all; and

(3) buildings containing one flat held by a qualifying tenant and other space that is not "flats".

2.102 An example of the third category is mixed commercial-residential premises such as a building with a purpose-built shop on the ground floor and a flat upstairs.

2.103 It is worth mentioning that blocks of more than two flats where just one flat is held on a long lease would not qualify in any event because of the requirement for at least two-thirds of the flats to be let to qualifying tenants.

2.104 We asked above at paragraph 2.10 about the RTM for houses and will not repeat the arguments here. The other issue in this section of the consultation paper is whether, when dealing with mixed commercial-residential premises, there should be a requirement for a minimum number of residential units on long leases.

2.105 Currently, where the RTM is acquired in respect of a building which contains premises that are not held by qualifying tenants, the landlord remains responsible for those functions which relate exclusively to the non-qualifying parts of the premises.[86] We do not propose to change this division of responsibility. The landlord also has the right to be a member of the RTM company and to vote.[87]

2.106 Accordingly, we do not see a good reason to maintain the requirement for a minimum of two residential units to be held by qualifying tenants. We think that if one long leaseholder wishes to acquire the RTM by themselves in a building where there are no other residential leasehold premises, they should be able to do so. We understand that, in these cases, the long leaseholder would cover most, if not all, costs of management through the service charge.

2.107 In Chapter 4, we discuss the management of appurtenant property which is not used exclusively by the premises (or part of the premises) over which the RTM is being exercised.

Consultation Question 9.

2.108 We provisionally propose that one qualifying tenant should be able to claim the RTM over:

(1) buildings which contain no other residential premises; and

(2) buildings in which there are no other qualifying tenants.

Do consultees agree?

Proportion of residential units held by qualifying tenants

Current law

2.109 To qualify for the RTM, the number of flats in the building (or part of the building) held by qualifying tenants must represent at least two-thirds of the total number of flats in the building (or part of the building) over which the RTM is to be exercised.[88]

Our proposal

2.110 Leaseholder stakeholders suggested that the required proportion of qualifying units (the “qualification threshold”) should be lowered to half rather than two-thirds of the

---

86 Commonhold and Leasehold Reform Act 2002, s 96(6).

87 See Chapter 5.

88 Commonhold and Leasehold Reform Act 2002, s 72(1).

number of residential units. This would encompass any building where long leaseholders held the majority of units.

2.111 On the other hand, landlords urged us to take into account that the RTM is a no-fault right and that the RTM company should be able to show strong support from the leaseholders to legitimise taking away management from the landlord. They pointed out that if the qualification threshold were to be reduced to half, then all qualifying tenants would be required to become members of the RTM company.[89]

2.112 We therefore consider two options:

(1) maintaining the current law – two-thirds of the flats in the premises must qualify for the RTM; or

(2) lowering the qualification threshold – at least half of the units in the premises must qualify.

2.113 The approach in (2) would have the advantage of aligning the requirements for qualification and participation (discussed below). It would also bring more buildings within the scope of the RTM, which is in line with our Terms of Reference, which require us to consider facilitating the RTM for leaseholders.

2.114 We note that this differs from the proposal in the enfranchisement consultation paper to retain the two-thirds rule in that context.[90] In our view, this distinction is justified because, as we have discussed above, the RTM represents a less significant interference with the landlord's property rights. It is therefore appropriate that there may be some situations in which qualifying for the RTM is less onerous than qualifying for enfranchisement.

Consultation Question 10.

2.115 We provisionally propose that the requirement for at least two-thirds of the flats in the premises to be held by qualifying tenants should be reduced to 50%. Do consultees agree?

Requirement of actual participation

2.116 In addition to the two-thirds qualification threshold discussed above, the number of qualifying tenants who become members of the RTM company must be equal to at least half of all the flats in the premises (the "participation requirement").[91] In a building comprising 12 flats, eight must be held by qualifying tenants under the two-thirds

89 We discuss the participation requirement below at paras 2.116 and 2.117.

90 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 8.135 to 8.142.

91 Commonhold and Leasehold Reform Act 2002, s 79(5).

qualification threshold, but only six of them need to be members of the RTM company for a claim to proceed.

2.117 We do not consider that the participation requirement needs to be amended. We note that the combined effect of the participation requirement and our proposal to reduce the two-thirds qualification threshold would have the effect of requiring all qualifying tenants to become members of the RTM company in situations where exactly half of the units in the building are held by qualifying tenants. Nevertheless, we consider that the 50% floor on participation provides necessary protection for both landlords and non-participating leaseholders from the control of management rights by minority interests. In addition, it ensures a critical mass of participation in the RTM, providing the RTM company with legitimacy amongst residents within the building.

Two-unit buildings

2.118 The above propositions raise particular concerns in the context of a building with only two units.

2.119 If the qualifying tenants of both units wish to acquire the RTM, they will satisfy both the qualification threshold (whether reduced in accordance with our proposal above or not) and the participation requirement, and can make an RTM claim.

2.120 If one ("Tenant A") wishes to acquire the RTM but the other ("Tenant B") does not, the qualification threshold and participation requirement are still satisfied. However, the current law prevents Tenant A from claiming the RTM: both qualifying tenants in a two-unit building must participate in the RTM.[92]

2.121 It is our view that this position should be retained, so that one qualifying tenant in a two-unit block cannot acquire the RTM on their own. We note that this is at odds with our provisional proposal concerning enfranchisement in this context. In the enfranchisement consultation paper, we provisionally propose that, in a two-unit building, one leaseholder alone could acquire the freehold.[93] It may appear counterintuitive that a leaseholder in a two-unit building (in which both units are on long leases) may pursue enfranchisement but not the RTM, particularly as we have argued that certain qualifying criteria for the RTM should be more permissive than for enfranchisement. However, we consider that a two-unit building presents a uniquely fraught scenario for the RTM.

2.122 In the enfranchisement context, it might be the case that only one of the leaseholders is in a financial position to purchase the freehold, and it could be for the benefit of both parties that they do so. In the context of the RTM, the capital required to participate is much less. If Tenant B does not want to participate, this may suggest an inability for the parties to work together. The binary nature of the relationship between Tenants A and B means that the RTM framework is vulnerable to being used against one by the other should they not be on good terms. Although Tenant B would be entitled to become a member of the RTM company after Tenant A had acquired the RTM, at little

---

92 Commonhold and Leasehold Reform Act 2002, s 79(4).

93 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.145.

cost, this may result in the parties being deadlocked, and the landlord having the casting vote.[94] This result would undermine the entire purpose of the RTM.

2.123 While a deadlock is also possible in any RTM company with an even number of members, a larger group of people is more likely to be able to negotiate a solution, as well as being more likely to have members whose positions are more malleable. There will inevitably be disputes in buildings of all sizes and with any number of tenants, but we think that the risk of insoluble acrimony is particularly acute in a two-unit building.

2.124 Although we recognise that this issue is finely balanced, we have tentatively concluded that the potential for a deadlocked dispute involving the RTM company justifies a less permissive approach in this particular situation. We seek consultees' views.

Consultation Question 11.

2.125 We provisionally propose that the current rule requiring the participation of both qualifying tenants in a two-unit building should be retained, because of the particular risk of dispute and deadlock in the RTM context. Do consultees agree?

NON-QUALIFYING PARTS OF THE PREMISES

2.126 Even where a building qualifies for the RTM generally, because it contains the requisite proportion of qualifying tenants who have satisfied the participation requirement, there may be parts of the building which can never become subject to the RTM.

2.127 The management functions which transfer to the RTM company are only exercised over parts of the premises which are held by qualifying tenants (that is, leaseholders who have long leases). If the building also contains, for example, commercial units or flats retained by the landlord and let out on short leases, the landlord will retain the management functions in respect of these parts.

2.128 Provided that the building qualifies overall, the exterior of the building is likely to become the responsibility of the RTM company, even where some of the exterior forms part of the non-qualifying premises. This is because the landlord retains only the management functions which relate exclusively to the non-residential premises.[95]

2.129 In practice it appears that RTM companies employ managing agents where the building comprises commercial parts, and the managing agents manage both the residential and non-residential parts. Matters relating exclusively to the latter are presumably dealt with under instructions from the landlord.

---

94 We discuss the landlord's vote at paras 5.94 to 5.101.

95 Commonhold and Leasehold Reform Act 2002, s 96(6)(a).

2.130 Where the service charge due from the leaseholders of qualifying units does not amount to 100% of the total service charge for the premises, the landlord must contribute on behalf of the non-qualifying parts.[96] Some stakeholders reported that the commercial tenants in their buildings do not have an obligation to pay service charges, and said that the residential leaseholders were expected to fund the upkeep of the commercial premises. Commercial leases are usually full repairing and insuring ("FRI") leases, which means that the commercial tenant must repair and insure at least their own part of the building at their own cost.

2.131 It is outside the scope of this project to come up with a solution to the sometimes unfair distribution of service charges. If there are any service charges payable to the landlord under the commercial leases, the landlord should have to hand them over to the managing agents. If there are no such service charges, the leaseholders will effectively have to pay for the upkeep of all premises, including the commercial ones.

Exemption for premises with more than 25% non-residential space

Current law and problems

2.132 Premises are completely excluded from the RTM if the non-residential parts exceed 25% of the total internal floor area.[97] "Non-residential parts" are defined as any part of the premises that is not comprised in common parts of the building or occupied or intended to be occupied as residential premises.[98] The non-residential parts include business premises and other non-residential areas like storage rooms retained by the landlord.

2.133 We have been told that this causes significant challenges in practice and has led to considerable litigation. Disputes include the following:

(1) In *Connaught Court*,[99] the qualifying tenants could not claim the RTM because 26% of the total net internal area was non-residential. The leaseholders appealed, arguing that the porter's flat, which did not have a residential use at the time of the RTM claim, should be considered residential, as they intended it to be used for a residential porter. The Upper Tribunal dismissed the appeal, confirming that it was irrelevant what the leaseholders wished to do with the flat, and that it was the landlord's intention which was decisive.

(2) In *1 Palace Gate*,[100] the freehold title of the building referred to five flats, but the landlord built a sixth flat in the basement which was used as office space. This brought the building outside the scope of the RTM.

---

96 Commonhold and Leasehold Reform Act 2002, s 103.

97 Commonhold and Leasehold Reform Act 2002, sch 6, para 1.

98 Commonhold and Leasehold Reform Act 2002, sch 6, para 1(2).

99 *Connaught Court RTM Co Ltd v Abouzaki Holdings Ltd* [2008] 3 Estates Gazette Law Reports 175, (10 November 2008) LRX/115/2007 Lands Tribunal.

100 *1 Palace Gate RTM Co Ltd v Winchester Park Ltd* (22 October 2012) LON/OOAW/LRM/2012/0021 Leasehold Valuation Tribunal (London Rent Assessment Panel) (unreported).

(3) In *Canute Castle*,[101] the Leasehold Valuation Tribunal decided that the empty parts of a basement represented "non-residential" premises. This brought the building over the 25% limit and outside the scope of the RTM.

(4) Finally, *Rope Quays*[102] is an example of the technical arguments that can arise in respect of commercial premises. There, the RTM claim was phrased to include "1-30 Jacana Court and commercial unit" followed by a "note": "Note that management powers obtained through this RTM claim do not extend to the commercial unit within the premises". Although the commercial unit seems to have been within the 25% limit, the First-tier Tribunal held the RTM claim to be invalid because it did not provide a clear description of the premises.

2.134 The examples above provide a flavour of the issues encountered in relation to non-residential premises. Landlords appear willing to build or re-build their premises in such a way as to take them over the non-residential threshold for the RTM. As "non-residential" includes areas that are not necessarily commercial, such as empty basements or storage rooms, we have been told by leaseholder stakeholders that it is relatively easy for landlords to find ways to bring the building over the 25% limit.

2.135 The adequacy of the policy that non-residential premises of more than 25% would take the building outside the scope of the RTM has been consistently questioned by stakeholders. In addition to the problems listed above, we were told that the limit was arbitrary and that it in fact excludes many leaseholders from the possibility of acquiring the RTM. It may even preclude buildings with majority residential use from being eligible for the RTM. This goes against the purpose of the RTM policy, which is to put management back in the hands of the leaseholders where there is a majority of long leaseholders in the premises.

The position in enfranchisement

2.136 There is a similar exclusion in the enfranchisement legislation relating to collective enfranchisement claims for buildings where more than 25% of floor space is non-residential.[103] In the enfranchisement consultation paper, we acknowledged that the limit is somewhat arbitrary and prevents some buildings from being enfranchised merely because they are configured in such a way as to preclude the possibility of the leaseholders acquiring the freehold. We noted anecdotal evidence of developers constructing properties with 26% commercial use.

2.137 In the enfranchisement consultation paper, we provisionally proposed that the 25% rule should be retained. [104] We suggested that the percentage provides a clear and relatively simple means of identifying those buildings to which enfranchisement rights were intended to attach: that is, buildings in predominantly residential use. We acknowledged that any numerical limit will cause certain people to fall outside the

---

101 *Canute Castle RTM Co Ltd v Keystone Property Co Ltd* (27 June 2008) CHI/00MS/LRM/2009/0002 Leasehold Valuation Tribunal (Southern Rent Assessment Panel) (unreported).

102 *Rope Quays 2014 RTM Co Ltd v Holding & Management Solitaire (No 2) Ltd* (26 November 2015) CHI/24UF/LRM/2015/0010 First tier Tribunal Property Chamber (Residential Property) (unreported).

103 Leasehold Reform, Housing and Urban Development Act 1993, s 4(1).

104 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 8.110 to 8.118.

scheme, and suggested that it might be better to maintain the current and well-known limit of 25% than to increase or reduce it without proper justification.

2.138 However, we also accepted that the effect of a 25% limit might be to preclude buildings with majority residential use from being eligible for freehold acquisition, if the non-residential units are sufficiently large. It might also prevent the freehold acquisition of a building consisting of a flat above a shop. Therefore, we encouraged consultees to tell us about the appropriateness of this limit.

Our proposal for RTM

2.139 We think that different considerations apply in the context of the RTM, to the extent that it is possible to justify a different policy. The RTM does not interfere with a landlord's property rights, or its ability to collect rent from commercial tenants. The RTM company would not gain management functions in respect of the non-qualifying parts of the building, which would remain subject to the existing agreements between the landlord and the commercial tenants.

2.140 In practical terms, the non-residential premises exclusion has a much higher impact on RTM than on enfranchisement claims. While the evidence of conduct by landlords and developers intended to avoid the 25% rule in enfranchisement was "anecdotal", there is well documented and wide-ranging evidence to show that it poses significant problems in the RTM context.

2.141 In enfranchisement, landlords receive an appropriate price for selling their interest in the land or reducing it by granting longer leases. In contrast, they receive no monetary compensation when the RTM is taken from them and, sometimes even lose streams of income, such as commissions. Accordingly, landlords have more incentive, and in practice appear to be inclined, to take technical points in relation to "non-residential" premises and to construct or redesign properties to fall outside the allowed percentage.

2.142 Our provisional proposal is therefore to remove the threshold for non-residential premises altogether.

2.143 We think that removing the restriction entirely is preferable to simply increasing the percentage of non-residential space which would exclude a building from the RTM to, for example, 50%. We acknowledge that any threshold is, to an extent, arbitrary and that landlords who wish to avoid the prospect of an RTM claim could just design or let their premises in such a way as to fall outside any new threshold by a very small margin.

2.144 There was very strong support among the leaseholders we talked to for eliminating this limitation, or at least increasing the threshold for commercial parts so that more buildings would qualify for the RTM. Stakeholders representing landlord interests were more cautious, emphasising the need to protect the interests of the commercial leaseholders.

2.145 We take on board the need to protect commercial leaseholders. We provisionally propose that the RTM company should be required to instruct professional managing agents if more than 25% of the internal floor area of the building is made up of

commercial premises (as opposed to "non-residential" premises, such as a non-demised garage). The managing agents would manage the building as a whole, not just the commercial parts. In Chapter 5, we discuss the Government's work on the regulation of managing agents. We envisage that the RTM company would be required to instruct managing agents complying with the requirements ultimately imposed by the Government as part of this reform. There, we also consider other circumstances in which it might be appropriate to require an RTM company to employ a professional managing agent.

2.146 The other arrangements for management of the building would remain as they currently are where the RTM is exercised over a building which includes some non-residential premises.[105] The landlord would retain the management functions which relate exclusively to the non-residential premises, and may have to contribute to the service charge to cover the RTM company's costs of managing the building.

2.147 We are aware that our proposal to remove the exclusion altogether means that, in principle, one or two flats on top of a block containing shops or offices would be able to claim the RTM. In our view, this extreme scenario is unlikely to arise in practice because there would be little incentive for those flats to pursue the RTM.

Consultation Question 12.

2.148 We provisionally propose that the exemption for buildings containing more than 25% non-residential premises should be removed, so that the RTM could be acquired in respect of such buildings. Do consultees agree?

Consultation Question 13.

2.149 We provisionally propose that the RTM company should be required to instruct professional managing agents, satisfying applicable regulatory standards, for any buildings containing commercial premises which represent more than 25% of the total internal floor area. Do consultees agree?

Consultation Question 14.

2.150 Do consultees have experience of being unable to acquire the RTM because of the exemption for buildings containing more than 25% non-residential premises?

[105] See above at paras 2.126 to 2.131.

Chapter 3: Qualifying criteria for leases

INTRODUCTION

3.1 In Chapter 2, we explain that certain qualifying criteria must be satisfied before the RTM can be exercised. In that chapter, we discuss the qualifying criteria for buildings which may be subject to the RTM ("qualifying premises"). In this chapter, we consider the type of lease that a leaseholder must have to be a "qualifying tenant" who may make an RTM claim. We also consider special cases of leases, leaseholders and landlords.

3.2 We set out the current law, the problems we have identified, and our proposed solutions.

NATURE OF THE LEASE: CURRENT LAW

3.3 Under the 2002 Act, the RTM can only be exercised by "qualifying tenants" of flats.[106] Broadly speaking, a person is a qualifying tenant of a flat if they are the tenant of a flat under a long lease.[107]

3.4 A "long" lease is a lease granted for a term of more than 21 years. For these purposes, a leaseholder must at some point be, or have been, able to say that they are entitled to remain a leaseholder for the next 21 years.[108]

3.5 It is not the total duration of the lease that matters, but the fact that at some point there were more than 21 years left on the lease. For example, the following are not "long" leases within the meaning of the 2002 Act, despite the leases totalling more than 21 years:

(1) consecutive leases totalling more than 21 years, where each of the leases is for 21 years or less – for example, a lease granted in 1999 for 10 years, followed by another one over the same premises granted in 2009 for 15 years;

(2) an extended lease, totalling more than 21 years, where the original lease was for 21 years or less and the extension was 21 years or less – for example, a lease granted in 2000 for 15 years and extended in 2015 for another 15 years; or

(3) a lease for 10 years and 3 months, which was extended for 11 years but backdated so that it is expressed to run for a term of 21 years and 3 months from the initial date[109] – for example, a lease granted from 25 March 1995 for 10

---

106 Commonhold and Leasehold Reform Act 2002, s 75.

107 Commonhold and Leasehold Reform Act 2002, s 75(2). We discuss the meaning of "flat", and the current exclusion of houses from the RTM at para 2.5 to 2.22.

108 *Roberts v Church Commissioners* [1972] 1 QB 278.

109 These were the facts in *Roberts v Church Commissioners* [1972] 1 QB 278.

years and 3 months, extended on 29 October 1997 for an additional 11 years but drafted as a lease for 21 years and 3 months starting from 25 March 1995.

3.6 However, the fact that the lease may be terminated before more than 21 years have passed, either by the leaseholder or by the landlord, does not affect its characterisation as a long lease.[110]

3.7 The following are also long leases for the purposes of the 2002 Act:

(1) a lease for a term fixed by law with an obligation for perpetual renewal, but only where it is not a sublease originating from a lease that is 21 years or less;[111]

(2) a lease for an initial period of up to 21 years, with an obligation for (non-perpetual) renewal at no cost, which has been renewed so that it exceeds 21 years;[112]

(3) a lease taking effect under the Law of Property Act 1925[113] as a lease for 90 years terminable by notice after a death or marriage/civil partnership;[114]

(4) a shared ownership lease where the tenant has a 100% share;[115]

(5) a right-to-acquire, a right-to-buy or a rent-to-mortgage lease; [116]

(6) a lease, regardless of how long, granted to the same tenant subsequent to a long lease over the same or part of the same property;[117] and

(7) a lease extended under Part I of the Landlord and Tenant Act 1954 or schedule 10 to the Local Government and Housing Act 1989.[118]

3.8 Two or more leases between the same parties are assumed to be one lease where they are over the same flat or part of a flat and/or appurtenant property (such as a garden or car park).[119] This is to ensure that leaseholders who happen to own their flats and appurtenant property under more than one lease qualify for the RTM just once, despite there being multiple leases.

---

110 Commonhold and Leasehold Reform Act 2002, s 76(2)(a).

111 Commonhold and Leasehold Reform Act 2002, s 76(2)(b).

112 Commonhold and Leasehold Reform Act 2002, s 77(3).

113 Law of Property Act 1925, s 149(6).

114 Commonhold and Leasehold Reform Act 2002, s 76(2)(c).

115 Commonhold and Leasehold Reform Act 2002, s 76(2)(e).

116 Commonhold and Leasehold Reform Act 2002, ss 76(2)(d) and (f).

117 Commonhold and Leasehold Reform Act 2002, s 77(2).

118 Commonhold and Leasehold Reform Act 2002, s 77(4).

119 Commonhold and Leasehold Reform Act 2002, s 77(5).

NATURE OF THE LEASE: PROBLEMS AND PROPOSALS FOR REFORM

3.9 We are not aware of any difficulties with the definition of long lease or its practical application in the context of the RTM, other than in relation to shared ownership leases, which we discuss below.

Shared ownership

Overview

3.10 A shared ownership lease is defined in the 2002 Act as a lease:[120]

(1) granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or of the cost of providing it; or

(2) under which the tenant will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the dwelling.

3.11 Shared ownership is often described as "part-buy, part-rent" and is intended to make home ownership more affordable for people on low and middle incomes. The purchaser buys a "share" of a house or flat (usually between 25% and 75%) and pays rent on the remainder of the property, usually at market value. As the buyer only needs to secure a mortgage for the share of the property they are purchasing, the deposit required will be less than that required to buy the same property outright.

3.12 The most common type of shared ownership lease is based upon the former Housing Corporation/Tenant Services Authority "model lease". Buyers usually purchase a minimum stake of 25% and can subsequently purchase further shares, whether in increments or altogether, of a set percentage, potentially up to 100%. This is known as "staircasing". Usually staircasing is upwards only, though some housing providers allow for downwards staircasing. In practice, it is rare for shared ownership leaseholders to staircase to 100%. The Times has recently reported that fewer than 5% of leaseholders staircase every year.[121] In some cases, such as in designated protected areas,[122] leaseholders are not allowed to staircase to 100%.

3.13 In a shared ownership lease, the buyer is responsible for 100% of the service charges for the property and common parts, despite "owning" only a share. The service charges can increase substantially at any point during the term of the lease, particularly if there are major works to be carried out such as replacing a roof or installing new windows throughout the block.[123] Below, we discuss shared ownership

---

120 Commonhold and Leasehold Reform Act 2002, s 76.

121 The Sunday Times, "The Scandal of Shared Ownership Schemes" (30 September 2018), available at https://www.thetimes.co.uk/article/shared-ownership-scandal-dbl3bfj8f.

122 See Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009/2098.

123 G Peaker, "Shared Ownership: a flawed model?" (2013) 16(6) *Journal of Housing Law* 119 to 122.

in the context of RTM. A more detailed and wider discussion of shared ownership can be found in our enfranchisement consultation paper.[124]

Are shared ownership leases with less than 100% share "long" leases?

3.14 The 2002 Act provides that a long lease, which would be eligible for the RTM, includes "*a shared ownership lease… where the tenant's total share is 100%*".[125] The implication is that a shared ownership lease of a flat where the leaseholder has not staircased to 100% is not a long lease and thus, would not qualify for the RTM.

3.15 However, several conflicting decisions in the High Court and the Upper Tribunal have led to significant confusion on this point.

(1) *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* ("*Brick Farm Management*") was primarily concerned with collective enfranchisement rights against charitable landlords.[126] The Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") contains an identical provision to the 2002 Act.[127] There, the High Court accepted that shared ownership leases are long leases under the 1993 Act regardless of the ownership percentage.[128] This is because a long lease is defined as a lease of more than 21 years and shared ownership leases are virtually always granted for a term of more than 21 years.[129]

(2) Three years later, in *Richardson v Midland Heart Ltd,*[130] another High Court judge reached the opposite view. Interpreting the 2002 Act, the judge held that a shared ownership leaseholder who held only a 50% share in her home did not have a long lease within the meaning of section 76(2)(e).[131] Instead, she was only an assured tenant, who did not even have the right to be paid back the value of her share in the property on eviction.

(3) More recently, in *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* ("*Corscombe Close*"),[132] the Upper Tribunal examined the status of shared ownership leases in relation to the RTM. It held that a shared ownership lease for a term of over 21 years was a long lease and therefore qualified for the RTM. Approving the earlier comments in *Brick Farm Management*, the judge

---

124 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 9.4 onwards.

125 Commonhold and Leasehold Reform Act 2002, s 76(2)(e).

126 [2005] EWHC 1650 (QB), [2005] 1 WLR 3934.

127 Leasehold Reform, Housing and Urban Development Act 1993, s 7(1)(d).

128 *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB), [2005] 1 WLR 3934 at [15].

129 *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB), [2005] 1 WLR 3934 at [15] to [16].

130 *Richardson v Midland Heart Ltd* [2008] Landlord and Tenant Reports 31.

131 *Richardson v Midland Heart Ltd* [2008] Landlord and Tenant Reports 31 at [19].

132 *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC).

said that the provisions in subsections 76(2)(a) to (f) should be read as a series of gateways by which a lease might qualify as a long lease, as opposed to a stack of sieves, such that a lease could fall through one, but be caught by another.[133]

3.16 The correctness of the decisions in *Corscombe Close* and *Brick Farm Management* has been questioned.[134] If Parliament had intended shared ownership leases to be treated as long leases, it could have inserted an express provision to that effect into schedule 1 to the Housing Act 1988 (which lists types of tenancies that cannot be assured tenancies under that Act). Further, the explanatory notes to the 2002 Act, albeit of no legal effect, are explicit:

> Where the lease is a shared ownership lease, it is only counted as a long lease for the purposes of the right to manage if the leaseholder owns a 100 per cent share of the lease.[135]

3.17 The First-tier Tribunal is bound by Upper Tribunal decisions[136] and is also expected to follow High Court decisions.[137] Here, *Corscombe Close* in the Upper Tribunal and *Richardson v Midland Heart Ltd* in the High Court have reached diverging conclusions. It is therefore unclear whether shared ownership leaseholders of flats qualify for the RTM. As yet, no decision of the Court of Appeal or Supreme Court has emerged to settle the debate. We believe that the position is one which can and should be clarified in legislation.

Our proposal

3.18 Although, as set out above, there is legal uncertainty regarding shared ownership, the position for RTM, as determined by the Upper Tribunal, is that shared ownership leases of less than 100% qualify for the RTM.

3.19 We understand from stakeholders that, in practice, shared ownership leaseholders are accepted to be qualifying tenants for the RTM by all the parties involved: other leaseholders, landlords and managing agents. They participate in the RTM, have membership of the RTM company and become involved in the management of the properties which acquire the RTM. This has generated an expectation among shared ownership leaseholders that RTM rights are available to them.

3.20 Shared ownership leaseholders contribute 100% of the service charges, regardless of the share that they have. This is a strong reason to treat them on equal terms to other

---

133 *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC) at [15].

134 See C Carr, "Right to manage – shared ownership leases" (2014) 18(4) *Landlord and Tenant Review* 150.

135 Commonhold and Leasehold Reform Act 2002, Explanatory Notes, Commentary on the Sections: Pt 1, ss 76 and 77.

136 *Re Brunswick Centre* [2017] Landlord and Tenant Reports 7.

137 *Solitaire v Sherwin* [2010] UKUT 412 (LC) at [26]: "Although a decision of the High Court is not binding on an LVT (because there is no hierarchical relationship between them), in view of the relative standing of the court and the tribunal I find it hard to conceive of circumstances in which an LVT could possibly be justified in rejecting the authority of a High Court decision.".

qualifying tenants when it comes to having a say in the management of their building and how service charges are deployed.

3.21 We are not aware of any particular issues which have arisen as a consequence of their shared ownership status. There does not seem to be anything inherent to shared ownership leases which makes them unsuitable for the RTM. No one we have spoken to, including landlord interests, has asked us to propose an exclusion from RTM of shared ownership leases which have not staircased to 100%.

3.22 For these reasons, our proposal is to enshrine, in law, that shared ownership leaseholders who have long residential leases are qualifying tenants for the RTM. This would be the case even if they have not staircased to 100%.

3.23 We do not propose that the provider of the shared ownership lease who retains the remaining "share" in the property (usually a housing association) should also be a qualifying tenant. The housing association would usually have the right to participate in the RTM in any event, as the landlord.

3.24 In our enfranchisement consultation paper, we proposed that shared ownership leaseholders who have not fully staircased should be able to obtain a lease extension but not to buy the freehold. This is because a lease extension would maintain the staircasing agreement between the parties whereas an outright acquisition would circumvent it.[138] Qualifying for, and acquiring, the RTM does not interfere in any way with the staircasing provisions or the landlord's property rights. Accordingly, we cannot see a justification on policy grounds to be more restrictive of shared ownership leaseholders' rights in RTM than we are in the case of lease extensions.

Consultation Question 15.

3.25 We provisionally propose that shared ownership leaseholders with long leases should be qualifying tenants for the purposes of RTM, regardless of whether they have staircased to 100%. Do consultees agree?

TYPES OF QUALIFYING TENANTS: CURRENT LAW

Individual or company

3.26 A qualifying tenant under the 2002 Act can be an individual or a corporate entity. We have considered the position of corporate leaseholders in the context of the RTM legislation but did not find any specific issues arising as a consequence of a leaseholder being a corporate entity.

[138] Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 9.11 and 9.34.

Trustees

3.27 The RTM legislation is not concerned with beneficial interests[139] so, where the lease is held on trust, the trustee is, or the trustees are, the qualifying tenant. Section 109 of the 2002 Act extends a trustee's powers to permit participation in the RTM, unless there is express provision in the trust deed to the contrary.

Joint leaseholders

3.28 The 2002 Act allows only one qualifying tenant per flat.[140] Where there are joint leaseholders under a lease, they are together regarded as one qualifying tenant.[141] Accordingly, all joint tenants must act together to participate in the RTM.

3.29 The importance of recording joint tenants as one member in the membership register was recently highlighted in *Wentworth House*.[142] The prescribed articles of association for RTM companies make provision for the joint tenants to choose which one is recorded first in the register of members and which one can vote.

Mortgagees in possession and receivers

3.30 Sometimes the qualifying tenant may lose possession of their flat. The question in these cases is whether they are still the qualifying tenant and, as such, the right person to be served with RTM notices and to agree to participate in an RTM company and in an RTM claim.

3.31 Where a mortgagee takes possession of a qualifying tenant's flat, or appoints receivers, the person who is registered as the owner of the flat on the Land Register remains the qualifying tenant.[143] The receivers, who are appointed to enforce the mortgagee's rights under the mortgage, or the mortgagee itself, may have the right to sell the flat. But unless and until there is a registered disposition of the legal estate, the registered owner, usually the borrower under the mortgage, remains in law the owner of the property.[144]

3.32 This means that a notice served on the qualifying tenant who is registered as the current owner on the Land Register, and that qualifying tenant's membership of the RTM company and participation in the RTM claim, are valid. This is so even if at the relevant time the tenant's flat was repossessed by the mortgagee or receiver.

3.33 We consider that this is the right approach to determine the relevant qualifying tenant, as it is easy to find out from the Land Register who is the current registered

---

139 *Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC) at [29].

140 Commonhold and Leasehold Reform Act 2002, s 75(5).

141 Commonhold and Leasehold Reform Act 2002, s 75(7).

142 *Wentworth House (Pyrford Road) RTM Company Limited v Gateway Property LLP* (16 October 2017) CHI/43UM/LRM/2017/0004 First-tier Tribunal Property Chamber (Residential Property) (unreported).

143 See *Orchard Court RTM Co Ltd v Singh* (11 December 2014) LON/00BH/LRM/2014/0023 First-tier Tribunal Property Chamber (Residential Property) (unreported) discussing mortgagees; *Choumert Road RTM Co Ltd v Assethold Ltd* (10 September 2012) LON/00BE/LRM/2012/0017 Leasehold Valuation Tribunal (unreported) discussing receivers.

144 Land Registration Act 2002, ss 27(1) to (4).

leaseholder. This also gives certainty. This is subject to an exception to the rule that the registered owner is the owner of the property, which we discuss below.

Deceased and bankrupt leaseholders

3.34 Where a leaseholder had died but was still registered on the Land Registry as the leaseholder of the premises, the Upper Tribunal held that they were no longer the qualifying tenant. Instead, their personal representative, or executor, or the Public Trustee became the qualifying tenant.[145]

3.35 This is because, on the death of a registered owner, their property will pass to their executors or to their administrators (on the grant of letters of administration) without the need to register them on the Land Register.[146] Although the deceased's personal representatives may apply to be registered,[147] it is not necessary for them to do so to make an effective disposition of the registered property.

3.36 The same applies on the bankruptcy of an individual owner and on the dissolution of a corporate one.[148] In these cases, the transfer of leasehold title to the trustee in bankruptcy and to the Crown, respectively, is automatic and does not require registration, although the trustee in bankruptcy may apply to be registered.

3.37 Both here and in the case of repossession under a mortgage, the legal owner of the flat will be the qualifying tenant. In the case of repossession, the original registered proprietor remains the legal owner, and therefore the qualifying tenant. In contrast, as bankruptcy and death trigger automatic transfers of the legal title, the personal representatives or trustee in bankruptcy becomes the qualifying tenant. The difference in approach is not specific to the RTM, but originates from general principles of the law of property.

3.38 The above change in the identity of the qualifying tenant does not make any difference in terms of serving notices on the qualifying tenant. An RTM company may give a notice to a qualifying tenant of a flat at the flat itself. The Upper Tribunal held that a notice to the flat was good notice to a deceased's personal representatives, even where they were not named in the notice and may not yet have been appointed.[149]

Leaseholders with leases of multiple units

3.39 Unlike in enfranchisement,[150] there is no exclusion of leaseholders who own more than two flats on long leases. Qualifying criteria and voting rights in the RTM company

---

145 *Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC).

146 Land Registration Act 2002, s 27(5)(a); see also Megarry & Wade, *The Law of Real Property* (8th ed 2012) para 7-109.

147 Land Registration Rules 2003/1417, r 163.

148 Land Registration Act 2002, s 27(5)(a) and (b).

149 *Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC) at [34].

150 In collective enfranchisement, where a qualifying tenant holds three or more flats in any relevant premises, there is deemed to be no qualifying tenant of those flats: Leasehold Reform, Housing and Urban Development Act 1993, s 5(5).

are determined per flat, so that a person who has three long leases of three flats would count as three qualifying tenants.

Leaseholders with intermediate leases

3.40 Not all leases have the freeholder as the landlord. Sometimes, the person living in a property may have a long lease from another leaseholder, who may in turn have it from another leaseholder and so on. The leaseholders in-between the freeholder and the last leaseholder in the chain of leases are called "intermediate leaseholders". They are both leaseholders in respect of the superior lease and landlords in respect of the inferior lease. An intermediate lease may be a longer lease in respect of the same premises or it may be over more extensive premises than the lease immediately inferior to it. For example, A may have a 999-year lease over a flat which it then lets on a 125-year lease to B. Or A may have a 125-year lease over two flats, of which it lets only one flat to B on a lease for 125 years minus a day.

3.41 Where there is a chain of leases of the same property, only the most inferior long leaseholder can qualify for the RTM.[151] For example, if the freeholder grants a 125-year lease to A, who then grants a 99-year lease to B, who then lets it out on a 1-year tenancy to C, only B qualifies for the RTM. This is presumably the case because the most inferior long leaseholder is the party who pays the service charges, which are then passed up the chain to the freeholder.

3.42 Intermediate leaseholders can be qualifying tenants in respect of flats they do not sub-lease on long leases.[152] For example, in a block of 50 flats owned by the freeholder, an intermediate leaseholder has the lease to 20 flats. The intermediate leaseholder lets 13 of those flats on short leases, five on long leases and retains two flats. Assuming all other qualifying conditions are met, the intermediate leaseholder would be the qualifying tenant for the 13 flats on short leases and for the two retained flats. The leaseholders of each of the five flats on long leases would be the qualifying tenants, each in respect of their flat.

3.43 We are not aware of any issues in respect of intermediate leaseholders in RTM. This is probably because the qualification rule is straightforward and the long leaseholder with the most inferior interest can be easily identified on checking the Land Register. Our enfranchisement consultation paper includes a detailed explanation of intermediate leases in the enfranchisement context, where they are more contentious.[153]

TYPES OF LANDLORD

3.44 The 2002 Act does not provide for any qualifying criteria in respect of landlords: in general, if the leaseholders and the premises qualify, then the RTM may be exercised. However, there are specific rules or exemptions in respect of types of landlords:

---

151 Commonhold and Leasehold Reform Act 2002, s 75(6).

152 *Howard de Walden Estates Ltd v Aggio* [2008] UKHL 44, [2009] 1 AC 39.

153 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, ch 16.

(1) resident landlords;

(2) multiple freeholders of the same building;

(3) local authorities;

(4) the Crown; and

(5) the National Trust.

3.45 We discuss each below, and make proposals for reform where relevant.

Resident landlords

3.46 Sometimes, the fact that the freeholder is living in the building takes the building outside the scope of the RTM legislation, even though the leaseholders are qualifying tenants. This is the case where:

(1) the building has four or fewer units;

(2) the building is a not a purpose-built block of flats;

(3) the freeholder or an adult member of the freeholder's family occupies one of the units as their sole or principal home; and

(4) the freeholder or an adult member of the freeholder's family have:

(a) occupied the unit as their sole or principal home for the past 12 months; or

(b) (where the building was purchased from a resident freeholder) entered into occupation within 28 days of the purchase and have occupied the unit as their sole or principal home ever since.[154]

3.47 This exemption was meant to protect the freeholder's interest where the freeholder converted a property, usually a house, into a small number of units to let on long leases. The policy aim was to encourage development and increase housing stock. As with many other RTM qualification provisions, this exemption was mostly copied over from enfranchisement legislation without scrutiny in the RTM context.

3.48 In our enfranchisement consultation paper, we said we should maintain a similar, but not identical, "resident landlord"[155] exemption for collective freehold acquisitions.[156] This was because we had not been told of any issues with that exemption in the

---

154 Commonhold and Leasehold Reform Act 2002, sch 6, para 3.

155 The statutory language in both RTM and enfranchisement refers to "resident landlords", but the exception only applies to freeholders, not any intermediate landlords.

156 See sections 4(4) and 10 of the Leasehold Reform, Housing and Urban Development Act 1993 for the wording of the exemption in collective enfranchisement.

context of enfranchisement.[157] We consider, however, that there are good reasons to diverge from that policy for RTM and remove the resident landlord exemption.

3.49 We understand that resident landlords are rarely encountered these days, as most conversions were undertaken many years ago. However, a few stakeholders told us that it is unfair for leaseholders to be deprived of the right to have a say in the management of the building for which they pay service charges. One stakeholder said that this exemption represented the single most problematic issue with RTM for them. Stakeholders interested in this issue highlighted that, if the leaseholders were to acquire the RTM, the freeholder would be able to join the RTM company and participate in any management decisions.

3.50 We consider that the RTM should be facilitated and encouraged in particular for smaller buildings, where the leaseholders are more likely to manage co-operatively. We have considered whether the risk of losing the management functions would discourage freeholders from converting a smaller building and our view is that it is unlikely to have a deterrent effect. In buildings with four or fewer units, the freeholder's interests as leaseholder of the unit (where applicable) and as landlord (in any event) would give them a significant say in the RTM company. For example, in a building with four flats on long leases where the freeholder has the lease to one of the flats, the freeholder would have two votes in the RTM company (one as leaseholder and one as landlord).

3.51 Additionally, we have been told that the financial gain to the freeholder obtained from converting and selling the units is likely to outweigh any remaining concerns about the RTM in these cases.

3.52 The resident landlord exemption in collective enfranchisement is narrower than that in RTM and meant to protect against a much more intrusive interference with the freeholder's property rights. The enfranchisement exemption only applies where the freeholder who converted the building, or their family, continue to live in it. The RTM exemption includes any successors in title of the original freeholder where they want to live in the building, so it could restrict the RTM indefinitely. In terms of degree of interference, allowing collective enfranchisement where there are resident landlords would reverse the relationship between the leaseholders and the resident landlord and would create obligations and liabilities for the latter that did not exist before. The RTM, on the other hand, simply transfers the existing management functions of the resident landlord to the RTM company, in which both the leaseholders and the landlord can participate. Accordingly, we think that this justifies being more favourable to leaseholders on this point in the context of RTM.

[157] Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.154.

Consultation Question 16.

3.53 We provisionally propose that the law should be changed to allow leaseholders to qualify for the RTM in premises with a resident freeholder. Do consultees agree?

Consultation Question 17.

3.54 Do consultees have experience of leaseholders being prevented from exercising the RTM by the resident landlord exemption?

Consultation Question 18.

3.55 Do consultees consider that our provisional proposal to allow leaseholders to qualify for the RTM on premises with a resident freeholder is likely to deter home owners from converting part of their property into a leasehold flat or flats?

Multiple freeholders of the same building

3.56 Where parts of a building are owned by different freeholders, then the building as a whole cannot be the subject of an RTM claim.[158] However, if there is a self-contained part of the business which is owned by one freeholder, then the leaseholders can still apply for the RTM of that part.[159]

3.57 We asked stakeholders about this exemption, in particular freeholders. No one we spoke to gave any reason why freeholders could not co-ordinate to hand over the RTM of the whole building to the RTM company. Many stakeholders thought that this would be preferable to the current position because it would allow the building to be managed as a whole by the RTM company. If this were to be allowed, it would be in addition to the leaseholders' current right to acquire the RTM over a self-contained part of the building. Leaseholders could seek to acquire the RTM over the whole building if desirable and, if not, over their own self-contained part.

3.58 Accordingly, we ask for consultees' views on allowing acquisition of the RTM for the whole building where self-contained parts of the building are in split freehold ownership.

3.59 We are of the view that, if this were to be allowed, the tribunal should have a power to reconcile conflicting or diverging covenants in the different leases in the rare cases where:

---

158 Commonhold and Leasehold Reform Act 2002, sch 6, para 2.

159 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 25-12.

(1) there are conflicting covenants; and

(2) the parties cannot agree between themselves how to reconcile them.

3.60 In terms of parallels that can be drawn, the tribunal already has the power to create a sort of bespoke scheme of management under section 24 of the Landlord and Tenant Act 1987. The tribunal also has a power to vary the terms of leases for long leaseholders under section 35 of the Landlord and Tenant Act 1987 if the lease fails to make "satisfactory provision" on a range of matters, including repair, maintenance and insurance. While these powers are not exactly what we are proposing, they are good examples of the type of "lease re-writing" powers that the tribunal already has.

Consultation Question 19.

3.61 Do consultees consider that an RTM company should be able to acquire the RTM over the whole building where the freehold of the building is in split ownership?

Consultation Question 20.

3.62 If the law was changed to allow the RTM over a building in split freehold ownership, do consultees agree that the tribunal should have the power to reconcile any conflicting covenants in the leases with the different freeholders?

Consultation Question 21.

3.63 Do consultees have experience of the RTM in relation to a building owned by different freeholders?

Local authorities

3.64 Where a building contains flats which are let directly by a local housing authority on long leases, the long leaseholders do not qualify for the RTM.[160] A "local housing authority" means a district council, a London borough council, the Common Council of the City of London, a Welsh county council or county borough council or the Council of the Isles of Scilly.[161] Housing associations are not within this definition and are therefore subject to the RTM legislation, insofar as their long leaseholders are concerned.

3.65 Long leaseholders and tenants of local housing authorities have a separate scheme under section 27AB of the Housing Act 1985, which enables them to have a say in the

[160] Commonhold and Leasehold Reform Act 2002, sch 6, para 4.

[161] Housing Act 1985, s 1.

management of their homes and services. They can do so by establishing a tenant management organisation ("TMO") and applying to take over the landlord's responsibility for managing housing services, such as repairs, caretaking, and security.[162] TMOs have more flexibility than RTM companies in terms of organisation, structure and responsibilities. For example:

(1) a TMO may take the form of a company, a co-operative or a community benefit society while an RTM company can only be a company limited by guarantee, with mandatory articles of association;[163]

(2) the prescribed management agreement between the TMO and the local housing authority, which sets out the rights and obligations of the TMO, has optional clauses in addition to the mandatory ones, whereas the RTM company has inflexible obligations set out by statute;[164] and

(3) management functions that are to be taken over are negotiated with the local housing authority and can be tailored to the requirements and capacity of the TMO, whereas the RTM company automatically takes over all the management functions of the landlord, even where undesirable.[165]

3.66 Conversely, because of the importance of delivering effective services, effective use of public money and operating within the highly regulated management functions of a public authority, the TMO is required to be assessed by an approved assessor before it can exercise any management function. The assessor checks that the TMO is competent to exercise the management functions agreed with the local housing authority. The TMO must pass the assessment before the TMO can put its plan forward to be voted on by the tenants. Only once the TMO plan is approved by a majority of tenants is the TMO allowed to take over the management. After the acquisition of the relevant management functions, the TMO is required to undertake regular training, which is provided with the support of the local housing authority.

3.67 We do not propose to review the RTM of local housing authority tenants, which is established under a separate and detailed regime outside the 2002 Act. Distinct and sector-specific considerations apply to local housing authorities, which would be better dealt with in a review of public authority housing. To give an example, local housing authorities are required to undertake public procurement exercises to engage contractors, which would add a new level of complexity to the transfer of, and ability of an RTM company to enter into, management contracts on acquisition of the RTM.

The Crown

3.68 The RTM applies to property belonging to the Crown or in which the Crown has an interest.[166] The 2002 Act makes special provision for how sums payable to the RTM

---

162 Housing (Right to Manage) (England) Regulations 2012/1821, Explanatory Notes.

163 See Chapter 5 for a discussion of the form and structure of RTM companies.

164 See Chapters 8 and 9 for a discussion of the obligations and liabilities of the RTM company.

165 See Chapter 8 for a detailed discussion of the transfer of management functions.

166 Commonhold and Leasehold Reform Act 2002, s 108(1).

company are to be raised and paid for by the Duke of Cornwall and the Chancellor of the Duchy of Lancaster.[167]

National Trust

3.69 The National Trust is not exempted from the RTM under the 2002 Act. In principle, assuming the qualifying criteria are met, long leaseholders of flats owned by the National Trust could currently acquire the RTM. We are not aware of any leaseholders having done so. We were told by the National Trust that, in practice, the flats they let on long leases form part of buildings which would not qualify for the RTM. This was said to be the reason for which the National Trust had not sought an exemption from the RTM legislation when it was enacted. National Trust property is exempted from collective enfranchisement.[168]

3.70 In Chapter 2, we make proposals to permit leaseholders of houses to qualify for the RTM. The National Trust has expressed concern in relation to our proposal to include leasehold houses within the scope of the RTM legislation. We understand that the National Trust has around 700 properties which it lets out on long leases, most of which are houses.

3.71 National Trust property involves, due to its nature and character, special considerations and more burdensome liabilities. However, the National Trust have told us that long leaseholders of National Trust houses already have management functions in respect of their houses under their leases. There is therefore no need for them to claim the RTM. The National Trust was, however, concerned that the RTM could allow leaseholders to become responsible for shared appurtenant property such as listed parks and conservation areas. Even where the shared property consists of something seemingly more straightforward to manage, such as a car park, the National Trust was concerned that the RTM company may choose practicality over preserving the landscape. For example, the RTM company may choose to cover the car park in tarmac where it is a natural space. This concern could also arise in the future in respect of National Trust flats, given that in Chapter 2 we propose to relax the qualifying criteria for the RTM.

3.72 We therefore propose that there should be an exemption from the RTM for National Trust properties, both houses and flats.

Consultation Question 22.

3.73 We provisionally propose that National Trust properties should be excluded from the RTM. Do consultees agree?

---

167 Commonhold and Leasehold Reform Act 2002, ss 108(3) to (4).

168 Leasehold Reform, Housing and Urban Development Act 1993, s 95; see also Leasehold Reform Act 1967, s 32.

MIXED-USE UNITS AND BUSINESS TENANCIES

3.74 The RTM was intended to be a right for residential leaseholders in respect of residential property. As in the enfranchisement consultation paper, we have considered whether the RTM should be available in respect of the following:

(1) Premises designed and/or used for both residential purposes and other purposes. We are aware, for example, of the increasing use of live/work leases, where both residential and business use are permitted or mandated by the lease and where the premises may be configured partly as a living space and partly as an office or workspace. We refer to this as "mixed-use".

(2) Premises designed for residential purposes but in fact used entirely for non-residential purposes. This could occur where someone takes a long lease of a flat or a house with the intention (known to the landlord) of using it entirely for business purposes. An example might be a house, which retains its original configuration, rented for use as a private physiotherapy practice, or a flat rented for use as a design studio. We refer to such examples as "business leases". The premises would still be a "residential unit" – being constructed or adapted for use as a dwelling – but should they be susceptible to an RTM claim?

Current law and problems

3.75 Business tenancies do not qualify for the RTM under the 2002 Act. A "business tenancy" is defined as:

> any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.[169]

3.76 The above definition includes leases over premises which are used by the tenant for a business, either exclusively or in addition to a residential use, and therefore means that mixed-use premises as well as premises let on business leases are excluded from the RTM.

3.77 In the enfranchisement consultation paper, we reviewed section 5 of the *1*993 Act, which imposes an identical "business lease"[170] exemption from enfranchisement rights.

3.78 There is some lack of clarity over how the exclusion works in practice. For example, there is a tribunal decision which held that relevant use is actual use, so that if a tenant uses a work/live unit solely for living they may still be able to claim the RTM.[171] However, this decision is to be doubted in light of a more recent Court of Appeal

---

169 Landlord and Tenant Act 1954, s 23(1).

170 Business "lease" is the same as business "tenancy" – both the Leasehold Reform, Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002 use the definition in the Landlord and Tenant Act 1954.

171 *KW RTM Co Ltd v Lemonland (Kings Wharf) Ltd* (16 April 2007) LON/00AM/LEE/2006/0003 Leasehold Valuation Tribunal (unreported) at [8] to [9].

decision which held that tenants could not rely on their own breaches of covenant to bring the property within the definition of a house for the purposes of enfranchisement.[172] Accordingly, if the lease requires (rather than merely "permits") business use in addition to residential use, it appears that the possibility of the RTM would be excluded even if unit is in fact only used for residential purposes.

3.79 Nevertheless, the business tenancy exclusion in the 2002 Act is not tightly drafted. Under the Landlord and Tenant Act 1954 (from which the definition is adopted), a tenancy is a "business tenancy" only if business is being carried on by the tenant or a company controlled by the tenant (as opposed to anyone else).[173] Accordingly, it is quite easy to circumvent the exclusion by subletting the property on a short lease to a third party (such as a relative of the tenant) to carry on the business use.[174] We do not know how frequently this occurs in practice. The ease with which it can be avoided may well be the reason why the "business tenancy" exemption has not generated litigation in the context of RTM.

Mixed-use and business tenancies: our proposals

3.80 The RTM was introduced to benefit residential leaseholders and our Terms of Reference do not ask us to consider extending it to units let out for business purposes. We think therefore that residential units and leaseholders should remain the focus of the RTM provisions. However, as discussed above, there is some uncertainty about the circumstances in which the lease is a "business tenancy", so that the RTM is excluded. We consider that the RTM should be available when the leaseholder is allowed to live in the premises – even if they also use it as their place of business or are expected to do so.

3.81 These proposals are consistent with our proposed policy on enfranchisement.[175] In the enfranchisement consultation paper, we suggested that, as long as residential use is one of the permitted uses of the property, the leaseholder should not be disqualified from enfranchisement. We propose the same approach for the RTM. This would mean that live/work units and other mixed-use units could be the subject of an RTM claim. A house or flat let out solely for business purposes, prohibiting residential use, could not. A flat with no restrictions on use, even where used purely for business purposes, could also be subject to the RTM.

3.82 We think that this approach will almost invariably make it easy to establish whether the RTM may be available or not: it is merely a question of construction of the lease. We consider that it should be incumbent on the landlord to ensure that the lease permits only business use, if this is the intention of the parties and if the landlord wishes to exclude the possibility of an RTM claim.

---

172 *Henley v Cohen* [2013] EWCA 480, [2013] Housing Law Reports 28.

173 Landlord and Tenant Act 1954, s 23(1).

174 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 25-32.

175 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238 paras 8.52 to 8.53.

Consultation Question 23.

3.83 We provisionally propose that the existing exclusion for leases which allow any non-residential use should be replaced with an exclusion for leases which prohibit residential use. Do consultees agree? If not, is there any justification for having a different position in the RTM than in enfranchisement?

Consultation Question 24.

3.84 Do consultees have experience of leaseholders being prevented from exercising the RTM by the exclusion for leases which allow any non-residential use?

Chapter 4: RTM on estates

INTRODUCTION

4.1 It is not unusual for a development to comprise of multiple buildings, with appurtenant property such as roads, car parks or gardens shared between the buildings. These developments are often referred to as “estates”.

4.2 Estates may contain a mixture of buildings, including blocks of flats and individual freehold or leasehold houses. The leaseholders or owners in the buildings may all be contributing to the costs of maintaining and/or repairing shared appurtenant property on the estate, whether as part of the service charge under a lease or under an estate rentcharge.

4.3 In this chapter, we consider the problems which arise with the RTM in the context of estates. These are:

(1) the difficulties involved where the RTM is exercised over single buildings on estates;

(2) the restriction on exercising the RTM over multiple buildings. The current law does not allow qualifying tenants in multiple buildings to act together to take over the management functions through a single RTM company in a single claim. This is the case even where they pay into the same service charge fund or share appurtenant property between the buildings; and

(3) the difficulties surrounding the current law on property appurtenant to buildings over which the RTM has been acquired, which is also shared with other buildings on the estate.

4.4 We make proposals to allow a single RTM company to make an RTM claim over more than one building, and consider how this could work. We also make a proposal to change the current law on non-exclusive appurtenant property, to avoid some of the complications currently faced by RTM companies.

4.5 In this consultation paper, we distinguish between “shared appurtenant property”, “exclusive appurtenant property” and “non-exclusive appurtenant property”. When we refer to “shared appurtenant property”, we mean appurtenant property which belongs to, or is usually enjoyed with, two or more buildings. It may or may not be exclusive to those buildings. We refer to “exclusive appurtenant property” where appurtenant property belongs exclusively to, or is usually enjoyed exclusively with, a building (or multiple buildings) included within the same RTM. Where appurtenant property is not exclusive to a building or buildings within the same RTM, we refer to this as “non-exclusive appurtenant property”.

SINGLE-BUILDING RTM ON ESTATES

4.6 It is currently possible for qualifying tenants in a single block on an estate to acquire the RTM over that block, while the rest of the estate remains under landlord management. Stakeholders have also told us that, because of the current restriction on a single RTM company acquiring the RTM over multiple buildings,[176] all blocks on an estate sometimes acquire the RTM simultaneously through separate RTM companies and take a co-ordinated approach to management.

4.7 It has been suggested to us by some stakeholders that, in the case of estates, the only RTM option should be acquiring the RTM over the whole estate.[177] They have argued that single buildings, or limited parts of the estate, should not be able to acquire the RTM separately, mainly because the administration and management of the estate would become overly complicated. As well as difficulties with the current law around non-exclusive appurtenant property, apportioning the services can be complicated, for example in relation to insurance or the supply of electricity.

4.8 We accept that there are practical and administrative complications where the management is split on an estate, particularly with regard to non-exclusive appurtenant property.[178] However, under the current law qualifying tenants have the option to acquire the RTM over a single block on an estate, so to remove this would be taking away a right which qualifying tenants currently have.

4.9 Even if the law were changed to allow for the RTM to be exercised by a single RTM company over multiple buildings, it may be difficult to establish the required levels of participation and cooperation among the resulting number of qualifying tenants. In addition, as we discuss below, there are potential difficulties involved in the running of an RTM company which manages multiple buildings, depending on the particular circumstances.[179] There may also be a significant administrative and financial difference between managing a single building and managing the whole of an estate. Single-building RTM may still therefore be attractive in some cases.[180]

4.10 Removing the option of single-building RTM would mean that qualifying tenants on an estate faced an unpalatable “all or nothing” choice between whether to have no RTM or an RTM over the whole estate. It could even result in qualifying tenants on estates being pressured into agreeing to the RTM, because other qualifying tenants wish to make a claim and cannot do so without estate-wide agreement.

4.11 Given these arguments, we are not persuaded that we should propose the removal of the right that qualifying tenants already have to acquire the RTM over a single building on an estate. We think that the law should preserve this existing right, regardless of

---

176 See paras 4.14 to 4.18 below.

177 We discuss whether the law should be changed to allow multi-building RTM at paras 4.14 to 4.50 below.

178 We discuss non-exclusive appurtenant property at paras 4.101 to 4.116 below.

179 See paras 4.32 to 4.46 below.

180 We discuss the application of the qualifying criteria and participation requirements to multi-building RTM from paras 4.51 to 4.70 below.

whether the remaining part of the estate is managed by the landlord or by another RTM company.

4.12 As we discuss in Chapter 2, we propose to adopt the concept of "residential unit" which we introduced in our enfranchisement consultation paper. This removes the distinction between flats and houses. Under this proposal, it would be possible to acquire the RTM over leasehold houses, and leasehold house owners would become qualifying tenants. They would therefore be able to acquire the RTM over a leasehold house as a single building on an estate just as the qualifying tenants of any other leasehold building could.

Consultation Question 25.

4.13 We provisionally propose that qualifying tenants of a single building on an estate should retain the existing right to claim the RTM over that single building. Do consultees agree?

SHOULD THE LAW BE CHANGED TO ALLOW FOR MULTI-BUILDING RTM?

Current law

4.14 The current law restricts the exercise of the RTM to single buildings, or parts of buildings. It does not allow qualifying tenants in multiple buildings to act together to take over the management functions through a single RTM company in a single claim, even where they pay into the same service charge fund or share appurtenant property. This is the result of a 2015 Court of Appeal decision: *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* ("*Triplerose*").[181]

4.15 *Triplerose* concerned three conjoined appeals from the Upper Tribunal[182] on the question of whether one RTM company could acquire the management of more than one set of premises.

4.16 In each of the three cases, the estate in question consisted of multiple blocks of flats. In each case, the qualifying tenants had formed one RTM company to manage the "premises", which was defined in the RTM company's constitution as including multiple blocks in accordance with the prescribed articles required by the 2002 Act.[183] The RTM company in each case had served the landlord with separate notices of claim for each of the blocks forming part of the "premises", as opposed to one notice for all of the buildings that the RTM claim related to.

---

181 [2015] EWCA Civ 282, [2016] 1 WLR 275.

182 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd*; *Garner Court RTM Co Ltd v Freehold Managers (Nominees) Ltd; Holybrook RTM Co Ltd* v *Proxima GR Properties Ltd* [2013] UKUT 606 (LC).

183 We discuss the prescribed articles in Chapter 5.

4.17 The Court of Appeal held that one RTM company could not acquire the RTM over more than one set of premises. The Court of Appeal reached its conclusion based on the following three considerations:

(1) a strict interpretation of the 2002 Act, including the model articles for RTM companies, which the court said did not envisage the situation of an RTM company managing more than one block of flats;[184]

(2) the consultation paper leading to the 2002 Act and subsequent debates in Parliament, including an unsuccessful attempt to amend the Bill to provide expressly that an RTM company could acquire the management of more than one block;[185] and

(3) the practical problems which could be faced by RTM companies managing more than one block of flats.[186]

4.18 The Court of Appeal's decision went against what had been tacitly accepted by the same court in *Gala Unity Ltd v Adriadne Road RTM Co Ltd* ("*Gala Unity*"), where one RTM company was managing two buildings.[187] *Gala Unity* was deemed not to be on point by the Court of Appeal in *Triplerose* because it had dealt with a different question of law. The sole contested issue in *Gala Unity* was whether appurtenant property shared with non-RTM buildings fell within the definition of "appurtenant property" in section 112(1) of the 2002 Act.[188]

Problems with multiple RTM companies on a single estate

4.19 *Triplerose* went against the tide of prior decisions at tribunal level,[189] which had identified many reasons why permitting one RTM company to manage a whole estate would be beneficial. As mentioned above, stakeholders have told us that a work-around the current restriction on a single RTM company acquiring the RTM over multiple buildings is for all blocks on an estate to acquire the RTM simultaneously through separate RTM companies. While this provides a partial solution, it costs RTM companies more time and money than having one multi-building RTM claim.

4.20 In *Fencott Ltd v Lyttelton Court RTM Co Ltd*, the numerous disadvantages of management by multiple entities were set out starkly:

> Where otherwise separate self-contained buildings receive services through inseparable communal installations, or where truly self-contained buildings share appurtenances (such as car parks, gardens or access roads), effective

---

184 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [47].

185 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [55] to [57].

186 We discuss the examples Gloster LJ provided at paras 4.37 to 4.42 below.

187 [2012] EWCA Civ 1372, [2013] 1 WLR 988.

188 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [61]. We discuss non-exclusive appurtenant property at paras 4.101 to 4.116 below.

189 *Fencott Ltd v Lyttelton Court RTM Co Ltd* [2014] UKUT 27 at [51].

> self-management is likely to require that control be vested in a single body. Not only is the prospect of dual management between an RTM company and the estate freeholder "not a happy one" but the potential for discord, duplication of effort and wasted expenditure where multiple single block RTM companies must collaborate is almost as daunting.[190]

4.21 These disadvantages have also been brought to our attention by stakeholders with experience of the legal and practical difficulties of having multiple RTM companies on a single estate. The respondents in *Triplerose* submitted that it was in the best interests of both the landlord and the leaseholder to allow the management of estates as one entity.[191] Some commentators have suggested, reflecting on this, that the ability of an RTM company to manage an estate as a whole is particularly important where all blocks share car parks and communal areas on the estate.[192]

4.22 Where different RTM companies have exercised the RTM over separate buildings, the confusion over which RTM company is liable for different parts of the estate may lead to conflict:

(1) between RTM companies;

(2) between an RTM company and a landlord;

(3) between an RTM company and a third party managing the residual parts of the estate; or

(4) between the leaseholders and the RTM company.

4.23 This difficulty was acknowledged by Lady Justice Gloster in *Triplerose*, who suggested that the RTM companies could enter into an agreement to delegate the management of certain areas between them. However, this suggestion was based on the untested assumption that RTM companies would be willing to delegate their management responsibilities.[193] Failure to come to an agreement could lead to either duplication of, or gaps in, management to the detriment of both leaseholders and landlords.[194]

Models for multi-building RTM

4.24 Many stakeholders have talked about "estate-wide" RTM. We prefer to use the term "multi-building RTM". We have looked at two possible models for multi-building RTM.

(1) A "restricted" model, where any multi-building RTM is only possible if the RTM is acquired over all of the buildings on an estate.

---

190 *Fencott Ltd v Lyttelton Court RTM Company Ltd* [2014] UKUT 27 at [53].

191 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [39].

192 A Parr, L Williams and A Hindle, "Right to Manage and Multiple Premises" (2015) 19 *Landlord and Tenant Review* 167, 169.

193 A Parr, L Williams and A Hindle, "Right to Manage and Multiple Premises" (2015) 19 *Landlord and Tenant Review* 167, 169.

194 We discuss non-exclusive appurtenant property at paras 4.101 to 4.116 below.

(2) A "flexible" model, where multi-building RTM is possible over two or more buildings on an estate without requiring that the RTM is acquired over all of the buildings on an estate.

4.25 We have proceeded on the basis of the flexible model of multi-building RTM in this consultation paper. Some stakeholders considered that the restricted model was the less complex option and would ensure more estates are managed as a whole. We are, however, of the view that it has several shortcomings.

4.26 It may rarely be possible to achieve multi-building RTM on the restricted model because:

(1) it may be difficult for an RTM company to engage enough interest from qualifying tenants to satisfy the participation criteria across the estate. On bigger estates, it could mean getting thousands of qualifying tenants to agree to the RTM.[195] There may be practical problems to overcome to meet the threshold, such as absentee owners whom it is difficult to contact or flats in the process of being sold; and

(2) it may not be possible to exercise a multi-building RTM at all if the estate includes buildings which do not qualify for the RTM.[196]

4.27 It may also be difficult in practice to identify what comprises the whole of an estate. Some estates will be complex. We discuss further below the link between buildings that should be required for a multi-building RTM.[197] We set out here diagrams of two hypothetical estates to demonstrate possible issues.

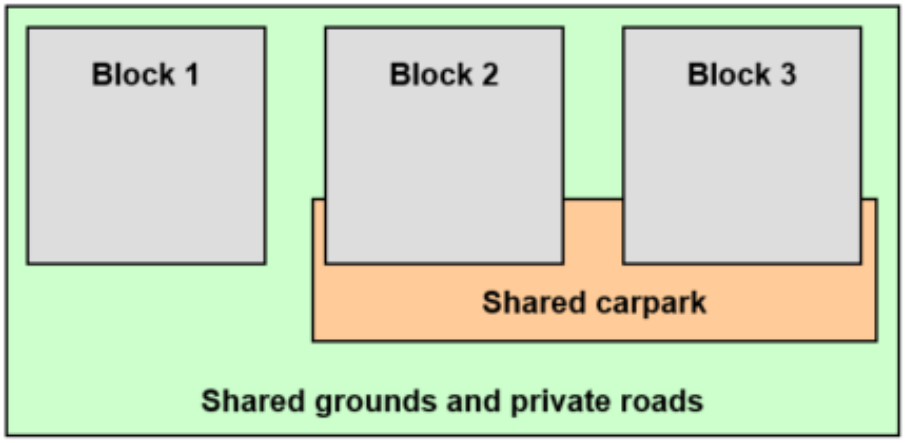
---

195 A similar issue came to prominence in the context of leaseholders' right to form a "recognised tenants' association". In 2017, the Government carried out a public consultation on proposals which would require landlords to request consent from all leaseholders to provide their names and contact details to a secretary of a tenants' association: Department for Communities and Local Government (now Ministry of Housing, Communities and Local Government ("MHCLG")), *Consultation on recognising residents' associations, and their power to request information about tenants* (July 2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf. Consultees broadly supported that proposal and it has been given effect by Tenants' Association (Provision of Recognition and Provision of Information) (England) Regulations 2018/1043 (see also MHCLG, *Consultation on recognising residents' associations, and their power to request information about tenants: government response* (October 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746926/Recognising_residents_associations_-_consultation_response.pdf.pdf.

196 We discuss the application of the qualifying and participation criteria to multi-building RTM from paras 4.58 to 4.70 below.

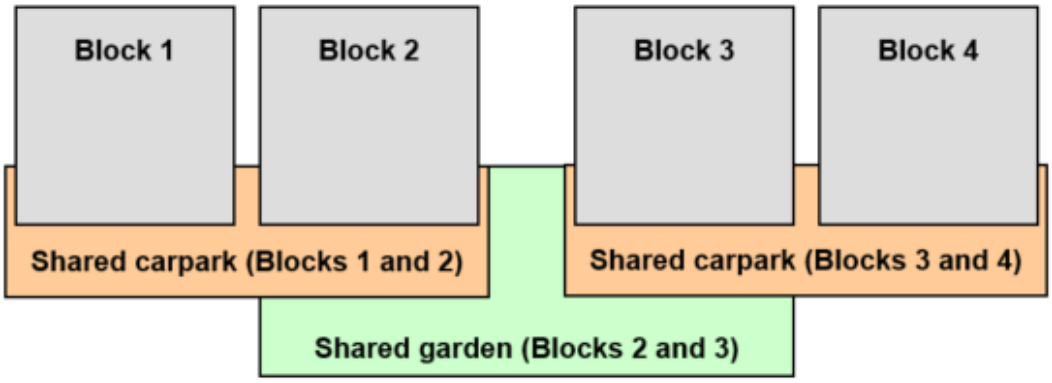
197 See paras 4.51 to 4.57 below.

Figure 1



4.28 As illustrated by Figure 1, some estates may have some appurtenant property shared between all buildings on the estate, but other appurtenant property shared by only a couple of the buildings on the estate. It might be argued that Blocks 2 and 3 in Figure 1 comprise their own "estate" within a larger estate.

Figure 2



4.29 As illustrated by Figure 2, there may be no appurtenant property which is shared between all buildings on the estate, but each building may share some appurtenant property with another building. It might be argued that Blocks 1 to 4 in Figure 2 should not be viewed as one "estate".

4.30 If single-building RTM is permitted on estates,[198] then it would seem logical to allow for the flexible model for multi-building RTM. Otherwise, the same work-around could be employed as is currently used: two or more buildings on an estate could make separate, but co-ordinated, RTM claims and make co-ordinated decisions on management, and the restricted model limitation would be meaningless in practical terms.

[198] See paras 4.6 to 4.13 above.

4.31 The flexible model permits multiple buildings to join together in a way which is sensible in the circumstances. This flexibility should help to mitigate some of the potential problems identified with multi-building RTM, which we consider below.

Potential problems with multi-building RTM

4.32 The Government considered whether to allow multi-building RTM during the debates on the 2002 Act. This was not implemented because of a number of difficulties:

> The Government have considerable sympathy with the suggestion that leaseholders of an estate of leasehold properties managed as a single entity should be able to exercise the RTM en bloc rather than on a property-by-property basis. However, several difficult technical problems would need to be addressed and overcome before we could introduce such a measure with confidence. There would be difficult questions as to how best to deal with situations in which a majority of leaseholders in the estate as a whole favoured exercise of the RTM but in which leaseholders of one or more individual blocks were opposed. Furthermore, many leasehold estates are a mixture of flats and houses, and problems would therefore arise from differences between the existing leasehold law on flats and on houses. It is also not uncommon for estates managed as a whole to include freehold as well as leasehold properties. Clearly, much work would have to be done before a regime could be devised for such estates, and that would have to await a future legislative opportunity.[199]

4.33 The flexible model[200] and our proposal as to the application of participation criteria to multi-building RTM[201] would address the question of what would happen if leaseholders in an individual building were opposed to the RTM. If qualifying tenants in an individual building were opposed such that the participation criteria for that building were not satisfied, that building would not be included within the RTM claim.

4.34 As discussed in Chapter 2, we propose that leasehold house owners should be eligible to acquire the RTM.[202] Leasehold house owners would therefore be entitled to participate in any multi-building RTM. In practice, the leasehold house owner may already have management functions in respect of the house itself under the lease. Participating in a multi-building RTM could however allow a leasehold house owner, as a member of the RTM company, to share the management functions over shared appurtenant property on the estate.

4.35 Owners of freehold houses on the other hand are not qualifying tenants because they do not hold the property on a long lease, and so will not be able to participate in an RTM claim. Estates often include freehold houses, either because the houses were sold on this basis, or because the owners have purchased the freehold at a later

---

199 *Hansard* (HC), 11 March 2002, vol 381, col 689 to 690, Ms Sally Keeble, Parliamentary Under-Secretary (Department of Transport, Local Government and Regions).

200 See paras 4.24 to 4.31 above.

201 See paras 4.58 to 4.70 below.

202 See paras 2.8 to 2.10.

date.[203] We consider the position of freehold houses and other buildings on an estate below.[204]

4.36 First, we consider further difficulties that have been identified with the concept of multi-building RTMs.

Risk of conflict of interest, or domination, by larger building

4.37 In *Triplerose*, Lady Justice Gloster placed much reliance on the difficulties which might arise where the blocks managed by the same RTM company are of varying size, with the result that members of a larger block could dominate decisions impacting on a smaller block.[205]

4.38 In practice, most decisions will be taken by the directors of the RTM company, rather than the members.[206] All RTM company members (as well as third parties such as the managing agent and landlord) are eligible to be directors of the RTM company if appointed by the RTM company. We discuss the appointment of directors in a multi-building RTM company from paragraph 4.95 to 4.100 below. We do not propose that their appointment would depend on the size of the building or any building-specific aspects.

4.39 Some decisions may however be made by resolution of the members of the RTM company. Each qualifying tenant in buildings included within the RTM would be entitled to company membership. Where one building has 100 units held by qualifying tenants and another has 20, it would be easy for that smaller building to be "out-voted" if there is a member vote and the larger building uses its power to prioritise its own building.[207] They could use this power to ensure the appointment of directors to represent the larger building's interests.

4.40 Individual leaseholders in a smaller building would have the right to enforce an RTM company's obligation to perform the management functions under the lease. However, many day-to-day management decisions are discretionary and not determined by the lease – such as whether to appoint a managing agent, who it should be, which contractors to use and whether repair works should be done immediately or only when absolutely necessary. Again, this comes back to the decisions of directors or, if the question is put to the members, the result of a members' vote.

4.41 The Court of Appeal also recognised that the interests of leaseholders in different buildings on the same estate may diverge[208] – for example, if some blocks are "luxury", but others more modest. Leaseholders in luxury blocks may wish to undertake maintenance regularly, using expensive materials to increase the value of their

---

203 Under the Leasehold Reform Act 1967, or by agreement with their landlord.

204 See paras 4.117 to 4.120 below.

205 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [52] to [54].

206 See Chapter 5.

207 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [52].

208 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [52].

properties, whereas those in more modest blocks may prefer to minimise costs by approving repairs only when absolutely necessary.

Risk of "estates" across geographically remote sites

4.42 The Court of Appeal considered it would be odd if a minority of qualifying tenants in a block in Reading were subject to the decisions of a majority group in a block in Liverpool, because they were members of the same RTM company.[209] We consider this issue below and discuss what link there should be between buildings for them to qualify for multi-building RTM.[210]

Management of appurtenant property

4.43 Where one block acquires the RTM, including over appurtenant property used by other premises (for example, a car park or garden shared by the whole estate), this raises questions about how management functions should be divided between the parties with overlapping responsibilities. We discuss this in more detail below, and make proposals for reform.

Difficulties of achieving cooperation between large numbers of leaseholders

4.44 As we discussed in our enfranchisement consultation paper,[211] any collective action requires a significant level of cooperation, agreement and organisation between those participating. The more qualifying tenants there are, the more difficult it may be to organise the requisite level of participation. In addition, the ongoing management burden may be considerably greater when the RTM is exercised over multiple buildings.

4.45 The above are, however, not arguments against allowing multi-building RTM. They merely indicate that it might not be practicable, or possible, in every case. It may not always be in the best interests of the qualifying tenants in a building to participate in a multi-building RTM on their estate. The flexible model of multi-building RTM would allow for buildings not to be included if this were the case.

4.46 Stakeholders have told us that, despite *Triplerose*, there are estates which have one RTM company managing multiple buildings effectively. There are also several estates which are being run successfully by leaseholder-owned management companies who have management functions by virtue of being a third party to the relevant leases.

Our proposal

4.47 The RTM was introduced to give leaseholders more control over the management of their properties and it seems clear that, in some cases, multi-building RTM is the best way to facilitate that. We are therefore persuaded by the arguments for multi-building RTM and propose that it should be possible for a single RTM company to acquire the RTM over multiple buildings and exclusive appurtenant property. We consider how

---

209 *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275 at [49].

210 See paras 4.51 to 4.57 below.

211 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, from para 6.33.

non-exclusive appurtenant property should be dealt with at paragraphs 4.101 to 4.116 below.

4.48 This is consistent with our proposals on enfranchisement, which envisage that multiple buildings on an estate should be able to carry out collective freehold acquisition.[212] One difference with the enfranchisement proposals however is that the model of estate-wide enfranchisement proposed is more akin to the restricted model of multi-building RTM discussed above. The enfranchisement model anticipates that the effect of an estate-wide enfranchisement is that none of the estate is left in leasehold ownership.[213] There are different concerns in enfranchisement which justify a different approach. Most notably, enfranchisement concerns ownership rather than management. A flexible model for enfranchisement could result in mismatches in the ownership of different parts of the estate. For example, shared appurtenant property which is required for the enfranchised buildings, such as private roads, could remain in the ownership of the landlord.

Consultation Question 26.

4.49 We provisionally propose that the law should allow for a single RTM company to acquire the RTM over two or more buildings situated on the same estate in a single RTM claim. Do consultees agree?

Consultation Question 27.

4.50 Do consultees think it would be cheaper for leaseholders on an estate to carry out a multi-building RTM rather than multiple single-building RTMs (both in terms of acquisition costs and ongoing costs)?

QUALIFICATION AND PARTICIPATION CRITERIA FOR MULTI-BUILDING RTM

Link required between buildings for multi-building RTM

4.51 As mentioned above, many stakeholders have talked about “estate-wide” RTM, but in fact it may be difficult in practice to ascertain all the buildings which form part of the “estate” and, indeed, to comprehensively define an “estate”. As we discuss above, we prefer to refer to “multi-building RTM”. We have considered what link there should be between two or more buildings if they are to be subject to an RTM claim by a single RTM company.

---

212 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.93.

213 It would, however, be possible for the freehold of a building or part of a building on the estate to be owned separately as the result of a collective freehold acquisition that takes place separately from the estate-wide enfranchisement.

4.52 We have identified two possible situations where it would be sensible to allow buildings to be managed together as part of a multi-building RTM.[214] These are where there is sufficient proximity or a common service charge fund.

4.53 We consider that the law should allow for multi-building RTM over buildings which are close in proximity such that it would make sense to manage them together. While it might be difficult to define "sufficient proximity", we think that the existence of shared appurtenant property would demonstrate that the buildings were sufficiently close as to justify facilitating a multi-building RTM.

4.54 Separately, in our enfranchisement consultation paper,[215] we suggested that collective freehold acquisition on an estate should be available where the residential units let on long leases within multiple buildings all contribute to a common service charge. The fact that there are also other separate service charges for each distinct building, or for smaller groups of buildings, should not prevent estate enfranchisement. The same test should, in our view, apply to the RTM, as the contribution to a common service charge is equally relevant. We envisage that this test would also capture buildings which have only one element of a service charge in common.

4.55 We have considered whether multi-building RTM should only be permitted where there is both shared appurtenant property and a common service charge, or whether having one of these elements should be sufficient. Stakeholders have told us that arrangements for sites can vary considerably. It is not uncommon for buildings in close proximity to have separate service charges. However, it may still make sense for these buildings to be managed together. We would not wish to exclude this possibility by requiring a common service charge in every case. We think that having either a common service charge, or shared appurtenant property, would indicate that the buildings may sensibly be managed together.

4.56 Under this proposed test, a multi-building RTM claim would not be prevented merely because the landlord (or management company where they are party to the lease) of each building is different,[216] provided there is shared appurtenant property or commonality of service charges.[217] The test should be interpreted widely where it would be sensible to permit multi-building RTM.

---

214 Subject to the remaining qualifying and participation criteria. We discuss the application of the qualifying and participation criteria to multi-building RTM from paras 4.58 to 4.70 below.

215 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.95.

216 See paras 3.56 to 3.63.

217 The RTM company would be required to claim the RTM from the landlord of each building in this scenario, serving the claim notice on each landlord.

Consultation Question 28.

4.57 We provisionally propose that the RTM should be capable of being exercised over multiple buildings by a single RTM company in a single RTM claim if either:

(1) the buildings to be managed by the single RTM company share some appurtenant property; or

(2) the qualifying tenants in each building contribute to a common service charge (whether or not other, separate service charges are payable).

Do consultees agree?

Application of qualifying criteria and participation requirements to multi-building RTM

4.58 For qualifying tenants to be able to exercise the RTM, certain qualifying criteria and participation requirements must be satisfied. We discuss these in more detail in Chapters 2 and 3. They concern, among other things:

(1) buildings or parts of buildings over which the RTM cannot be claimed;[218]

(2) a minimum number and proportion of residential units held by qualifying tenants;[219] and

(3) a minimum number of qualifying tenants which are members of the RTM company.[220]

4.59 In Chapters 2 and 3, we ask whether these criteria should be changed to bring more premises within the RTM. Whether or not changes are made to the criteria, there is a question as to how these criteria should be applied to multi-building RTM.

4.60 To aid the discussion, we have set out a hypothetical mixed estate below. The estate is comprised of the following:

(1) Blocks 1 to 5: five blocks of 10 leasehold flats (50 flats in total), each held by a qualifying tenant under a lease granted by the developer landlord. Each of these blocks would qualify individually for the RTM and, in each case, at least five qualifying tenants in each block would be needed for an RTM claim to go ahead for any single block.

(2) Block 6: a block of 10 leasehold flats, the freehold of which is beneficially owned by the leaseholders who have collectively enfranchised. This building

---

218 See paras 2.38 to 2.69.

219 See paras 2.99 to 2.115. See Chapter 3 for the discussion around who is a "qualifying tenant".

220 See paras 2.116 to 2.125.

would qualify individually and an RTM claim could proceed over that block if five of the qualifying tenants joined the RTM company.

(3) Block 7: a block of 10 flats held under qualifying leases covering 50% of the building, with commercial space occupying the other 50%. This building would not currently qualify for the RTM individually because it is over the 25% non-residential threshold.[221]

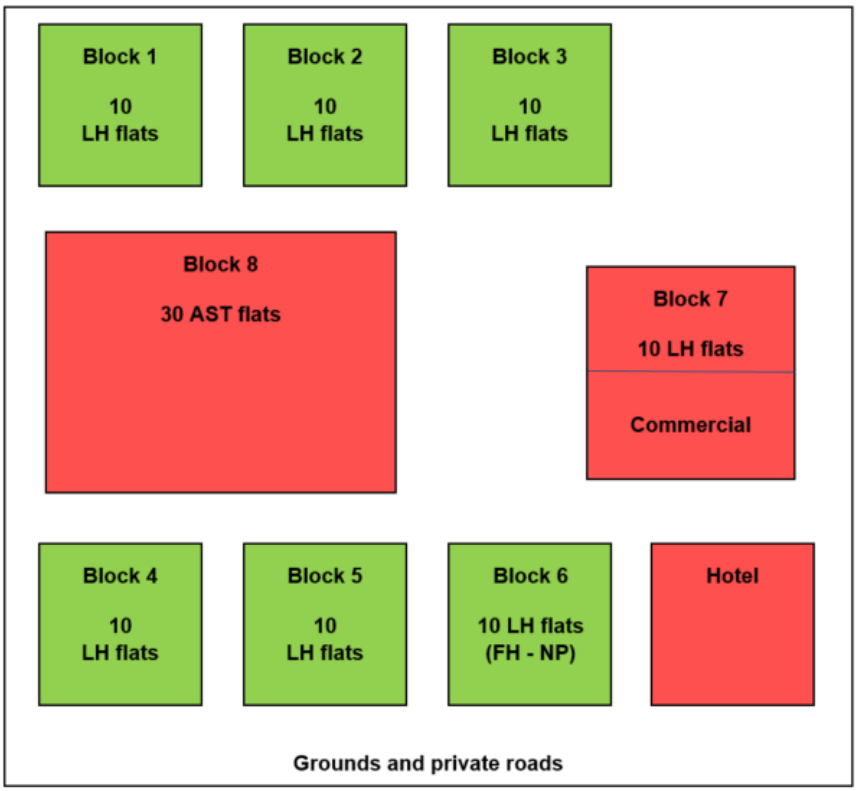
(4) Block 8: a block of 30 flats retained by the freeholder and let out on short assured tenancies. This building would not qualify individually since it has no qualifying leases.

(5) Hotel: this building would not qualify individually since it has no qualifying leases.

4.61 We have represented this estate below as a diagram in Figure 3.

[221] We have proposed removing the commercial threshold, but we include it in this example in case that proposal is not supported.

Figure 3



Key:

	Building individually qualifies for RTM (under current law)
	Building does not individually qualify for RTM (under current law)
LH	Leasehold
FH	Freehold
AST	Assured shorthold tenancy
(FH - NP)	Freehold owned by nominee purchaser

4.62 In the example above there are 100 flats on the estate. Seventy are held by qualifying tenants. This means that more than two-thirds of the total 100 flats on the estate are held by qualifying tenants.

4.63 The law could apply the qualifying criteria and participation requirements either across all of the buildings being included within the RTM claim together, or to each individual building included in the RTM claim.

4.64 The general view from stakeholders we spoke to was that, if possible, estates should be managed in their entirety, avoiding the problems of fragmented management. This may be the case particularly where it is easier to manage the premises on a multi-building basis. Given that leaseholders in different buildings may be paying the same service charge and sharing appurtenant property, there is an argument that it makes sense to facilitate qualifying tenants in such buildings coming together to exercise the

RTM. One stakeholder suggested to us that dividing estates according to blocks is arbitrary when they all pay towards a common service charge.

4.65 This view might indicate that the qualifying and participation criteria should not have to be satisfied by each individual building in a multi-building RTM but should instead be satisfied as a whole across the buildings. The reasons for this are set out in (1) and (2) below.

(1) Applying the qualifying criteria and participation requirements across the buildings as a whole would allow qualifying tenants in buildings which would not otherwise individually qualify to take part in a multi-building RTM. In the hypothetical estate at Figure 3, for example, the qualifying tenants in Blocks 1 to 7 may decide to enter into a multi-building RTM. Block 7 would not qualify individually under the current law because the non-residential part of the building exceeds 25% of the total internal floor area of Block 7. However, the non-residential parts do not exceed 25% of the total internal floor area of Blocks 1 to 7. Block 7 could therefore be included within the multi-building RTM claim if the remaining qualifying criteria and participation requirements were met.[222]

(2) Applying the participation requirement to each building individually could impede, perhaps significantly, the chances of an RTM company managing to achieve the levels of participation required. The more qualifying tenants there are, the more administratively burdensome it may be to engage with them and secure their RTM company membership.

4.66 Applying the qualifying and participation criteria to the estate as a whole would be consistent with our proposals on enfranchisement:

> we suggest that the criteria … relating to minimum potential participation … and non-residential use, should apply equally – albeit by reference to the units on the estate as a whole rather than to the units of a particular building. An estate enfranchisement could therefore take place even if one block of flats on the estate would not by itself qualify for a collective freehold acquisition of that block.[223]

4.67 In the RTM context however, there are several arguments against applying the qualifying and participation criteria across the buildings as a whole.

(1) It could potentially allow the inclusion of buildings which are far from satisfying the qualifying and participation criteria in their own right. In the hypothetical estate at Figure 3, for example, imagine that Block 8 instead contains one qualifying tenant, with the other 29 flats let out on assured shorthold tenancies. If the qualifying tenants in Blocks 1 to 8 decided to exercise a multi-building RTM, Block 8 could be included within the claim even though only one of the 30 flats in the building contains a qualifying tenant. The landlord would retain the management functions which relate only to flats or units not held by qualifying

---

222 The landlord would retain the management functions in relation to the non-residential part of Block 7: Commonhold and Leasehold Reform Act 2002, s 96(6)(a).

223 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 8.156.

tenants.[224] There will however be management functions which are common to the different flats in Block 8 (such as the operation of lifts), which the RTM company would acquire.

(2) It could lead to confusing results in some circumstances. Buildings which contained no qualifying tenants could technically be included within the multi-building RTM, but in practice the landlord would continue to manage them. In the hypothetical estate in Figure 3, for example, a multi-building RTM could be claimed over the whole estate, including Block 8 and the Hotel. The landlord would however retain those management functions which relate only to these buildings. Such a result would have the potential to cause confusion about which party has management responsibilities in respect of those buildings.

(3) If the participation requirement only had to be satisfied across the estate as a whole, buildings could be included within RTM claims without the consent of any qualifying tenants in that building. The qualifying tenants in each building may have different concerns, for example if one block is a luxury block and another is more modest. It may disadvantage qualifying tenants in one building to be subsumed within an RTM claim without their consent. The impact of this could be particularly stark in two instances.

    (a) One such instance is where a building has recently enfranchised (such as Block 6 in the hypothetical estate in Figure 3 above). The enfranchising leaseholders could, against their will, be included within a multi-building RTM claim, thereby losing the control of the building that they had just purchased.

    (b) Another such instance is where there are leasehold houses on an estate with blocks of flats. A leasehold house owner could, against their will, be included within a multi-building RTM claim. Leaseholders in a block of flats are likely to have different concerns and priorities to leasehold house owners on the same estate.

(4) Below, we discuss whether individual buildings should have the right to break away from multi-building RTMs.[225] There could be undesirable results if the qualifying and participation criteria were applied as a whole across the multiple buildings, and the law also allowed for individual buildings to break away from the RTM.

    (a) The other buildings could break away to leave only a non-qualifying building in the RTM. This building could potentially contain no qualifying tenants to be members of the RTM company.

    (b) Alternatively, the other buildings could break away to leave only a building whose qualifying tenants never wanted to be included in the multi-building RTM in the first place. Although we discuss the ability to

---

224 Commonhold and Leasehold Reform Act 2002, s 96(6)(a).

225 See paras 4.78 to 4.88 below.

hand back management in Chapter 11,[226] it would take some time to finalise this and the RTM company would be required to manage the building in the meantime. This building may have no qualifying tenants who are willing to be members of the RTM company.

(5) At paragraphs 4.25 to 4.31 above, we explain our preference for a flexible model of multi-building RTM, to allow different buildings to exercise a single RTM claim through a single RTM company where it makes sense for them to do so. As such, it would seem reasonable to require each building to have to satisfy the qualifying and participation criteria in its own right.

4.68 On balance, we think that, in the context of multi-building RTM, the qualifying and participation criteria should be applied to each building individually, so that each building has to satisfy the qualifying and participation criteria in its own right.

4.69 We acknowledge that this is a different approach to that taken in the enfranchisement consultation paper. As mentioned earlier, there are different considerations in the enfranchisement regime, most notably that it relates to ownership rather than management. The difference is also due to our preference for the flexible model for multi-building RTM, whereas estate enfranchisement is premised on the basis that the whole estate enfranchises.

Consultation Question 29.

4.70 We provisionally propose that the qualifying criteria and participation requirement should have to be satisfied by each individual building included in the claim for a multi-building RTM, rather than as a whole across all of the buildings included in the claim. Do consultees agree?

POST-ACQUISITION OPTIONS FOR MULTI-BUILDING RTM

An option for qualifying buildings to join?

4.71 Where there is a multi-building RTM claim, it may not include all qualifying buildings on the estate. This may be because the requisite participation requirement for a building was not met[227] or because the RTM company simply did not wish to include all buildings. We have considered whether, in such cases, other buildings (the "excluded" buildings) should have a right to join in with the established RTM later.

4.72 If the law were to allow for this, we think the qualifying tenants of an excluded building would have to set up a new RTM company, exercise the RTM in their own right, and join the existing RTM company once the right is acquired.[228] This is because the qualifying tenants of the excluded building must demonstrate that the building qualifies

---

226 See paras 11.110 to 11.119.

227 We discuss the application of the qualifying and participation criteria to multi-building RTM from paras 4.58 to 4.70 above.

228 Potentially requiring a new RTM vehicle to be set up covering all the buildings including the excluded one.

and that they have the requisite number of participating qualifying tenants, and the landlord must then have the right to serve a counter-notice.

4.73 Where the existing RTM company and the new RTM company agree that the best way forward would be for the building(s) to be joined into the existing arrangements, the necessary arrangements could be made by consent. But where the existing RTM company does not want to extend the scope of its management functions, should there be a *right* for the excluded buildings to join regardless? We would only envisage this potential right applying where the existing RTM company already manages at least two buildings on the same estate.

4.74 Under the current law, different buildings on the same estate can be managed by different parties, such as the landlord (or their managing agent) and several different RTM companies. We have already discussed the practical issues, uncertainties and disagreements to which this can lead. Providing a right for excluded buildings to join the existing RTM could "reunite" a previously fractured management structure.

4.75 To allow a right for a building to be joined to an existing RTM later on may create successive RTM claims if the option to break away is adopted,[229] because the RTM company of the existing buildings who are being forced to take a new building could claim the RTM again to avoid having to deal with the new building.

4.76 On balance, we do not think that the qualifying tenants/RTM company of the excluded building should have a right to join their excluded building to an existing RTM. To force the existing RTM company to extend its managements functions where it does not wish to do so could lead to disputes and non-management.

Consultation Question 30.

4.77 We do not consider that there should be an automatic right for qualifying tenants of premises not originally included in an RTM claim to later join an existing multi-building RTM arrangement. Do consultees agree?

An option to break away?

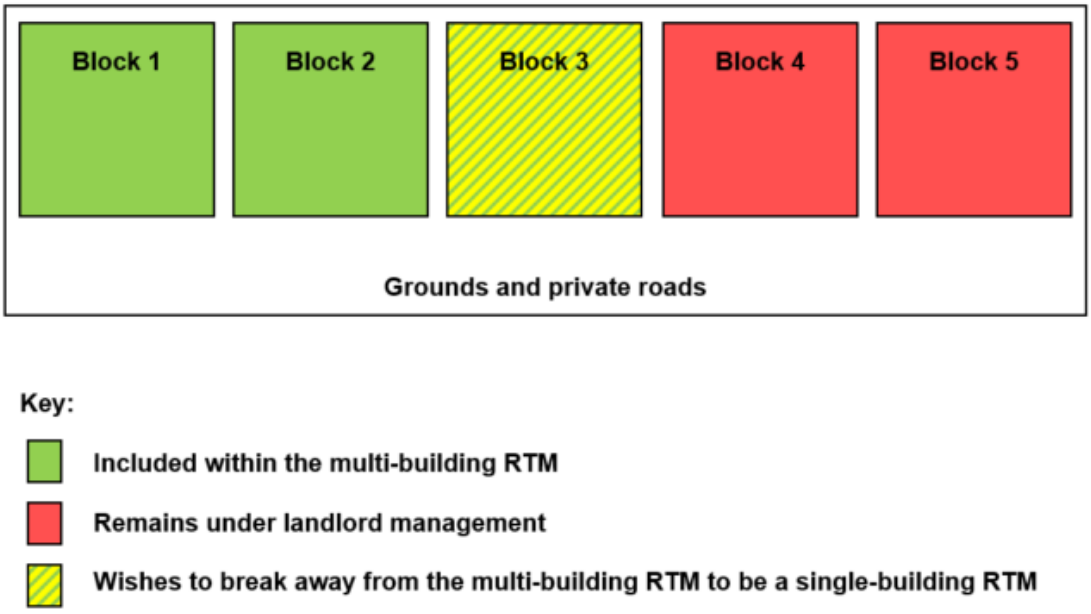
4.78 The opposite question also arises: once an RTM company managing more than one building has been established, should it be possible for individual buildings to "break away" from that multi-building RTM company? The qualifying tenants in one of the buildings or in a smaller number of buildings could then exercise the RTM in respect of their own building or buildings. For example, one stakeholder told us that their smaller block had decided to break away from estate-wide self-management (not actually an RTM) because the leaseholders of the larger block had voted to appoint expensive managing agents. The smaller block did not feel this was in their best interests.

[229] See paras 4.78 to 4.88 below.

4.79 The ethos of the flexible model is to give flexibility to qualifying tenants, and to allow them to exercise the RTM together with qualifying tenants in other buildings to the extent it makes sense to manage them together.

4.80 We have set out a hypothetical estate in Figure 4 below to demonstrate some of the issues that may arise. The estate comprises five blocks of flats. Three of the five blocks (Blocks 1, 2 and 3) exercise the RTM collectively under our new proposals. A year later, there is a falling out between qualifying tenants in Blocks 1 and 2, on one side, and Block 3 on the other.

Figure 4



4.81 In such a scenario, should Block 3 be able to "break away", setting up its own RTM company and serving an RTM claim notice on both the existing RTM company and the landlord? It would give the block self-determination, but would leave three parties with management functions over the same estate:

(1) the landlord (or the landlord's managing agent) in respect of Blocks 4 and 5, which did not exercise the RTM in the first place;

(2) the original RTM company, now only managing Blocks 1 and 2; and

(3) a second RTM company, managing Block 3.

4.82 However, this result could also happen organically without the exercise of an option to break away. The qualifying tenants in Blocks 1 and 2 could acquire the RTM over their buildings first, and the qualifying tenants in Block 3 acquire the RTM over their building separately later. The qualifying tenants in Block 3 might decide not to join the existing RTM over Blocks 1 and 2, or the qualifying tenants in Blocks 1 and 2 might refuse to allow Block 3 to join.

4.83 In the enfranchisement consultation paper we talked about the "ping pong problem" where two competing "factions" of leaseholders wish to take control of a single

property.[230] When one faction exercises the right to collective enfranchisement and acquires the freehold of the premises, the other faction could do the same thing immediately thereafter and take the freehold interest from the first faction. Under the current law on enfranchisement, this could go on indefinitely, at least in theory. In practice, the cost of each transfer is likely to be a discouraging factor.

4.84 The ping pong problem is not an issue for RTM at present because there can currently only be one RTM company in respect of a single building.[231] However, a similar problem could potentially arise if we allow for multi-building RTM and the right to break away. It could end up that different "factions" try to take the RTM from each other. For example, an RTM company may acquire the RTM over several buildings. One building may later decide to break away. The multi-building RTM company may later re-apply to acquire the RTM over the buildings, including the separate building. The risks of this can however be minimised if the qualification and participation criteria are applied per building rather than across the estate, as proposed above.[232] We also address the issue of successive claims in Chapter 11.[233]

4.85 On balance, we think that it would be consistent with our other proposals to allow for buildings to break away. The law would have to allow for an RTM company to be able to submit an RTM claim in respect of a building or buildings already involved in a wider multi-building RTM.[234]

4.86 Under the current law, there is a four-year ban on a further RTM claim being made in respect of the same property after the RTM has ceased.[235] We explain this in more detail in Chapter 11 and ask whether this should be reduced, possibly to 12 months.[236] We think that the restriction on successive claims should also apply to break-away claims so that leaseholders are prevented from breaking away from the multi-building RTM for a minimum period of time following the multi-building RTM acquisition date. If the leaseholders in a building opted to be in the multi-building RTM to begin with, it would seem sensible that they be subject to the same rule when thinking of breaking away. This would also help ensure a period of stability and allow things to settle on the multi-building RTM without buildings being able to threaten to break away while the multi-building RTM company is in the early stages of taking over the management.

---

230 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.59.

231 All qualifying tenants have the opportunity to join that RTM company, but not to set up a new one to replace or usurp the existing arrangements. See Chapter 5.

232 See paras 4.58 to 4.70 above.

233 See paras 11.62 to 11.67.

234 Under the current law, there can only be one RTM company in respect of a particular set of premises: Commonhold and Leasehold Reform Act 2002, s 73(4). We discuss this, and our proposals for reform, from para 5.31.

235 Commonhold and Leasehold Reform Act 2002, sch 6, para 5(1)(b).

236 See paras 11.75 to 11.145.

Consultation Question 31.

4.87 We provisionally propose that qualifying tenants of buildings should be able to "break away" from existing multi-building RTM arrangements and exercise the RTM in their own right. Do consultees agree?

Consultation Question 32.

4.88 We provisionally propose that the restriction on successive claims should apply to break-away claims, so that the qualifying tenants of the building(s) wishing to break away have to wait for a minimum period following the multi-building RTM acquisition before making the break-away claim. Do consultees agree?

MULTI-BUILDING RTM COMPANIES

Voting rights

4.89 As discussed above, Lady Justice Gloster in *Triplerose* was concerned that, if two blocks of different sizes were to be managed by one RTM company, the company members belonging to the larger block would be able to dominate decisions to the detriment of the smaller block. This might even include decisions on issues which relate exclusively to the smaller block.

4.90 As we discuss in Chapter 5, the general principle for companies (including companies limited by guarantee) is that the business of a company, which typically includes day-to-day decisions about management and maintenance, is conducted by the directors rather than the members.[237] The key question is therefore about the composition of the board of directors, which we discuss below. Members can however pass a special resolution requiring the directors to take (or not take) a specific course of action,[238] and can also vote at general meetings.[239] It is therefore possible that a management decision may be taken by the members rather than the directors.

4.91 Under general company law, companies are free to set out specific voting rules in their articles.[240] This is not the case for RTM companies, which have their articles prescribed by statute. The prescribed articles could be changed (by regulation) to allow some flexibility for specific voting rules. It would then be possible to devise a

---

237 Companies (Model Articles) Regulations 2008/3229, sch 2, art 3. This is reflected in the articles for RTM companies: RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 8; RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 8.

238 Companies (Model Articles) Regulations 2008/3229, sch 2, art 4. For RTM companies, see: RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 9; RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 9.

239 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 28; RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 28.

240 Companies Act 2006, s 284(4).

system to "dilute" the votes of members in a larger building. For example, if each full vote were to be divided by the number of units in the relevant building, the votes of members in a larger building would be worth less than those in a smaller building:

(1) members living in a block of 20 flats would have a vote worth 1/20;

(2) members living in a block of five flats would have a vote worth 1/5; and

(3) a member in a leasehold house would have one full vote.

4.92 Another option may be to provide in the articles for different classes of vote for each building included in the multi-building RTM. Each class would only be permitted to vote on specified matters – for example, those matters which relate to the business of the RTM company as a whole, and those which relate to their building alone.

4.93 We have not analysed these options in detail because we consider that such variable votes for multi-building RTM companies would lead to additional complexity and cost. The RTM company or its members would probably have to take additional legal advice when setting up the arrangements and when counting votes. It would make voting by a show of hands (rather than a poll) difficult. If a smaller building ends up with more votes than a larger one, this might also be unfair for members in larger buildings. Therefore, we do not propose making any changes to the voting structure for multi-building RTM.

Consultation Question 33.

4.94 We do not consider that members of a multi-building RTM company should have different voting rights to members of a single-building RTM company, because of the likely associated complexity and cost. Do consultees agree?

Director appointments

4.95 As identified above, most decisions are made by the directors, not the members. It may therefore be prudent for members of an RTM company to seek to ensure that, in a multi-building RTM, their building is represented by a director on the board. The appointment of a director could either be achieved by a decision of the existing board of directors or by a resolution passed by a simple majority of all of the members of the RTM company.[241]

4.96 To appoint a director by a resolution of members, members from a building with few qualifying tenants may need the support of some members from a building containing more qualifying tenants to achieve the simple majority support required. This issue in itself might detract from the desirability of a multi-building RTM.

4.97 We do not think it would be helpful to specify that a company should endeavour to have directors from each building on the board, or even to mandate that there must be

[241] RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 22(1); RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 22(1).

a director per building. This would not be appropriate in all circumstances. In particular:

(1) it is not uncommon to have a range of sizes of buildings on one estate which could lead to some qualifying tenants being overrepresented. For instance, estates may contain multiple leasehold houses as well as blocks of flats. If it were mandated that there must be one director per building, the qualifying tenants in the leasehold houses would potentially be overrepresented on the board when compared to the qualifying tenants in the blocks; and

(2) as we discuss in Chapter 11, the directorship and membership of the RTM company may vary from time to time and, following the RTM acquisition date, there may not necessarily always be members in every building. To require that a director be appointed in respect of every building may therefore be an onerous and impractical requirement for the RTM company to comply with in these circumstances.

4.98 Even if we were to suggest having a proportionate number of directors for the number of qualifying tenants in each building, leaseholders in the different buildings may have different concerns and priorities. Such a proposal could mean that directors of larger buildings could sway board decisions, resulting in the RTM company making decisions which are not in the interests of smaller blocks.

4.99 In addition, qualifying tenants from buildings containing a sufficiently high number of members could in any event vote to increase the number of directors to add more from their buildings.

4.100 On balance, we do not think it is helpful to make specific proposals for the appointment of directors in a multi-building RTM company. We discuss the appointment of directors, and the constitution of the RTM company more generally, in Chapter 5.

NON-EXCLUSIVE APPURTENANT PROPERTY

Current law

4.101 Appurtenant property means non-residential property (including any "garage, outhouse, garden, yard or appurtenances") which belongs to, or is usually enjoyed with, the wider building or a flat within that building.[242] Section 72(1)(a) of the 2002 Act states that the RTM provisions apply to premises if:

> they consist of a self-contained building or part of a building, *with or without appurtenant property* [emphasis added].

4.102 In *Gala Unity*,[243] the Court of Appeal considered what constituted "appurtenant property" for the purposes of the 2002 Act so as to be susceptible to inclusion within an RTM claim.

---

242 Commonhold and Leasehold Reform Act 2002, s 112(1).

243 *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988.

4.103 The Court of Appeal held that nothing in the wording of the 2002 Act suggested that appurtenant property is limited to property that is exclusively appurtenant to the RTM premises. An RTM company was therefore entitled to take over the management of appurtenant property, even where that appurtenant property was not limited to property used exclusively by the premises in question. The common areas enjoyed by occupiers of different blocks would be appurtenant property to each set of premises and would be managed jointly by their respective managers.

4.104 Lord Justice Sullivan acknowledged that:

> the prospect of dual responsibility for the management of some of the appurtenant property in this and other similar cases is not a happy one … there is the potential for duplication of management effort and for conflict between the "old" management company and the new RTM company in respect of such appurtenant property, but I am not persuaded that these consequences are so grave, or that the end result is so manifestly absurd, that we would be justified in adding a gloss to words – appurtenant property – which are already defined in the Act.[244]

4.105 Lord Justice Sullivan also suggested that, if the parties wish to avoid duplication or conflict, they should "reach an agreement which would make economic sense for all parties".[245] Stakeholders and commentators have noted that this might be easier said than done, and have suggested that it is not satisfactory or possible in all cases for parties to reach an agreement.

4.106 *Gala Unity* has proved a controversial decision. Unlike in the later case of *Triplerose,* the consultation paper on what would become the 2002 Act[246] was not drawn to the attention of the Court of Appeal in *Gala Unity*, perhaps because the parties did not have legal representation. That paper clearly indicates that it was not envisaged that the RTM company would acquire any rights over property that was not exclusively appurtenant:

> The main objective is to grant residential long leaseholders of flats the right to take over the management of their building...[247]
>
> Premises would also include any associated parts, such as garages or gardens, which are for the sole use of the residents of the block in question.[248]
>
> In certain cases, a block of flats may be part of an estate of properties, with all blocks enjoying a number of common facilities. These may include, for example, a car park or gardens. Where that is the case, the RTM company would become responsible only for the management of the block for which the RTM had been

---

244 *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988 at [16].

245 *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988 at [16].

246 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843.

247 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, Part II, Section 3, ch 1, para 10.

248 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, Part II, Section 3, ch 1, para 15.

exercised. Responsibility for the management of the common facilities would remain as allocated under the lease, as would the liability of the leaseholders to pay towards the costs incurred.[249]

Where the exercise of RTM caused leaseholders to have to pay separate charges to the landlord and to the company, the leaseholders would be able to exercise the same rights in respect of both charges.[250]

4.107 RTM companies automatically acquire the management functions over appurtenant property, exclusive or otherwise, if they have submitted a valid claim notice.[251] The effect of *Gala Unity* and subsequent case law is that RTM companies have no choice but to acquire management over non-exclusive appurtenant property regardless of whether they claim it or even want it.

4.108 The soundness of *Gala Unity* and subsequent cases can be questioned on a further ground. Given that premises can be "with or without appurtenant property", it is arguable that a failure to mention appurtenant property in a claim notice constitutes a failure to specify the premises sufficiently. Without making such specification, it is impossible to know whether it was intended that appurtenant property be included.[252]

Problems with the current law

4.109 The current legal position on non-exclusive appurtenant property causes several problems from a practical perspective.

(1) Multiple parties (such as the landlord and the RTM company) may be responsible for the same non-exclusive appurtenant property. The RTM company and the landlord may struggle to reach an agreement on the management of the non-exclusive appurtenant property, which may lead to double-payments in respect of it, or non-management of it.

(2) The RTM company may not realise which appurtenant property it is becoming responsible for. This may be because the RTM company does not specify the appurtenant property in the claim notice and the issue is not discussed, or even considered, until a problem arises later. Alternatively, it may be because there is appurtenant property which no party is aware exists at the outset of the RTM claim. We have heard anecdotally of a case where the RTM company unwittingly became responsible for a complex sewer situated elsewhere on the

---

249 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, Part II, Section 3, ch 1, para 88.

250 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, Part II, Section 3, ch 1, para 102.

251 *Gala Unity Limited v Ariadne Road RTM Co Ltd* [2011] UKUT 425 (LC); *Pineview Limited v 83 Crampton Street RTM Co Ltd* [2013] UKUT 0598 (LC) at [59]; *Campbell Park (Columbia Place) RTM Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* (05 December 2013) CAM/00MG/LRM/2013/0023 & 0024 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [25].

252 We have been advised that, in practice, RTM companies may not specify the appurtenant property in order to prevent objections to the RTM claim from the landlord on the basis of incorrectly specified appurtenant property.

estate. In such a case under the current law, unless the landlord agrees,[253] the RTM company cannot hand back management responsibility to the landlord,[254] even though it is not necessarily well placed to manage the property.

(3) The process of agreeing which party is responsible for managing the property may lead to additional costs being charged to leaseholders.[255]

(4) The RTM company acquires the RTM over non-exclusive appurtenant property without the right to collect service charges in respect of other buildings. The landlords of the other buildings will need to contribute to the costs of managing the non-appurtenant property (which they will likely collect through service charges in their buildings). If the landlords fail to contribute, however, this could potentially strain the finances of the RTM company.

Our proposal

4.110 We recognise this lack of clarity around non-exclusive appurtenant property as a key difficulty with the RTM on an estate. The RTM company may acquire the RTM without knowing the extent of the property it is managing, and without knowing that there may be an overlap with property that is also under the landlord's management.

4.111 We provisionally propose that the decision in *Gala Unity* should be reversed. We think that there should be a presumption that management functions in respect of non-exclusive appurtenant property do not transfer to the RTM company. Management functions in respect of exclusive appurtenant property should automatically transfer: the RTM will have to be acquired over all the premises which use that appurtenant property in order for it to transfer automatically when the RTM is acquired.

4.112 In relation to non-exclusive appurtenant property, the presumption that the management functions over it remain with the landlord would apply unless either:

(1) the RTM company and the landlord agree otherwise for any of the management functions in respect of it; or

(2) the tribunal makes a determination that the RTM company should acquire any of the management functions in respect of it.

4.113 Any agreement or determination that any of the management functions for the non-exclusive appurtenant property should transfer to the RTM company would need to address the practicalities of dual management. For example, if the RTM company would in practice be the one managing the non-exclusive appurtenant property, then the agreement or determination would need to address how the RTM company could recover contributions for the non-exclusive appurtenant property from the other non-RTM buildings.

---

253 Commonhold and Leasehold Reform Act 2002, s 97(2).

254 Although see our proposals on handing back management, set out at paras 11.110 to 11.119.

255 O Tassell, "Meaning of 'Appurtenant Property' – Right to Manage Claim" (2013) 17 *Landlord and Tenant Review* 20, 22.

4.114 We acknowledge that this may lead to some delay and added costs upfront in those cases where the RTM company wishes to acquire any of the management functions in respect of non-exclusive appurtenant property. We think however that this is preferable to acquiring the management functions in respect of the non-exclusive appurtenant property automatically, which is an added responsibility for the RTM company and can lead to disputes and costly litigation further down the line.

4.115 In Chapter 10, we ask whether it would be beneficial to introduce mediation or arbitration into the RTM process.[256] We consider that the arrangements for management of non-exclusive appurtenant property could be one area in which this may be useful.

Consultation Question 34.

4.116 We provisionally propose that there be a presumption that the management functions relating to appurtenant property which does not belong exclusively to, or is not usually enjoyed exclusively with, the building(s) over which the RTM is being acquired should not transfer to the RTM company. Do consultees agree?

NON-RTM BUILDINGS

4.117 As we mention in the introduction to this chapter, estates may contain a mixture of buildings. The other buildings with which the appurtenant property is shared may include freehold houses and commonhold blocks. It is likely that the owners or leaseholders within these other buildings will contribute to the cost of the management and maintenance of shared appurtenant property on the estate, either through an estate rentcharge or as part of a service charge.

4.118 The Government is currently consulting on measures to ensure that estate rentcharges paid by freeholders are fairer and more transparent.[257] Broadly speaking, the measures under consideration would be based on certain of the existing statutory protections around service charges paid by leaseholders.[258]

4.119 The proposed reforms of commonhold[259] may lead to an increase in commonhold buildings. Owners of commonhold units may similarly be required to pay an estate rentcharge to contribute to the shared appurtenant property on their estate. We suggest that the Government considers owners of commonhold units alongside freeholders in their review of estate rentcharges.

---

256 See paras 10.36 to 10.48.

257 Ministry of Housing, Communities and Local Government, *Implementing reforms to the leasehold system in England: a consultation* (October 2018).

258 Ministry of Housing, Communities and Local Government, *Implementing reforms to the leasehold system in England: a consultation* (October 2018), para 4.3.

259 Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241.

4.120 Our project is focussed on making the existing RTM procedure more efficient for leaseholders. We have not considered whether the RTM regime should be extended to permit certain freeholders, such as freehold house owners, to exercise the RTM. The RTM regime has been developed for leaseholders, and the inclusion of freehold house owners or commonhold unit owners within it would require a significant re-writing of the regime, or an entirely separate regime. Estate rentcharges are subject to a different statutory regime from leasehold service charges (and only cover appurtenant property on the estate, rather than the building itself).

Chapter 5: The RTM Company

5.1 Before leaseholders can take any steps towards making an RTM claim, they must form an RTM company.[260] In this chapter we set out the structure of the RTM company, the process of incorporation, and its governance once it has been established. We consider the duties of directors and the role of company members. Where specific problems are identified we provisionally propose solutions.

THE RTM COMPANY STRUCTURE

The current law

5.2 Currently, the RTM company takes the form of a company limited by guarantee. [261] Below we consider whether this is the most appropriate corporate structure.

Limited liability

5.3 The liability of members of an RTM company is limited to £1.[262]

5.4 In our enfranchisement consultation paper, we noted that unlimited liability for company members would discourage leaseholders from joining the company.[263] We believe that this argument applies with equal force in the RTM context and therefore that the limited liability structure should be maintained for RTM companies.

Companies limited by guarantee

5.5 There are two forms of private limited liability companies: a company limited by guarantee and a company limited by shares. A company limited by guarantee has no share capital. Instead it operates on the basis of membership. The members do not own a portion of the company, unlike in a company limited by shares.

5.6 The guarantee model provides a good structure for organisations, such as RTM companies, whose aim is not to make a profit, and so neither need nor want to issue shares or dividends. Beyond this, there appear to have been two main reasons why the limitation by guarantee model was chosen under the 2002 Act.[264]

(1) To prevent the company having to acquire a substantial degree of share capital. A company structure with no share capital requirement ensures that the availability of the RTM is not driven by the individual financial circumstances of leaseholders. This is important given that, for many leaseholders, purchasing the freehold through enfranchisement as a means of addressing management

---

260 Commonhold and Leasehold Reform Act 2002, s 71(1).

261 Commonhold and Leasehold Reform Act 2002, s 73(2)(a).

262 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 7.

263 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.71.

264 *Hansard* (HL), 27 February 2001, vol 622, col CWH 126, Lord Whitty.

issues is likely to be cost-prohibitive.[265] We consider this reason to be particularly persuasive.

(2) In order that RTM companies, right to enfranchise companies,[266] and commonhold associations had the same structure. This was intended to allow leaseholders to move from one type of company to another without complication.

5.7 As we said in our enfranchisement and commonhold consultation papers, a further advantage of companies limited by guarantee is ease of administration.[267] This is because, unlike for companies limited by shares,[268] members of companies limited by guarantee are not issued with share certificates. While we have been told that some RTM companies issue membership certificates to their members, this is not a legal requirement.

5.8 This makes adding and removing RTM company members a straightforward process. When an RTM company member sells their flat their membership automatically ceases[269] and the buyer can, if they wish to, apply to join the RTM company.[270] The only administrative task is updating the register of members.[271]

5.9 By contrast, in a company limited by shares, the seller would have to formally transfer their shares to the buyer[272] by sending them a completed transfer form and share certificate. The buyer or the seller would then have to request that the company register the transfer.[273] The company would then have to record the transfer in the register of members,[274] and issue a new share certificate to the buyer.[275] Effective administration of membership in a company limited by shares relies on members carrying out this procedure correctly.

5.10 Given the turnover rate of leasehold properties, and therefore of RTM company members, we consider that the administration of an RTM company should be as

---

265 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, p 115.

266 A Radvesky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2017) ch 20-01. The provisions on right to enfranchise companies have not been brought into force.

267 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.77; Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, para 7.27.

268 Companies Act 2006, s 768.

269 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 27.

270 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26(1).

271 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26(6).

272 Companies Act 2006, s 770.

273 Companies Act 2006, s 772.

274 Companies Act 2006, s 771(1).

275 Companies Act 2006, s 776(1)(a).

simple and time-efficient as possible. This is best achieved through the guarantee model.

A co-operative model?

5.11 Although we have not identified any problems with the guarantee model, one stakeholder suggested that the co-operative society model might be preferable.

5.12 Co-operative societies are not dealt with by the Companies Act 2006 ("the Companies Act"). They are governed by separate legislation[276] and are regulated by the Financial Conduct Authority ("FCA"). To fulfil the FCA's registration requirements, co-operative societies must have a common economic, social or cultural need and be run for the mutual benefit of their members.[277] This explicit aim of mutual benefit may be appealing to leaseholders.

5.13 Co-operative societies are limited by shares[278] but, unlike companies regulated by the Companies Act, there is no statutory requirement for co-operative societies to issue share certificates.[279] Despite this, we are still of the view that a share-based structure would place an unnecessary administrative burden on RTM companies. A departing member's shares would still have to be processed, even without share certificates, since membership does not automatically cease on the sale of the property, as is currently the case for RTM companies.

5.14 Furthermore, co-operative societies are incompatible with our other provisional proposals for the following reasons:

(1) they require three members at the point of registration.[280] By contrast, we propose maintaining the current rule that RTM companies can be established with a single member,[281] so as not to make the incorporation process more difficult than necessary;

(2) they have a "one member, one vote" model.[282] Below at paragraph 5.94 we discuss why the current weighted voting system is preferable; and

---

276 Co-operative and Community Benefit Societies Act 2014.

277 Financial Conduct Authority, *Finalised guidance 15/12: Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014* (November 2015), para 4.10, available at https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf.

278 Financial Conduct Authority, *Finalised guidance 15/12: Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014* (November 2015), para 6.2, available at https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf.

279 *Halsbury's Laws of England* (2015) vol 48 *Financial Institutions*, para 939.

280 Co-operative and Community Benefit Societies Act 2014, s 2(2)(b).

281 Companies Act 2006, s 7(1).

282 Financial Conduct Authority, *Finalised guidance 15/12: Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014* (November 2015), para 4.12, available at https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf.

(3) co-operative societies are infrequently used. Both the public and professionals, such as accountants, are often unfamiliar with them.[283] They are therefore likely to be more difficult for leaseholders to come to grips with, meaning that it would be necessary to seek professional advice. This would make it a more expensive model for leaseholders to use.

5.15 Accordingly, our view is that RTM companies should continue to take the form of companies limited by guarantee.

Consultation Question 35.

5.16 We provisionally propose that RTM companies should continue to be companies limited by guarantee. Do consultees agree?

Should leaseholders be able to use RTM companies as nominee purchasers?

5.17 Currently, in the enfranchisement regime, a nominee purchaser is a person, whether natural or corporate, who conducts the collective freehold acquisition and acquires the premises on behalf of the participating leaseholders. In our enfranchisement consultation paper, we proposed that the nominee purchaser in a collective freehold acquisition should, like an RTM company, be a private company limited by guarantee.[284] This is a change from the current law, under which anyone (whether an individual or corporate body) can be a nominee purchaser.

5.18 While the RTM will not always be used as a stepping stone to enfranchisement, some RTM company members may one day wish to acquire their freehold collectively. It should be as easy as possible for leaseholders to exercise their enfranchisement rights. We have therefore considered whether it would be beneficial if leaseholders remain able, as they are currently, to use an existing RTM company as a nominee purchaser.

5.19 Under our enfranchisement proposals, a nominee purchaser company must adopt prescribed articles of association which cannot be departed from.[285] The same is true for RTM companies. Our proposed prescribed articles for nominee purchasers and those for RTM companies are incompatible in a number of areas including the objects of the company and the extent of the limitation of liability of company members. The solution could be for new hybrid articles to be created, which could allow a company

---

283 Cooperatives UK, *All you need to know about legal forms and organisational types – for co-operatives and community owned enterprises* (September 2017), p 33, available at https://www.uk.coop/sites/default/files/uploads/attachments/simply-legal-final-september-2017.pdf.

284 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.79.

285 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.82.

to transition from one regime to the other. These could either be adopted at the outset, or adopted by a special resolution[286] of RTM company members.

5.20 While this is theoretically possible, it would only be viable if all the members of the RTM company wanted to participate in a collective freehold acquisition. This is unlikely to be the case. Many leaseholders are interested in the RTM either because they cannot afford to acquire their freehold, or because they simply do not want to. Any attempt to transition the object of the company from the RTM to collective freehold acquisition may therefore lead to disputes among members and added complexity in terms of non-members joining only for freehold acquisition purposes.

5.21 It would be possible to amend the articles of association to provide that any member who did not want to be involved in a collective freehold acquisition could be expelled by a vote. However, we consider that this would be unfair on RTM company members opposed to freehold acquisition who would lose their right to participate in the RTM (noting that the RTM does not cease when the freehold is acquired).

5.22 Incorporating a new company limited by guarantee to act as nominee purchaser is likely to be comparatively quick, simple, relatively inexpensive, and possible without recourse to specialist legal advice. Importantly, establishing a new company would ensure the continued existence of the RTM company and prevent an unnecessary lapse in management of the premises.

5.23 We therefore provisionally propose that RTM companies should not be permitted to be used as nominee purchasers in collective freehold acquisitions if, and when, our proposals on prescribed articles for nominee purchasers are adopted by the Government. We consider that leaseholders' interests would be best served by establishing a new company to act as nominee purchaser, rather than using the existing RTM company.

Consultation Question 36.

5.24 We provisionally propose that, if our proposals on prescribed articles for nominee purchasers are adopted, it should not be permitted to use RTM companies as nominee purchasers in collective freehold acquisitions, as it is easier to set up a new company for this purpose. Do consultees agree?

[286] Companies Act 2006, s 21(1).

CREATION OF THE RTM COMPANY

The current law

Registering with Companies House

5.25 An RTM company can be formed with one director[287] and one member,[288] which can be the same person. The registration process is straightforward, and Companies House provides user-friendly guides for every stage.[289]

5.26 To form an RTM company, the following documents must be submitted to the registrar of companies:

(1) a memorandum of association stating that those making the application:

(a) want to form a company under the Companies Act; and

(b) agree to become members;[290]

(2) an application for registration,[291] which states:

(a) the company's proposed name (which must end with "RTM Company Limited");[292]

(b) where in the UK the company's registered office will be;

(c) that the liability of members will be limited by guarantee; and

(d) that the company will be private;[293]

(3) articles of association;[294]

(4) a statement of guarantee.[295] This is an undertaking that, if the company is wound up, each member will contribute to its assets an amount not exceeding £1;[296]

---

287 Companies Act 2006, s 154(1).

288 Companies Act 2006, s 7(1).

289 https://www.gov.uk/limited-company-formation/register-your-company.

290 Companies Act 2006, s 8.

291 Form INO1 – Application to register a company, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534915/IN01_V7.pdf.

292 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 2.

293 Companies Act 2006, s 9(2).

294 Companies Act 2006, s 18(2). Discussed below at para 5.40.

295 Companies Act 2006, s 11.

296 Companies Act 2006, s 11; RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 7.

(5) a statement of the company's proposed officers;[297]

(6) a statement of compliance confirming that the Companies Act registration requirements have been complied with;[298] and

(7) a statement identifying anyone with significant control over the company.[299]

5.27 The above documentation can be submitted by an RTM company representative or through a company formation agent. A list of formation agents can be found on the Companies House website.[300]

5.28 A fee is required for registration, the amount of which depends on the method by which documents are submitted, and the date by which registration is required. Fees range from £10 for submission by Software Incorporation Service for registration other than on the day of submission to £100 for submission in hard copy form for same day registration.[301] Any fees payable to agents or solicitors would be additional to this.

Effect of registration

5.29 After the registrar has examined the application, and is satisfied it complies with the necessary requirements, the RTM company will be registered.[302]

5.30 The RTM company will be allocated a registered number[303] and issued with a certificate of incorporation.[304] The certificate constitutes conclusive proof of the company's registration.[305]

Problems with the current law

5.31 Third parties sometimes set up RTM companies for their own purposes. This is problematic because once an RTM company exists for a particular set of premises, there can be no other RTM company for the purposes of the 2002 Act in respect of those same premises.[306]

---

297 Companies Act 2006, s 9(4)(c).

298 Companies Act 2006, s 13.

299 Companies Act 2006, s 12A. The conditions for "significant control" are set out in schedule 1A to the Companies Act 2006.

300 https://www.gov.uk/government/publications/formation-and-company-secretarial-agents/company-formation-agents-and-secretarial-agents.

301 Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2012/1907, sch 1, Pt 2, para 8.

302 Companies Act 2006, s 14.

303 Companies Act 2006, s 1066(1).

304 Companies Act 2006, s 15(1).

305 Companies Act 2006, s 15(4).

306 Commonhold and Leasehold Reform Act 2002, s 73(4).

5.32 Examples of such behaviour by third parties that stakeholders have told us about include:

(1) landlords who establish RTM companies in order to prevent leaseholders from exercising their right to acquire the RTM;[307] and

(2) managing agents that establish an RTM company for a specific building, and then pressure the leaseholders into acquiring the RTM, and appointing them as the building's managing agents.

5.33 The Leasehold Valuation Tribunal has held that landlords are not entitled to establish RTM companies to defeat a claim by a genuine RTM company.[308] However, it remains open to landlords to take a calculated risk and continue to set up "bogus" RTM companies, in the hope that leaseholders will not challenge them in the tribunal.

5.34 Furthermore, existing tribunal case law does not prevent non-landlord third parties, such as managing agents, from establishing RTM companies for their own purposes in the manner described above.

Our proposal

5.35 We provisionally propose the following solution to prevent the formation of sham RTM companies:

(1) abolishing the rule that once an RTM company has been established for a set of premises, there can be no other RTM company for that premises; and

(2) replacing it with a new rule that once an RTM company serves a claim notice relating to the premises, no other RTM company may do so until the claim is withdrawn or rejected by the tribunal or the RTM, having been acquired, ceases. It would therefore be the service of a claim notice, rather than merely setting up the RTM company, which would prevent a second RTM company from exercising the RTM.

5.36 Currently, landlords have an incentive to establish an RTM company to prevent leaseholders exercising the RTM. Our provisional proposal will remove that incentive, as the existence of an RTM company will no longer prevent the acquisition of the RTM. Landlords will remain entitled to be involved in the RTM company by becoming members once the RTM has been acquired.[309]

How our proposal will operate on estates

5.37 In Chapter 4, we propose that it should be possible to claim the RTM over multiple buildings on the same estate. If a claim form is submitted for a multi-building RTM over buildings A, B and C, we envisage that it should not be permissible for any of these three buildings to submit a single-building claim form while the multi-building

---

307 See, for example, *Danescroft RTM Co Ltd v Inspired Holdings Ltd & Eagil Trust Company Ltd* (29 April 2013) LON/00AC/LRM/2012/0032 First-tier Tribunal Property Chamber (Residential Property) (unreported).

308 *Danescroft RTM Co Ltd v Inspired Holdings Ltd & Eagil Trust Company Ltd* (29 April 2013) LON/00AC/LRM/2012/0032 First-tier Tribunal Property Chamber (Residential Property) (unreported).

309 Commonhold and Leasehold Reform Act 2002, s 74(1)(b).

claim form is outstanding. Given that we are proposing that the participation criteria for a multi-building RTM claim should be met per building, not per estate, we do not expect this to give rise to any difficulties. Under our proposal, at least 50% of the qualifying tenants of each building will have to participate in a multi-building claim. There is therefore no risk of a single building being "blocked" from its own RTM by a multi-building RTM in which it does not wish to participate.

5.38 The law implementing our provisional proposal would have to allow for those who want to break away from a multi-building RTM to submit a claim notice for a single-building RTM, even though their building is already covered by a claim notice. Similarly, it will have to permissible for those who want to transition from a single-building RTM to a multi-building RTM to issue a claim notice in order to do so.

Consultation Question 37.

5.39 We provisionally propose that the limit on the number of RTM companies that can exist in relation to a set of premises should be removed and replaced by a rule that once one RTM company serves a claim notice in relation to a set of premises, no other RTM company can do so until:

(1) the RTM claim is withdrawn or rejected by the tribunal; or

(2) the RTM, having been acquired, ceases.

Do consultees agree?

Consultation Question 38.

5.40 Do consultees have experience of landlords setting up RTM companies in an attempt to prevent leaseholders from acquiring the RTM?

Consultation Question 39.

5.41 Do consultees have experience of third parties such as managing agents setting up RTM companies in an attempt to gain some benefit?

ARTICLES OF ASSOCIATION

5.42 Arguably, the most important[310] constitutional document of the RTM company is its articles of association. A company's articles of association set out the regulations with which it must comply.[311]

The distinction between model and prescribed articles

5.43 Most limited companies are not required to register articles of association at the time of application.[312] They will be deemed subject to default model articles of association, if no alternative articles are registered.[313] These model articles can be adopted in whole, in part, or not at all, depending on the wishes of the company members.[314]

5.44 By contrast, RTM companies are expressly excluded from the application of these model articles,[315] and are instead subject to articles contained in specific RTM regulations.[316] Unlike the model articles, the RTM articles ("the prescribed articles") are prescribed and cannot be deviated from. Any attempt to deviate from the prescribed articles, whether intentionally or by oversight, is of no effect and the RTM company will instead be deemed to have adopted the prescribed articles unaltered.[317]

What do the prescribed articles cover?

5.45 The prescribed articles state that the object, or one of the objects of the RTM company, is the acquisition and exercise of the RTM in relation to the relevant premises.[318]

5.46 The prescribed articles include rules on:

(1) the process that must be followed for becoming or ceasing to be a member of the RTM company;[319]

---

310 *Palmer's Company Law* (2018) vol 2 ch 2.1101.

311 Companies Act 2006, s 18.

312 Companies Act 2006, s 18(2).

313 Companies Act 2006, s 20; Companies (Model Articles) Regulations 2008/3229.

314 Companies Act 2006, s 20(1)(b).

315 Commonhold and Leasehold Reform Act 2002, s 74(7).

316 The English regulations are the RTM Companies (Model Articles) England) Regulations 2009/2767. The Welsh regulations are the RTM Companies (Model Articles) (Wales) Regulations 2011/2680. Their content, including the numbering of the provisions, is identical. The only difference is that the Welsh regulations have "paragraphs", as opposed to "articles".

317 RTM Companies (Model Articles) (England) Regulations 2009/2767, reg 2(2); RTM Companies (Model Articles) (Wales) Regulations 2011/2680, reg 2(2); *Fairhold Mercury Ltd v HQ (Block 1) Action Management Co Ltd* [2013] UKUT 487 (LC), [2014] Landlord and Tenant Reports 5.

318 Commonhold and Leasehold Reform Act 2002, s 73(2)(b).

319 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 26 to 27.

(2) how directors are appointed and how their appointment is terminated;[320]

(3) how directors must make decisions;[321]

(4) how to run a directors' meeting;[322]

(5) how to organise general meetings, including who has the right to speak at them;[323]

(6) the allocation of votes;[324]

(7) how votes should be conducted at general meetings;[325]

(8) administrative arrangements, including matters such as means of communication;[326] and

(9) indemnity and insurance arrangements.[327]

Should prescribed articles be maintained?

5.47 We consider that prescribed articles are vital in order to minimise the burden on leaseholders in setting up an RTM company. Prescribed articles mean that leaseholders do not have to decide on the content of their articles, nor draft them. The RTM process is therefore quicker, cheaper and easier for leaseholders.

5.48 Other benefits of prescribed articles, particularly in the RTM context, include:

(1) ensuring that the company operates fairly, for example in relation to entitlement to become a member, and allocation of votes;

(2) setting consistent standards for RTM company administration and decision making;

(3) protecting the landlord's interests by promoting a consistent style of management, regardless of the size of the block; and

(4) conveyancers' familiarity with them which, in the context of a sale of a flat, should improve the speed, quality and cost of advice given to clients.

---

320 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 22 to 23.

321 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 12 to 13.

322 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 14 to 17.

323 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 28 to 32.

324 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33.

325 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 33 to 38.

326 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 39 to 42.

327 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 43 to 44.

5.49 We have not identified any fundamental problems with the prescribed articles and consider that they are comprehensive in their content. In our view, the prescribed articles should be maintained in their current form, with the exception of some minor amendments suggested in this consultation paper.[328]

COMPANY OFFICERS AND MEMBERS

Directors

Appointment of directors

5.50 The RTM company can be formed with just one director[329] and one member,[330] which can be the same person. Once formed, the RTM company can commence the process of claiming the RTM by serving a notice inviting participation[331] on the qualifying tenants. We discuss this process in Chapter 6.

5.51 The RTM company can add directors at any time. Directors are appointed either by a resolution passed by a simple majority of members (an ordinary resolution)[332] or by a decision of the existing directors.[333]

5.52 RTM company directors can be qualifying tenants or a third party, such as a managing agent or family member of the leaseholders.[334] We have been told by stakeholders that the expertise of third party professional directors can be helpful to RTM companies. Although landlords could be directors as a matter of law, we are not aware of any landlord being invited to be a director or insisting that they should be on the board.

Removal of directors

5.53 RTM company members can remove directors by an ordinary resolution of which special notice has been given.[335] The company must then, where practicable, give members notice of the resolution at the same time as it gives notice of the meeting. If impracticable, notice may be given by newspaper advertisement.[336]

---

328 See Chapters 4 and 11.

329 Companies Act 2006, s 154(1).

330 Companies Act 2006, s 7(1).

331 Commonhold and Leasehold Reform Act 2002, s 78.

332 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 1.

333 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 22.

334 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 22.

335 Companies Act 2006, s 168(1). Special notice requires the RTM company being given not less than 28 days' notice of the intention to move the resolution, before the meeting at which it is to be moved: Companies Act 2006, s 312(1).

336 Companies Act 2006, s 312(3).

5.54 It is not necessary for the resolution to provide reasons for removing the director.[337] However, the director must be notified of the resolution and is entitled to be heard at the meeting at which it is moved.[338]

5.55 The prescribed articles set out a number of circumstances in which directorship will automatically cease. These include, but are not limited to:[339]

(1) ceasing to be a director by virtue of any provision of the Companies Act 2006;

(2) being prohibited from being a director by law;[340]

(3) being the subject of a bankruptcy order; and

(4) a registered medical practitioner who is treating the director submitting a written opinion to the company stating that the director is physically or mentally incapable of acting as director and may remain so for more than three months.

Members

5.56 Membership of the RTM company is restricted to qualifying tenants and, once the RTM has been acquired, any landlord under a lease of any part of the premises.[341] Given that landlords' interests in the property are likely to be directly affected by the management decisions of the RTM company, we are of the view that landlords should retain the right to join the RTM company post-acquisition.

5.57 Each qualifying tenant is entitled to be a member of the company, subject to the restriction that there can be no more than one qualifying tenant per qualifying flat.[342] Qualifying tenants can apply to join the RTM company at any time after incorporation by making an application in the prescribed form.[343]

5.58 The role of third parties in the RTM company is potentially confusing. RTM company membership is restricted to qualifying tenants and landlords by the prescribed articles.[344] However, the Upper Tribunal has held that third parties being members will not affect the validity of the RTM company, nor prevent it from being entitled to acquire the RTM.[345] This is despite the fact that, as soon as the company constitutes

---

337 J Lewison and M Mullen, *Companies Limited by Guarantee* (4th ed 2014) para 5.7.1.

338 Companies Act 2006, s 169.

339 The full list is set out in the RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 23.

340 For example, by virtue of the Company Directors Disqualification Act 1986.

341 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26.

342 Commonhold and Leasehold Reform Act 2002, s 75(7).

343 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26.

344 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26.

345 *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord & Tenant Reports 23 at [53].

an RTM company for the purposes of the 2002 Act, third parties are not entitled to membership.[346]

5.59 Third parties are likely to be members where, on establishment of the company, some of the professionals assisting the RTM company (for example, the proposed managing agents) take on company roles in order to facilitate the RTM claim.

5.60 A person's membership automatically ceases as soon as they are no longer a qualifying tenant, or no longer a landlord under a lease. Additionally, it is open to members to resign from the company by giving seven days' notice in writing.[347] Such notice will not be effective if given between the date on which the claim notice is served and the date the RTM is acquired, or if the claim notice is withdrawn or deemed withdrawn.[348]

Directors' duties

The general duties

5.61 All directors owe general duties to the company. These duties, which are set out in sections 171 to 177 of the Companies Act, are:

(1) to act in accordance with the RTM company's constitution;[349]

(2) to act in a way most likely to promote the success of the company;[350]

(3) to exercise independent judgment;[351]

(4) to exercise reasonable care, skill and diligence;[352]

(5) to avoid conflicts of interest;[353]

(6) not to accept benefits from third parties;[354] and

(7) to declare any interest in a proposed transaction or arrangement.[355]

5.62 If a director breaches the above duties they will be individually liable to the RTM company. Directors' liability is joint and several. This means that in, for example, a

---

346 *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord & Tenant Reports 23 at [53].

347 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 27(3).

348 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 27(3).

349 Companies Act 2006, s 171.

350 Companies Act 2006, s 172.

351 Companies Act 2006, s 173.

352 Companies Act 2006, s 174.

353 Companies Act 2006, s 175.

354 Companies Act 2006, s 176.

355 Companies Act 2006, s 177.

claim for damages, the whole amount can be claimed from any one of the directors who are liable.

5.63 The remedies generally available to the company are:[356]

(1) damages (where the company has incurred loss);

(2) restoration of company property;

(3) an account of profits made by the director;

(4) rescission of a contract where the director failed to disclose an interest; and

(5) injunctions.

Who can sue RTM directors for breaching their general duties?

5.64 As it is the company itself, rather than particular individuals, to whom directors owe duties, it is the company that must seek a remedy for a breach of duty. One of the RTM company's prescribed objects set out in the prescribed articles is

> to commence, defend, participate in or pursue any application to, or other proceeding before, any court or tribunal of any description.[357]

5.65 The prescribed articles are silent about to whom the decision to litigate is given, making it unclear whether members (rather than directors) can themselves decide to do so.[358] There is case law supporting the view that members may by ordinary resolution decide to initiate litigation against directors regardless of the content of the articles.[359] However, the question is not a settled one.

5.66 If enforcement via ordinary resolution should fail, there are other options available to RTM company members:

(1) "derivative actions" whereby, in certain circumstances, an individual member is permitted by the court to make a claim against a director in the name of and on behalf of a company.[360] The action must relate to an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director;[361] and/or

(2) seeking by petition a court order that:

---

356 *Palmer's Company Law* (2018) vol 2 ch 8.3303. The consequences of breaching the general duties are the same as if the equivalent common law rule or equitable principle applied: Companies Act 2006, s 178.

357 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 5(o).

358 *Palmer's Company Law* (2018) vol 2 ch 8.3703.

359 *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd* [1975] 1 WLR 673, [1975] 2 All ER 424, 679 and 681.

360 Companies Act 2006, Pt 11.

361 Companies Act 2006, s 260(3).

(a) the company's affairs are, or have been, conducted in a manner which is unfairly prejudicial to the members' interests; or

(b) an actual or proposed act or omission of the company would be so prejudicial.[362]

Personal liability of directors

Civil liability

5.67 A director will be liable where:

(1) the RTM company committed a tort as agent for, or jointly with, the director;[363]

(2) the director authorised or directed the tort be committed by the company[364] or personally assumed responsibility for the company's actions;[365] or

(3) the director's acts give rise to the company's liability, and the director was acting in the course of their functions as director;[366]

Criminal liability

5.68 The Companies Act imposes criminal penalties on directors where an enactment has been contravened and the director authorised, permitted, participated in or failed to take reasonable steps to prevent the contravention.[367]

5.69 The offences set out in the Companies Act are too numerous to list here, but two examples particularly relevant to RTM directors are:

(1) failing to file accounts and reports, which attracts a fine not exceeding £5,000 and a daily default fine for continued contravention;[368] and

(2) failing to notify the registrar of changes to the directorship of the company, which attracts the same fine as listed in (1).[369]

5.70 There are also numerous offences outside the Companies Act. A particularly relevant example for RTM directors is the possibility of personal criminal liability for a health and safety offence committed by the RTM company if it was committed with their consent or connivance, or is attributable to their neglect.[370]

---

362 Companies Act 2006, s 994.

363 *Palmer's Company Law* (2018) vol 2 ch 8.2213.

364 *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, [1986] 2 WLR 871.

365 *Williams v Natural Life Health Foods* [1998] 2 All ER 577.

366 *Palmer's Company Law* (2018) vol 2 chs 8.2213, 8.221, 8.2220.

367 Companies Act 2006, s 1121.

368 Companies Act 2006, s 451.

369 Companies Act 2006, s 167.

370 Health and Safety at Work etc. Act 1974, s 37(1).

Relief from liability

5.71 Courts can relieve directors, either wholly or in part, from liability in proceedings for negligence, default, breach of duty or breach of trust.[371] This relief can be granted if the court deems the director to have acted honestly and reasonably and, in all the circumstances of the case, it would be fair to excuse them from liability.

5.72 It should be noted that the court's power to grant relief from liability does not apply in relation to criminal offences. It is also only applicable to claims against the director by the company itself, and not third parties.[372]

5.73 Directors can also protect themselves by purchasing directors' and officers' liability insurance.[373] Such insurance generally covers sums directors become liable to pay in damages resulting from liability for negligence, breach of duty or breach of trust. The policy will cover "directors and officers" of the RTM company.[374] Insurance will not protect a director where loss has been caused by their own deliberate or reckless conduct.[375]

ACCOUNTING AND FILING DUTIES OF THE RTM COMPANY

5.74 The financial reporting requirements of a company depend on its size. RTM companies are unlikely to be anything other than "small companies",[376] which have an annual turnover of no more than £10.2 million. The following requirements are therefore those which apply to "small companies".

Accounting and records

5.75 RTM companies must keep adequate accounting records sufficient to:[377]

(1) show and explain transactions;

(2) disclose the company's financial position; and

(3) enable directors to prepare accounts.

5.76 Failure to do so constitutes an offence by the directors, punishable by a fine or imprisonment.[378] It is a defence for a director to show that they acted honestly and that the default was excusable in the circumstances.

---

371 Companies Act 2006, s 1157.

372 *Customs and Excise Commissioners v Hedon Alpha Ltd* [1981] 2 WLR 791, [1981] QB 818.

373 Companies Act 2006, s 233.

374 R M Merkin, *Colinvaux's Law of Insurance* (11th ed 2017) para 21-148.

375 R M Merkin, *Colinvaux's Law of Insurance* (11th ed 2017) para 21-152.

376 Companies Act 2006, s 382.

377 Companies Act 2006, s 386(1).

378 Companies Act 2006, s 387.

5.77 The accounting record must be kept for six years from the date on which it is made.[379] It can be kept in either hard copy or electronic form, but must be capable of being reproduced in hard copy form.[380] The accounting record should be kept at the RTM company's registered office or another place the directors see fit.[381]

Registers

5.78 RTM companies must also keep:

(1) a register of people with significant control over the company;[382]

(2) a register of members, which records the names and addresses of members and the dates on which they became and ceased to be members;[383]

(3) a register of directors, containing the particulars of each director;[384] and

(4) a register of directors' residential addresses.[385]

5.79 If a person becomes or ceases to be a director, or there is a change in the register of directors or register of directors' residential addresses, the company must give notice of the change to the registrar within 14 days.[386]

5.80 If an RTM company fails to keep any of the above registers both it and its directors will have committed an offence punishable by a fine.

Filing

5.81 Annually, RTM companies must file with the Registrar of Companies:

(1) That financial year's end-year balance sheet.[387] The balance sheet must give a true and fair view of the state of affairs of the company. The company may also file a profit and loss account and directors' report with the balance sheet, but this is not mandatory.[388]

(2) An annual confirmation statement (previously known as a "return").[389] The statement confirms that the company has delivered all the information it is duty

---

379 Companies Act 2006, s 388(4)(a).

380 Companies Act 2006, s 1135.

381 Companies Act 2006, s 388.

382 Companies Act 2006, s 790M. A person has "significant control" if they meet one of the conditions set out in Part 1 of schedule 1A to the Companies Act 2006.

383 Companies Act 2006, s 113.

384 Companies Act 2006, s 162.

385 Companies Act 2006, s 165.

386 Companies Act 2006, s 167.

387 Companies Act 2006, ss 396(1) and 444(1)(a).

388 Companies Act 2006, s 444(1)(b).

389 Companies Act 2006, s 853A.

bound to give the Registrar, or that that information is being delivered simultaneously with the confirmation statement. The relevant information is any change to:[390]

(a) the identities or details of the company's directors;[391]

(b) the address of the RTM company's registered office;[392] or

(c) the register of people with significant control over the company.[393]

5.82 If a company fails to file its balance sheet or confirmation statement, directors commit an offence punishable by a fine.[394] It is a defence to both offences for the directors to prove they took all reasonable steps for securing compliance.

Should the company law requirements be relaxed?

5.83 In our enfranchisement and commonhold consultation papers, we asked whether consultees thought any of the company law requirements should be relaxed for nominee purchasers and commonhold associations respectively.[395]

5.84 We note that, unlike in our commonhold consultation,[396] no stakeholders have so far suggested that such relaxation should occur in the RTM context, we seek consultees' views on the same question. Given that no companies are currently exempted from complying with requirements such as filing accounts, we are of the view that there would have to be an exceptional reason for RTM companies to benefit from relaxed requirements.

Consultation Question 40.

5.85 We invite consultees' views on whether any requirements of company law should be relaxed for RTM companies.

---

390 Companies Act 2006, s 853B.

391 Companies Act 2006, s 167.

392 Companies Act 2006, s 87.

393 Companies Act 2006, s 790VA.

394 Companies Act 2006, ss 451 and 853L.

395 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 6.66; Reinvigorating Commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, para 7.67.

396 Reinvigorating Commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, para 7.28.

RTM COMPANY'S DECISION MAKING

The current law

Directors' meetings

5.86 Generally, day-to-day decisions are made by the company directors (rather than the members), with or without assistance and advice from a managing agent.

5.87 In accordance with the prescribed articles, directors' decisions must either be:

(1) by majority (if at a directors' meeting);[397] or

(2) unanimous (if all directors who would have been entitled to vote on the matter if it had been proposed as a resolution at a meeting indicate to each other that they share a common view on the relevant matter).[398]

5.88 Directors can appoint a director to chair their meetings.[399] If there is an equal number of votes for and against a proposal at a directors' meeting, the chair or director chairing the meeting has the casting vote.[400]

5.89 At directors' meetings, no proposal can be voted on, except a proposal to call another meeting, unless there is a quorum.[401] The quorum can be fixed by the directors, but must not be less than two. If it is not fixed, it is two.

General meetings

5.90 The RTM company members are also entitled to vote when resolutions are proposed at general meetings.[402] Resolutions can either be ordinary (requiring a simple majority) or special (requiring a 75% majority).[403]

5.91 Some things can only be done by special, not ordinary, resolution. For example: requiring the directors to take, or refrain from taking, a specified action.[404]

5.92 The vote on any resolution will be decided by a show of hands, unless a poll is demanded in accordance with the articles.[405] A poll on a resolution may be demanded

---

397 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 12.

398 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 13.

399 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 17.

400 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 18.

401 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 16.

402 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 28.

403 Companies Act 2006, ss 282 to 283.

404 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 9.

405 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33.

either in advance of the general meeting or at the general meeting.[406] It may be demanded by:

(1) the chairman of the meeting;

(2) the directors;

(3) two or more people with the right to vote on the resolution; or

(4) a person or persons representing at least one-tenth of the total voting rights of all members with the right to vote on the resolution.[407]

5.93 However, at general meetings, no business other than appointing the chairman of the meeting can be conducted unless those attending constitute a quorum.[408] The quorum for a meeting is:

(1) 20% of the RTM company members entitled to vote; or

(2) two RTM company members entitled to vote

(whichever is the greater number) being present in person or by proxy.[409]

Allocation of votes at general meetings

5.94 The allocation of the votes to be cast by RTM company members at general meetings is dependent on whether there are any landlord members of the RTM company.[410]

5.95 Where there are no landlord members, one vote is available to be allocated to each flat in the premises. The vote is to be cast by the RTM company member who is the qualifying tenant of the flat.[411] This means that a qualifying tenant who owns the leasehold of multiple flats will receive a number of votes equal to the number of flats they own.

5.96 However, where there is a landlord member of the RTM company allocation is instead as follows:[412]

(1) Each residential unit will be allocated the same number of votes as the total number of company members who are landlords under leases of any part of the premises. These votes are to be cast by the qualifying tenant company member or, if there is no qualifying tenant, the immediate landlord member. This means

---

406 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 35.

407 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 35(2).

408 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 29(1).

409 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 29(2).

410 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33.

411 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33(1).

412 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33(3).

the risk of landlord RTM company member votes outnumbering those of leaseholder RTM company members is low.

(2) Any non-residential part of the premises will be allocated a number of votes proportionate to floor area. These votes are to be cast by the immediate landlord of the non-residential part or (where there is no lease of that part) by the freeholder.

(3) No votes are to be cast in respect of a residential unit not subject to a lease.

(4) If the landlord member of the RTM company is not entitled to any votes under (1) or (2), they will be entitled to one vote.

5.97 This arrangement gives all RTM company members, including landlords (who have an ongoing interest in the way the building is managed), the entitlement to express their views on how the premises is managed.

5.98 In our view, the current voting structure strikes an appropriate balance between giving a voice to all interested parties and ensuring no party can skew the balance of the vote. We have not been told by stakeholders that it gives rise to any particular difficulty.

Changes to terminology

5.99 In Chapter 2, we provisionally propose that the RTM should extend to "residential units" rather than only flats, in order that it encompasses houses. We therefore propose changing the terminology throughout the prescribed articles.

5.100 In relation to voting, this means that, where there are no landlord RTM company members, one vote will be cast in respect of each "residential unit" in the premises, rather than flat.[413]

Voting in leasehold houses and buildings with one qualifying tenant

5.101 Under our provisional proposals it will be necessary to prevent landlords from voting where there is an RTM over a single house or a building with only one qualifying tenant. Otherwise, every resolution proposed at a general meeting could lead to a stalemate, with both the leaseholder and landlord having a single vote. Even without a vote, the landlord will remain able to participate in the RTM company by becoming a member. If necessary, it can also hold the RTM company to account through a derivative action or claim of unfair prejudice.[414]

Changes to the business tenancy exception

5.102 In Chapter 3, we provisionally propose changing the business tenancy exemption, so that any long lease which permits residential use can qualify for the RTM. This means

---

413 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33(2).

414 See para 5.66 above.

that any unit that is not currently being used as a residential unit, but which could be used for this purpose, will be a "residential unit".

5.103 Currently, the prescribed articles define "residential unit" to mean:

> A flat or any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling.[415]

5.104 A minor amendment is therefore required to the prescribed articles to make clear that units not currently being used for a residential purpose, but which could be used as a residential unit, should receive the same voting rights as any other residential unit.

5.105 We therefore propose that the definition of "residential unit" be amended to add:

> [….] as long as the lease of a flat or premises permits it to be used for the purposes of a dwelling, the flat or premises will constitute a residential unit even if it is not currently being used as a dwelling.

5.106 This will ensure that units used for a non-residential purpose, but which could be used for a residential purpose, will not be mistakenly be identified as "non-residential parts" for the purposes of the prescribed articles.[416]

Problems with the current law

5.107 Stakeholders have expressed concern about there being no obligation on RTM company directors under either the Companies Act[417] or the prescribed articles to hold annual general meetings ("AGMs"). We have been told by both leaseholders and managing agents that this can obstruct leaseholder involvement in RTM company decision-making.

5.108 While RTM company members can demand that a general meeting be held,[418] making such a demand places a procedural burden on them, as the request must:

(1) be made by members representing at least 5% of the total voting rights of all members with the right to vote at general meetings;[419] and

(2) state the general nature of the business to be dealt with at the meeting.[420]

Our proposal

5.109 We provisionally propose that the prescribed articles of association be amended so that RTM directors are obliged to call an AGM. Stakeholders, including both leaseholders and managing agents, have expressed support for this change. This

---

415 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 1.

416 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 33(3)(b).

417 *Palmer's Company Law* (2018) vol 2 ch 7.502.

418 Companies Act 2006, s 303(1).

419 Companies Act 2006, s 303(2)(b).

420 Companies Act 2006, s 303(4)(a).

proposal is in keeping with the existing provision for commonhold companies which, in our commonhold consultation paper, we proposed should be maintained.[421]

5.110 Unlike many private companies, which often only have one member, RTM companies have multiple members. Meetings are therefore required for members to participate fully in the company's decision-making.

Consultation Question 41.

5.111 We provisionally propose that the prescribed articles of association should be amended to require RTM company directors to hold a general meeting once a year. Do consultees agree?

EDUCATION OF RTM COMPANY DIRECTORS

5.112 Directors of RTM companies take on considerable responsibility. We have been told by stakeholders that the resources currently available to prospective RTM company directors are inadequate to prepare them for the role, particularly if they have no previous experience of running a company.

What educational resources currently exist?

5.113 Where comprehensive training for RTM company directors exists, its availability is limited to members of professional associations. For example, the Association of Residential Managing Agents ("ARMA") offers RTM company directors access to a portal with comprehensive resources on topics including: company law, accounting and finance, and the consequences of not complying with their legal responsibilities.[422]

5.114 However, access is available only if the RTM company joins ARMA, which requires both an application and subscription fee.[423] This is likely to be cost-prohibitive to many RTM companies. In any event, resources such as those offered by ARMA are intended to be accessed by people who are already RTM directors, rather than those who have yet to take on the role. This means that people may agree to be a director without knowing what it entails.

5.115 Where information is available online free of charge, it is often of a general nature, explaining what the RTM is,[424] or setting out general duties under company law[425]

---

421 Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, para 9.4.

422 http://www.newsontheblock.com/news-opinion/arma-membership-changes-to-help-directors.

423 *Guide to Joining ARMA* (October 2018), available at https://arma.org.uk/downloader/tvz/Guide_to_joining_ARMA_October_2018.pdf. The application fee is £50. Subscription fees are not published, but are available on request.

424 For example, https://www.lease-advice.org/advice-guide/right-manage/.

425 For example, https://www.gov.uk/guidance/being-a-company-director.

rather than providing specific training on the practicalities of running an RTM company. However, Companies House has recently published guidance specifically tailored to RTM directors[426] that includes an interactive learning tool on becoming a director, keeping records and filing accounts.[427]

5.116 While this is undoubtedly positive, the list of topics covered by the tool is not comprehensive. It omits, for example, the general duties owed by directors under the Companies Act. Prospective RTM directors may incorrectly assume that it is an exhaustive guide to all their responsibilities.

5.117 Given all of the above, we are of the view that the existing educational resources for RTM directors are inadequate.

Should these resources be bolstered?

5.118 We think that many prospective directors of RTM companies would benefit from specific training covering the basics of the responsibilities of an RTM company director. This is on the grounds that:

(1) all stakeholders with whom we have met have expressed strong support for the idea of RTM directors receiving training. Importantly, the stakeholders who expressed these views encompass the whole spectrum of interested parties: leaseholders (including current RTM company directors), landlords and managing agents;

(2) the people subject to the decisions of RTM company directors include leaseholders who are not RTM company members and have no control over how management is carried out; and

(3) landlords have an interest in the reversion which should be protected.

5.119 However, there are obvious questions as to who should provide training, what it should cover, and whether it should be mandatory.

Should director training be mandatory?

5.120 The idea of making training mandatory is superficially attractive, since it would ensure consistency in the level of knowledge of RTM company directors. However, we are conscious that placing such a burden on leaseholders so early in the RTM process may disincentivise them from becoming directors, or from exercising the RTM, in the first place. If there were a cost associated with mandatory training, it may also be prohibitive and may frustrate leaseholders' attempts to exercise the RTM.

5.121 We have been told that, at the outset of an RTM claim, there will often be a few highly motivated leaseholders spearheading the process who may wish to be a director and be willing to undertake and pay for the relevant training. However, when such a director wishes to sell their flat, or when management by the RTM company has failed and litigation has begun, it is likely to be difficult to encourage other leaseholders to

---

426 https://www.gov.uk/government/publications/flat-management-and-right-to-manage-rtm-companies/guidance-flat-management-companies-rtm-companies-and-commonhold-associations.

427 https://companieshouse.gomocentral.com/content/e6356b9e-e184-469d-be97-0642d3063f0e/web.

become directors. We are of the view that mandatory training would contribute to this difficulty, particularly if there was an associated cost.

5.122 Furthermore, the previous experiences of those who become RTM company directors differ greatly. Some are familiar with the duties of company directors from previous professional or personal experience, while others are unacquainted with the relevant concepts. It would therefore be challenging to pitch mandatory training at an appropriate level for all those obliged to undertake it.

5.123 Another factor which weighs against making training mandatory is the difficulty of enforcement. If training were mandatory, it would be necessary to create a penalty for non-compliance. This would also require creating a regulatory structure through which the penalty could be enforced, with a body responsible for policing non-compliance. We think that creating such a framework would be disproportionate given the limited benefits of making training mandatory. Furthermore, the complication created by adding an extra layer to the RTM regime would contradict our aim of making RTM easier and cheaper for leaseholders.

5.124 There is also a risk that mandatory training would give landlords another means by which to challenge RTM applications, by showing that directors have not complied with the requirements, or have done so to an insufficient degree.

5.125 We therefore propose that training should be strongly encouraged, and well publicised, but not mandatory.

Consultation Question 42.

5.126 We provisionally propose that training for RTM company directors should be encouraged and well-publicised, but not mandatory. Do consultees agree?

Who should provide training?

5.127 We provisionally propose that the Government should ensure that adequate training is available for RTM directors which covers, at the very least, the topics dealt with in this consultation paper. We think it must come from the Government rather than industry, for such training to be provided free of charge. As already mentioned, an unsatisfactory feature of some existing educational resources is that they are cost prohibitive. We think that training must be free in order to maximise the number of prospective RTM company directors who undertake it.

5.128 For example, the Government may wish to provide training through a body such as the Leasehold Advisory Service ("LEASE"). LEASE is a Government-funded independent body whose role is to provide free information to the public about residential leasehold. It already publishes advice guides and webinars on a range of topics relating to residential leasehold,[428] and is therefore familiar to leaseholders. It would be entirely in keeping with LEASE's existing functions and output for it to

[428] https://www.lease-advice.org/advice/.

provide resources covering the matters about which we propose prospective directors be educated.

5.129 While both Companies House and LEASE publish information relevant to RTM directors, we think it would be preferable for resources to be provided by, or at least accessible from, a single body's website. This will be the only way to overcome the current fragmented provision of educational resources. It would therefore be best if the Government nominated an appropriate industry body to create a comprehensive "manual" for the RTM, to which leaseholders could refer.

Consultation Question 43.

5.130 We provisionally propose that the Government should ensure that training resources for prospective RTM directors are provided free of charge. Do consultees agree?

RTM COMPANIES' USE OF PROFESSIONAL MANAGING AGENTS

Should it be mandatory for RTM companies to use managing agents?

5.131 We have considered whether it should be mandatory for RTM companies to use managing agents in all or any circumstances.

5.132 The possibility of mandatory use of managing agents was first raised by stakeholders, including some leaseholders. These stakeholders expressed strong support for making use of managing agents compulsory in order to ensure an adequate standard of management. They told us that RTM companies often underestimate the time it takes to manage premises and that, in some cases, the sheer size of the task can lead to buildings falling into disrepair, placing both the leaseholders' and landlords' property interests at risk

5.133 The Ministry of Housing, Communities and Local Government ("MHCLG") is currently undertaking work to set professional standards in leasehold property management by regulating those who act as managing agents. A working group, chaired by Lord Best, is considering the detail of the reform and is due to report back in July 2019.[429] MHCLG have provisionally proposed that managing agents should:

(1) be required to have a nationally recognised qualification to practise;

(2) be subject to a new independent regulator; and

[429] Ministry of Housing, Communities & Local Government, "Regulation of Property Agents Working Group: terms of reference", available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747903/Regulation_of_property_agents_working_group_terms_of_reference.pdf.

(3) subscribe to a new code of practice.[430]

5.134 Provided that MHCLG pursues these policies, it would be possible to define a "professional managing agent" in any provision requiring an RTM company to appoint one.

The arguments for mandatory use of managing agents

5.135 If, after considering the working group's report, MHCLG's proposals to regulate managing agents remain as above, it could be considered unfair that leaseholders whose properties are managed by RTM companies may not benefit from the same protection as those subject to professional freeholder management. This unfairness may arise because professional freeholder management is likely to be carried out by a managing agent which would be subject to the new regulatory regime.

5.136 The use of managing agents is beneficial to both leaseholders and landlords. The property interests of landlords are likely to be better protected if RTM companies must ensure management is carried out to specified professional standards. Managing agents are also likely to have professional indemnity insurance, so leaseholders may have a chance of recovering if they suffer loss due to negligent or bad management.

5.137 High standards of management and recourse will become more important given that our proposals for multi-building RTM and relaxing the qualifying criteria mean there may be more complex premises over which the RTM may be exercised. It may therefore be desirable for the more complex premises subject to the RTM to be managed in accordance with whatever standards are set by MHCLG.

5.138 The vast majority of RTM companies with whom we have met report that they use managing agents already, and we are keen to determine whether that is the case more widely. We have been told by RTM company directors that the ability to replace a poor managing agent with one of good quality is an important benefit of acquiring the RTM and may even be the main motivation for making an RTM claim. Given this, we do not expect that requiring RTM companies to use a regulated managing agent in certain circumstances would be a deterrent to acquiring the RTM.

5.139 The use of a regulated managing agent would provide a safeguard against any shortfall in the knowledge of the directors. The directors would still have overall responsibility for managing the premises, and sole responsibility for non-management issues such as ensuring compliance with company law.

5.140 It should also be noted that, should they wish to, RTM directors could choose to meet MHCLG's regulatory standards themselves by gaining the necessary qualifications to self-manage as a professional managing agent.

---

[430] Ministry of Housing, Communities & Local Government, "Protecting consumers in the letting and managing agent market" April 2018, p 7, available at https://www.gov.uk/government/consultations/protecting-consumers-in-the-letting-and-managing-agent-market-call-for-evidence/.

The arguments against mandatory use of managing agents

5.141 We acknowledge that some RTM companies may be reluctant to appoint a professional managing agent. Since the purpose of the RTM is to give leaseholders greater control over management, instructing managing agents may appear to some RTM companies to be relinquishing an element of that control, with the associated costs. It may also risk encountering the same problems with quality and price that were an issue pre-acquisition. Mandating the use of managing agents in all cases would remove the choice that RTM companies currently have whether to undertake the management themselves.

5.142 Although landlords almost always engage managing agents, they are not required to do so. Therefore, we do not consider that it would be proportionate if RTM companies were required to use a managing agent in all circumstances. Below we consider the circumstances which might justify making use of a managing agent mandatory. We ask for consultees' views.

The circumstances in which use of a managing agent could be made mandatory

5.143 We have considered the following options.

Where the premises consist of more than 25% commercial property

5.144 In Chapter 2, we provisionally propose removing the existing ban on the RTM being exercised in respect of buildings containing non-residential property exceeding more than 25% of the internal floor area.[431] We suggest that, instead, an RTM company exercising the RTM in respect of a building containing commercial (as opposed to non-residential) property exceeding more than 25% of the internal floor area should be required to instruct managing agents which satisfy the standards set by MHCLG. This proposal is intended to safeguard against the risks of removing the exemption.

Where premises are over a certain size

5.145 The difficulty of managing premises increases exponentially with their size, given the greater area to maintain and the greater number of leaseholders to deal with.

5.146 We have been told by stakeholders that, where RTM companies do not appoint a managing agent, this often relates to the size of the premises. Two principal reasons are that:

(1) the block is small enough that it is within the ability of the RTM company to manage it; and/or

(2) the small size of the block, and correspondingly low management fees, mean managing agents may refuse to take on the premises because it would be uneconomical for them to do so.

5.147 While we have heard anecdotal evidence of RTM companies successfully managing larger blocks – including a block of 36 flats, and another of 45 – these examples have been rare.

---

[431] See paras 2.132 to 2.150.

5.148 We seek consultees' views on whether a requirement to use a managing agent should apply where premises are over a certain size, and what the threshold for that size should be.

5.149 While any numerical threshold is arbitrary to an extent, we have been told by leaseholders that it is difficult to get the services of a good managing agent in blocks ranging from 12 flats or fewer to five flats or fewer. We therefore think, if a threshold were set, blocks of 10 units or more might be an appropriate level.

Where the premises have special characteristics

5.150 Another possible circumstance in which use of a managing agent could be made mandatory is if the premises has particular special characteristics. For example, if the premises:

(1) is a listed building;[432] or

(2) has a specialised use, such as retirement property.

Consultation Question 44.

5.151 In your experience, do most RTM companies appoint managing agents?

Consultation Question 45.

5.152 Should it ever be mandatory for RTM companies to use a managing agent which meets the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government?

[432] In accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990.

Consultation Question 46.

5.153 If consultees think it should be mandatory for RTM companies to use a managing agent meeting the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government, are any (or all) of the following the appropriate circumstances in which it should be mandatory:

(1) Where more than 25% of the internal floorspace of the premises is commercial property?

(2) Where the premises have more than a certain number of units?

(3) Where the premises have special characteristics such as:

(a) being a listed building; or

(b) having a specialised use, such as retirement property?

Consultation Question 47.

5.154 If consultees think that use of a managing agent should be mandatory in premises with more than a certain number of units, would 10 units be an appropriate threshold? If not, what would be an appropriate threshold?

Consultation Question 48.

5.155 Are there any other circumstances in which consultees think it should be mandatory to use a managing agent which meets the regulatory standards set by the Ministry of Housing, Communities and Local Government?

THE RTM COMPANY'S MANAGEMENT COSTS

Should RTM companies be able to recover their management costs through the service charge?

The current law

5.156 On acquisition of the RTM, RTM companies become responsible for enforcing payment of service charges. They are therefore "landlords" for the purposes of section 18 of the Landlord and Tenant Act 1985, which defines the service charges which the landlord is entitled to collect.[433] According to section 18, "service charges" include the landlord's "management costs". However, the Upper Tribunal held in

[433] Commonhold and Leasehold Reform Act 2002, sch 7, para 4(2).

Wilson v Lesley Place (RTM) Co Ltd ("*Wilson*") that management costs cannot be interpreted to include the RTM company's administration costs:

> [the costs of establishing and running the company] are not costs of dealing with general management of the block […][434]

Problems with the current law

5.157 This is problematic for two reasons. Firstly, we have been told by stakeholders that, in practice, most RTM companies recover their administration costs by including them in the service charge, regardless of whether the lease permits them to be recovered. This means that, at present, RTM companies are operating in a manner which leaves them open to future legal challenges by leaseholders seeking to recover service charges they were never entitled to collect. Given that RTM companies do not possess capital, the potential consequences of such proceedings are severe, and include insolvency.

5.158 Secondly, the decision in *Wilson* means that RTM companies have no means of recovering their administration costs. No enforcement mechanism is provided for, either in the prescribed articles or in the 2002 Act, again placing the RTM company at risk of insolvency. We consider this to be unfair, and are of the view that RTM companies should be able to recover their running costs as part of the service charge, even where the lease does not permit management costs to be recovered at all.

5.159 Our view is supported by a line of cases in which landlords were held entitled to recover through the service charge both the costs of arranging services and managing their delivery, and the overhead costs incurred in connection with management. These authorities are well summarised in *Waverley Borough Council v Kamal Arya* ("*Waverley*")*.*[435]

5.160 The effect of the opposing decisions in *Waverley* and *Wilson* is that landlords can often recover their administration costs through the service charge as management costs, while an RTM company performing the same management functions as a landlord cannot. We can see no principled reason for this discrepancy. In *Solarbeta Management Co Ltd v Akindele* ("*Solarbeta*")*,* which involved a resident management company, the Upper Tribunal held that the running costs of the management company could be recovered through the service charge:

> [it] is too restrictive and too technical or mechanistic an approach to the construction of clause 6.2.1 [of the lease] to draw any distinction between management of *the Estate* and management of *the Management Company*. There is no sensible distinction between the two because there cannot be one without the other, and the obligations and functions overlap and are all integral to the management of the Estate.[436]

5.161 In *Solarbeta*, the lease itself required the management company to manage the estate and provided that the administration costs would be recoverable through the service

---

434 [2010] UKUT 342 (LC), [2011] Landlord and Tenant Reports 11 at [15].

435 [2013] UKUT 501 at [30].

436 *Solarbeta Management Company Ltd v Akindele* [2014] UKUT 416 (LC) at [32].

charge. The issue was whether the administration costs included, in addition to managing agents' fees, the running costs of the company. While the broad approach of the Upper Tribunal is encouraging, it is unlikely to apply where the lease does not make provision about the management company. To our knowledge, leases do not usually make provision about RTM companies.

Our proposal

5.162 We therefore provisionally propose that the RTM legislation include a provision entitling an RTM company to recover its management costs (including administration costs) as if the lease made express provision for those to be recovered as a service charge.

Is it fair for non-member leaseholders to contribute to RTM company management costs?

5.163 We have considered whether it is fair for non-member leaseholders and landlords who contribute by virtue of section 103 of the 2002 Act, to be liable to pay their proportion of the RTM company's management costs as part of their service charge. We have provisionally decided that it is. Presently, the costs fall on the members of the RTM company alone, relying on their willingness to pay despite not being obliged to do so. This allows other leaseholders to "freeload" and receive the benefits of the RTM without being required to contribute to the legitimate shared costs.

5.164 It should be noted that, in common with all service charges, our proposed change would not allow RTM companies to charge inflated fees for their administration. Like all service charges, recovery of their management costs will be subject to requirement that they have been reasonably incurred.[437]

Consultation Question 49.

5.165 We provisionally propose that RTM companies should be able to recover their management costs (including administration costs) from leaseholders as if the lease made express provision for them to be recovered as part of the service charge. Do consultees agree?

Consultation Question 50.

5.166 Do consultees think that there would be a reduction in litigation if RTM companies were permitted to recover their management costs (including administration costs) through the service charge? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

[437] Landlord and Tenant Act 1985, s 19.

Chapter 6: Notices

6.1 In the previous chapter, we discuss the formation of the RTM company. Once the RTM company has been set up, it must follow a statutory process in order to acquire the RTM. As part of this process, a number of statutory notices must be served on the relevant parties. In this chapter we detail the existing notice procedure, identify the problems with the existing process and propose solutions.

THE PROCESS FOR CLAIMING THE RTM: OVERVIEW

6.2 The process is set out in the 2002 Act. To claim the RTM, the RTM company must:

(1) serve a notice inviting participation on the qualifying tenants who are not already members of the RTM company (or who have not already agreed to become members); and then

(2) serve a claim notice on any landlords and other relevant third parties.

6.3 Other relevant third parties for this purpose include: (i) any other party to any of the qualifying tenants' leases, who is not the leaseholder; (ii) any manager appointed under Part 2 of the Landlord and Tenant Act 1987 ("the 1987 Act"); and (iii) any intermediate landlord.[438]

6.4 The claim notice must state both a date by which a relevant third party must give any counter-notice and the date on which the RTM company intends to acquire management.

6.5 If the landlord or any relevant third party does not serve a counter-notice, or the RTM company's claim is accepted in the counter-notice(s), the RTM company acquires the RTM on the date given by the RTM company in the claim notice as the proposed acquisition date.[439]

6.6 If a counter-notice is served and the landlord disputes the RTM company's entitlement to the RTM, the RTM company must apply to the tribunal to acquire the RTM.

NOTICE INVITING PARTICIPATION

Current law

6.7 Before making any claim to acquire the RTM, the RTM company must give[440] a notice inviting participation to each qualifying tenant[441] who is not already a member of the

---

438 Commonhold and Leasehold Reform Act 2002, s 79(6).

439 We discuss the acquisition date in Chapter 7.

440 See Commonhold and Leasehold Reform Act 2002, s 111(5).

441 In summary, any long leaseholder in the premises. We discuss the definition of qualifying tenant from para 3.3.

RTM company or has not agreed to become a member.[442] If all qualifying tenants are already members of the RTM company (or have agreed to become members) then this stage of the process can be ignored.

6.8 The notice must be in writing.[443] The purpose of the notice is to notify all qualifying tenants that an RTM claim is being made and to provide an opportunity for them to become members of the RTM company at the earliest opportunity.[444]

6.9 The requirement to "give" the notice means that it must be served. Service can be actual service (whether by post or hand delivery) or deemed service (where the law determines that a notice has been received even if, in fact, it was not).

6.10 An RTM company may serve a leaseholder by sending the notice to the flat, unless an alternative address is given.[445] The advantage of this method of service is that it is immaterial whether the leaseholder actually receives the notice, because service is deemed to have been effective.[446]

6.11 If a landlord has the benefit of a lease within its own building and is therefore a "qualifying tenant", the notice inviting participation must also be served on the landlord as on any other qualifying tenant. If a landlord has retained flats which are not granted on a long lease, then there is no requirement to serve a notice inviting participation on the landlord.

Form and content of the notice inviting participation

6.12 The form and content of the notice is prescribed in regulations.[447] It must:

(1) state that the RTM company intends to acquire the RTM;

(2) give the RTM company's registered number at Companies House, the address of its registered office and the names of its directors and members;

(3) give the names of the landlord and any relevant third parties;

(4) include statements that, if the RTM is acquired by the RTM company:

(a) the RTM company will be responsible for:

(i) the discharge of the landlord's duties under the lease; and

---

442 Commonhold and Leasehold Reform Act 2002, s 78(1).

443 Commonhold and Leasehold Reform Act 2002, s 111(1)(a).

444 *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

445 Commonhold and Leasehold Reform Act 2002, s 111(5).

446 *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 213 (LC), [2013] Landlord and Tenant Reports 23.

447 Commonhold and Leasehold Reform Act 2002, ss 78(2) and (3); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684.

(ii) the exercise of the landlord's powers under the lease;

with respect to services, repairs, maintenance, improvements, insurance and management;

(b) the RTM company may enforce other tenant covenants;

(c) the RTM company will not be responsible for the discharge of the landlord's duties or the exercise of their powers under the lease:

(i) with respect to a matter concerning only a part of the premises consisting of a unit not subject to a lease held by a qualifying tenant; or

(ii) relating to re-entry or forfeiture; and

(d) the RTM company will have functions under specified statutory provisions;

(5) indicate whether the RTM company intends to appoint a managing agent and:

(a) if it does so intend, the name and address of the proposed managing agent (if known) and (if applicable) that the person is the landlord's managing agent; or

(b) if it does not so intend, the qualifications or experience (if any) of the existing members of the RTM company in relation to the management of residential property; and

(6) invite the recipients of the notice to become members of the RTM company but advise them that:

(a) where the RTM company gives a claim notice, a person who is or has been a member of the RTM company may be liable for the costs incurred by the landlord and others in consequence of the notice; and

(b) if the recipient of the notice does not fully understand its purpose or implications, they should seek professional help.

6.13 The notice must also include prescribed notes explaining its effect. It must also either be accompanied by a copy of the articles of association of the RTM company or include details as to where those articles can be inspected or how they can be ordered.[448] The Court of Appeal has doubted the utility of the inspection provisions given that the articles must be in a prescribed form and there is a right to obtain a copy of them on payment of a modest fee.[449]

---

448 Commonhold and Leasehold Reform Act 2002, ss 78(4) to (5). Failure to allow inspection or provide a copy means that the notice is not treated as having been given to the affected person under section 78(6) of the Commonhold and Leasehold Reform Act 2002.

449 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

Effect of errors in the notice inviting participation

6.14 The 2002 Act is explicit that a notice inviting participation is not invalidated by any inaccuracy.[450] The distinction between an inaccuracy and some more serious error is not always easy to draw and the case law has developed by way of examples, rather than statements of principle. It was held that the 2002 Act can save an error in providing otherwise correct information, such as a typographical error in the address of the property.[451] Conversely, in the same case it was held that the 2002 Act cannot save a notice which omits relevant information entirely, for example, by naming the wrong landlord.[452]

6.15 Even if the error goes beyond an inaccuracy, it may not be fatal to the process. It is necessary to ask whether Parliament intended that the error should result in total invalidity.[453] A failure to provide the prescribed notes which explain the effect of the notice is an error which results in total invalidity.[454]

6.16 Landlords frequently seek to put the RTM company to proof that the notice inviting participation has been properly served. We have been told that landlords often require the RTM company to provide signed copies of the application forms from the members and date-stamped registers, and otherwise look for errors in the process. There is uncertainty as to the state of the law on this issue:

(1) In *Sinclair Gardens Investments (Kensington) Ltd v Oak Investments RTM Co Ltd*[455] a notice inviting participation had not been served on one of two joint tenants of a flat. The other joint tenant was a member of the RTM company. The joint tenant who had not been served had been fully aware of the application and subsequently applied to become a member of the RTM company. The failure to serve the joint tenant did not invalidate the notice.

(2) The failure to serve one joint tenant did not affect the validity of the RTM claim because it did not cause any prejudice. The tribunal considered the prejudice to both the landlord and the leaseholders who had not been served. The "prejudice" test was also applied in *Alleyn Court RTM Co Ltd v Abou-Hamdan*[456] and *Avon Freeholds Ltd v Regent Court RTM Co Ltd*.[457]

(3) More recently, in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* ("*Elim Court*"),[458] the Court of Appeal disapproved the "prejudice" test. The court held that, where

---

450 Commonhold and Leasehold Reform Act 2002, s 78(7).

451 *Assethold Ltd v 15 Yonge Park RTM* [2011] UKUT 379 (LC); *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC).

452 *Assethold Ltd v 13-24 Romside Place RTM Co Ltd* [2013] UKUT 603 (LC).

453 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

454 *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

455 (15 June 2004) LRX/52/2004 First-tier Tribunal Property Chamber (Residential Property) (unreported).

456 [2012] UKUT 74 (LC).

457 [2013] UKUT 213 (LC), [2013] Landlord and Tenant Reports 23.

458 [2017] EWCA Civ 89, [2018] QB 571.

there had been a failure to comply with any requirements of the statutory scheme, the question was whether Parliament could be said to have intended total invalidity to be the result. Accordingly, whilst the results in the earlier decisions may be correct, their reasoning can no longer be considered good law.

6.17 The notice inviting participation must be a valid notice, otherwise the subsequent claim notice is invalid. This can encourage landlords to take technical challenges to the validity of the notice inviting participation as a collateral attack on an otherwise valid claim notice.[459]

Usefulness of the notice inviting participation?

6.18 The primary purpose of the notice inviting participation is to ensure that qualifying tenants are given the opportunity to join the RTM company before the start of the RTM process. Service of the notice inviting participation might also help the RTM company to obtain sufficient membership to proceed with the RTM claim.

6.19 In practice, however, it is unlikely that a leaseholder would be unaware of the RTM process whilst it was ongoing. Many RTM companies already make strenuous efforts to identify qualifying tenants and persuade as many as possible to join the RTM company; in some cases, even before the RTM company has been incorporated. We have been told that most RTM companies do this to ensure that they have enough qualifying tenants to enable the RTM company to serve a claim notice, and to avoid arguments about whether there was sufficient membership. Maximising membership of the RTM company also ensures that the costs of the process are shared between as many leaseholders as possible.

6.20 Qualifying tenants also have an unfettered right to join the RTM company at any time, preserved in the RTM company's articles of association.[460] Any qualifying tenants who did not join initially are able to join at any time afterwards.[461]

Our proposal

6.21 The case law indicates that the notice inviting participation has largely been used as a vehicle for landlords' objections rather than as a means of empowering leaseholders to join the RTM company.

6.22 In our enfranchisement consultation paper we noted that the 2002 Act sought to introduce notices inviting participation for collective enfranchisement claims,[462]

---

459 See, for example, *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 502 (LC), [2014] Landlord and Tenant Reports 6; *Assethold Ltd v 13-24 Romside Place RTM Co Ltd* [2013] UKUT 603 (LC); *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

460 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 26; RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 26.

461 We discuss the process for joining the RTM company, and the landlord's right to join the RTM company after the RTM is acquired, in Chapter 5.

462 Leasehold Reform, Housing and Urban Development Act 1993, s 12A amended by s 123 of the Commonhold and Leasehold Reform Act 2002.

although these provisions have never been brought into force.[463] We did not propose to revive the requirement for notices inviting participation for collective freehold acquisition (which is our proposed equivalent right to the existing right of collective enfranchisement). Instead, we proposed a new right to participate that would entitle leaseholders who had not participated in an earlier collective freehold acquisition to purchase a share of the freehold held by those who had done so. Leaseholders who had not known that others were bringing a collective freehold acquisition claim (or for some other reason did not join in) would therefore be able to acquire a share in the freehold at a later date.[464]

6.23 In the RTM context, we provisionally propose to abolish the requirement to serve a notice inviting participation. This will bring the processes for RTM and enfranchisement claims into closer alignment. We think it should be for the RTM company to make its own arrangements to ensure that it has sufficient qualifying tenants as members. Whilst we acknowledge that leaseholders currently receive some benefit from the formal notice, we think the RTM company will be sufficiently incentivised to encourage qualifying tenants to become members as the costs of the process can then be shared.

6.24 The existing legislative provisions also protect the leaseholders' rights to join the RTM company at any point, if they wish to do so, and we propose to retain this. We consider that the prescribed notes accompanying the claim notice (a copy of which is served on the qualifying tenants)[465] should include a statement to remind qualifying tenants of their right to join the RTM company. This will bring the right to the attention of any qualifying tenants who have not yet become members of the RTM company.

6.25 Abolishing the requirement to serve notices inviting participation would reduce the upfront costs of an RTM claim, making the process cheaper and simpler for leaseholders in line with our Terms of Reference. Moreover, it would eliminate the opportunity for a landlord to challenge the RTM claim based on a technical deficiency of the notice inviting participation.

Consultation Question 51.

6.26 We provisionally propose that the requirement to serve notices inviting participation should be abolished. Do consultees agree?

[463] Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.42.

[464] See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 6.152 to 6.156 and 11.41 to 11.43.

[465] We discuss this at para 6.35 below.

Consultation Question 52.

6.27 Do consultees think the acquisition process would be shorter and/or cheaper if notices inviting participation were abolished? If possible, please estimate how much time and/or money the average RTM company might save.

Consultation Question 53.

6.28 We provisionally propose that the prescribed notes accompanying the claim notice should include a statement that qualifying tenants are entitled to join the RTM company at any time. Do consultees agree?

CLAIM NOTICE

Current law

6.29 Assuming that the premises qualify (which we discuss in Chapter 2), the RTM company must have a minimum number of qualifying tenants as members before it can serve a claim notice. If there are only two qualifying tenants in the premises then both must be members, otherwise the number of members of the RTM company must be at least equal to half the total number of flats in the building.[466] We discuss qualifying tenant membership and our proposals for reform in Chapter 2. Landlords frequently challenge whether the RTM company has a sufficient number of leaseholder members.[467]

6.30 The claim notice cannot be given less than 14 days after the notice inviting participation was given. There does not appear to be a "cut off" date after which a notice inviting participation lapses and a new notice inviting participation must be served before the RTM company can claim the RTM. The test is whether there has been an alteration in the identity of those entitled to participate or in the nature of the claim which renders the notice inviting participation invalid.[468]

Form and content of claim notice

6.31 The form and content of the claim notice are prescribed.[469] It must:

---

466 Commonhold and Leasehold Reform Act 2002, ss 79(4) to (5).

467 See, for example, *Southall Court (Residents) Ltd v Buy Your Freehold Ltd* (23 July 2008) LRX/124/2007 Lands Tribunal (unreported).

468 *Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Co Ltd* [2011] UKUT 349 (LC).

469 Commonhold and Leasehold Reform Act 2002, ss 80(8) and (9); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684.

(1) state the name and registered office of the RTM company;[470]

(2) specify the premises[471] and contain a statement of the grounds on which it is claimed that they are premises to which the RTM applies; [472]

(3) state the full name and address of each qualifying tenant of a flat contained in the premises who is a member of the RTM company;

(4) contain particulars of the lease of each qualifying tenant member of the RTM company as are sufficient to identify it, including the date of the lease, the term of years and the date when the term commenced;

(5) specify a date, not earlier than one month after the claim notice is given, by which a counter-notice may be given; [473]

(6) specify a date, at least three months after the deadline for the counter-notice, on which the RTM company intends to acquire the RTM; [474]

(7) require any manager of the premises who does not dispute the RTM claim to notify the RTM company and the contractors about existing management contracts;

(8) contain a statement that, from the acquisition date, landlords under leases of the whole or any part of the premises to which the claim notice relates are entitled to be members of the RTM company;

(9) contain a statement that the notice is not invalidated by any inaccuracy in any of the particulars, but that a person who is of the opinion that any of the particulars contained in the claim notice are inaccurate may:

(a) identify the particulars in question to the RTM company by which the notice was given; and

(b) indicate the respects in which they are considered to be inaccurate; and

(10) advise that a person who receives the notice but does not fully understand its purpose should seek professional help.

---

470 The registered office address is also the address at which any counter-notice must be served: paragraph 1, schedule 2 of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825 for England and paragraph 1, schedule 2 of the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684 for Wales.

471 It can only be a single set of premises. See *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282, [2016] 1 WLR 275.

472 Commonhold and Leasehold Reform Act 2002, s 80(2).

473 Commonhold and Leasehold Reform Act 2002, s 80(6). Calculating this date has sometimes proved surprisingly difficult: see, for example *Moskovitz v 75 Worple Road RTM Co Ltd* [2010] UKUT 393 (LC), [2011] Landlord and Tenant Reports 4; *Windermere Court Kenley RTM Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2014] UKUT 420 (LC).

474 Commonhold and Leasehold Reform Act 2002, s 80(7).

6.32 As with the notice inviting participation, there are also prescribed notes which must accompany the claim notice.

6.33 There is no need to specify which management functions are being claimed or to identify what appurtenant property is the subject of the claim, because all functions are automatically acquired over the premises and any appurtenant property.[475] Indeed, there are good reasons not to specify what appurtenant property is claimed as an error may invalidate the claim notice.[476] There is also no requirement to attach a plan to the notice, although we have been told by stakeholders that this is occasionally included.[477]

6.34 The notice must be given to:[478]

(1) any landlord under a lease of the whole or any part of the premises, including an intermediate landlord;[479]

(2) any other party to such a lease otherwise than as landlord or tenant, such as a management company under a tripartite lease;

(3) any manager appointed under Part 2 of the 1987 Act ("a 1987 Act manager"). The notice must also be given to the court or tribunal that appointed them.[480]

6.35 A copy of the claim notice must also be given to any qualifying tenant.[481] Such a notice may be given by email.[482]

6.36 Landlords frequently dispute whether a notice has been given. For example:

(1) In *Plintal SA v 36-48A Edgewood Drive RTM Co Ltd*[483] the landlord contended that the notice had not been given because it had not been served at its registered office in an off-shore jurisdiction. This was despite the fact that the landlord received the notice and responded to it. The RTM company accepted

---

475 We discuss management functions and appurtenant property in Chapters 8 and 4 respectively.

476 *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988; *Pineview Ltd v 83 Crampton St RTM Co* Ltd [2013] UKUT 598 (LC); *Miltonland Ltd v Platinum House (Harrow) RTM Co Ltd* [2015] UKUT 236 (LC), [2016] Landlord and Tenant Reports 9.

477 Although in light of *Miltonland Ltd v Platinum House (Harrow) RTM Co Ltd* [2015] UKUT 236 (LC), [2016] Landlord and Tenant Reports 9 this is not a good idea, given the risk of invalidity arising from an error in the plan.

478 Commonhold and Leasehold Reform Act 2002, s 79(6). Where a person cannot be found, s 79(7) makes alternative provision for giving of notices; see below from para 6.141.

479 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

480 Commonhold and Leasehold Reform Act 2002, s 79(9).

481 Commonhold and Leasehold Reform Act 2002, s 79(8).

482 *Assethold Ltd v 110 Boulevard RTM Co Ltd* [2017] UKUT 316 (LC), [2017] 4 WLR 181. This requirement is also of secondary importance and failure is unlikely to invalidate the RTM process. This is a more generous regime than presently applicable to claims under the Leasehold Reform, Housing and Urban Development Act 1993: *Cowthorpe Road 1-1A Freehold Ltd v Wahedally* [2017] Landlord and Tenant Reports 4.

483 (05 March 2008) LRX/16/2007 Lands Tribunal (unreported).

that the claim notice had not been properly served, although the Leasehold Valuation Tribunal and Lands Tribunal considered that the company was wrong to do so.[484]

(2) In *Gateway Property Holdings Ltd v Ross Wharf RTM Co Ltd*,[485] the landlord disputed that service at its registered address was sufficient as it contended that it had specified an alternative address for service. This argument was eventually dismissed by the tribunal.

6.37 As with the notice inviting participation, the claim notice is not invalidated by inaccuracy in any of its particulars.[486] The case law does, however, draw the same distinction between inaccuracies and omissions.[487] For example, a failure to include the notes will invalidate the claim notice.[488]

6.38 There can only be one operative claim notice for any premises at any time.[489] We have been told that, on occasion, an RTM company will serve a second (or third and so on) claim notice without prejudice to the validity of the first notice. This is often done where the landlord challenges the validity of the first notice and the RTM company attempts to rectify the alleged issue with the first notice, but without accepting that the first notice is not valid. The operative notice will be the first valid notice given (which might not necessarily be the first actual notice given).

6.39 Once a claim notice has been given, then various rights of access arise. In all cases, the right extends to any part of the premises that it is reasonable to access in connection with any matter arising out of the RTM claim.[490] Access must be at a reasonable time and after giving not less than ten days' notice.[491]

6.40 The right is exercisable by:[492]

(1) any person authorised to act on behalf of the RTM company;

(2) any person who is landlord under a lease of the whole or any part of the premises and any person authorised to act on behalf of any such person;

---

484 The case concerned the RTM company's liability for costs under sections 88 and 89 of the Commonhold and Leasehold Reform Act 2002, so the tribunals' discussions about service of the notice are not binding.

485 [2016] UKUT 97 (LC), [2016] Landlord and Tenant Reports 15.

486 Commonhold and Leasehold Reform Act 2002, s 81(1).

487 See paras 6.14 and 6.15 above, which apply with equal force.

488 *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

489 Commonhold and Leasehold Reform Act 2002, ss 81(3) to (4).

490 Commonhold and Leasehold Reform Act 2002, s 83(1).

491 Commonhold and Leasehold Reform Act 2002, s 83(3).

492 These parties may wish to access the premises to determine whether the premises meet the RTM qualification criteria or to examine shared services.

(3) any person who is party to such a lease otherwise than as landlord or tenant and any person authorised to act on behalf of any such person; and

(4) any 1987 Act manager appointed to act in relation to the premises, or any premises containing or contained in the premises, and any person authorised to act on behalf of any such manager.

Withdrawal of claim notice

6.41 The RTM company may withdraw the claim notice at any time before it acquires the RTM.[493] It does so by giving notice of withdrawal to each landlord, third party manager, 1987 Act manager and qualifying tenant.[494]

6.42 In addition, a claim notice is deemed withdrawn if:[495]

(1) the RTM company receives a negative counter-notice and does not make an application to the tribunal for a determination that it is entitled to acquire the RTM within the prescribed time;

(2) the RTM company makes such an application to the tribunal but then withdraws that application;

(3) a winding up order is made, a resolution for a voluntary winding-up is passed, a receiver or manager of the RTM company is appointed, possession is taken by a debenture holder or a voluntary arrangement under the Insolvency Act 1986 is approved; or

(4) the RTM company is struck off the register of companies.

6.43 In our enfranchisement consultation paper, we noted that currently:

> a leaseholder's enfranchisement claim under the 1993 Act will be deemed to have been withdrawn if one of many deadlines for the progression of the claim are not met. The effect has been to create a series of traps into which leaseholders may fall, causing their claim to be treated as having been withdrawn, and making them liable to pay the landlord's non-litigation costs.[496]

6.44 We were also told in connection with enfranchisement that landlords sometimes encourage leaseholders to believe that an agreement will be reached, making the next step unnecessary, so that they miss their deadline and have to start a fresh

---

493 Commonhold and Leasehold Reform Act 2002, s 86(1).

494 Commonhold and Leasehold Reform Act 2002, s 86(2).

495 Commonhold and Leasehold Reform Act 2002, s 87.

496 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.148.

enfranchisement claim. Leaseholders are not able to bring a fresh claim within the 12 months following deemed withdrawal of a notice.[497]

6.45 To address the trap which leaseholders can fall into regarding the claim process deadlines, we provisionally proposed abolishing the deemed withdrawal provisions for enfranchisement claims. Instead, we proposed that a landlord who has served a Response Notice[498] should be able to apply to the tribunal for an order striking out the claim notice if the leaseholders have not taken the next procedural step within a reasonable time.[499]

6.46 In order to be able to make such an application to the tribunal, the landlord must have given the leaseholders 14 days' written notice of their intention to apply. We also proposed that other leaseholders should be able to apply for the same order if no steps have been taken within the prescribed period for a collective freehold acquisition claim and they wish to issue a new claim over the same premises.[500]

6.47 We are not aware of any problems arising from the deemed withdrawal provisions in the RTM context, although it seems likely that similar problems could arise as in enfranchisement claims. We consider that our proposal in the enfranchisement consultation paper offers greater protection to leaseholders. We therefore provisionally propose that the same approach should apply to the RTM in respect of an RTM company's failure to progress the claim.

6.48 We propose that the deemed withdrawal provisions should continue to apply in the circumstances set out at paragraph 6.42(2), (3) and (4) above. However, in Chapter 11, we make new proposals concerning the restoration of RTM companies that have been struck off the register following an administrative error.[501] If an RTM company was restored under this proposal, we envisage that an undetermined claim notice would also be restored and there should be no deemed withdrawal of the claim.

---

497 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.149 to 11.150. There is no such time restriction on the giving of a new notice claiming the RTM where one notice has been withdrawn.

498 This is the equivalent of a counter-notice in RTM. See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, p xvi for the definition of a Response Notice.

499 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.151. There is no set period either to set a deadline by which a step should have been taken by the leaseholders or which must have expired before a letter warning of an application to strike out can be made.

500 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.152.

501 See from para 11.93.

Consultation Question 54.

6.49 In our enfranchisement consultation paper we provisionally proposed to replace the current deemed withdrawal provisions for a claim notice. If this proposal applied in the RTM context, landlords who have served a counter-notice and leaseholders would have a new right to apply to the tribunal for an order striking out the claim where the RTM company has not initiated the next step in the process.

We provisionally propose that the same right should be introduced in the RTM context. Do consultees agree? This would replace the rule that the RTM company is deemed to have withdrawn its claim if it does not apply to the tribunal after receiving a negative counter-notice. If consultees think the position should be different from that in enfranchisement, please give reasons.

COUNTER-NOTICE

Current law

6.50 A landlord, manager or relevant third party who has been given a claim notice may give a counter-notice.[502] The counter-notice must be given no later than the date specified in the claim notice.[503] As with the notice inviting participation and the notice of claim, the form and content is prescribed.[504]

6.51 The counter-notice must:

(1) either admit that the RTM company is entitled to acquire the RTM or allege that, by reason of a specified provision in the 2002 Act, the company is not entitled.[505] In practice, landlords usually give general and bland statements of denial rather than detailed arguments. Moreover, additional arguments and objections not raised in the counter-notice can be raised in any subsequent tribunal proceedings;[506]

(2) include a statement that, where the RTM company has been given a counter-notice denying that it is entitled to acquire the RTM, the company may apply to the tribunal for a determination that it is so entitled; and

---

502 Commonhold and Leasehold Reform Act 2002, s 84(1).

503 Commonhold and Leasehold Reform Act 2002, s 84(1).

504 Commonhold and Leasehold Reform Act 2002, s 84(2); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684.

505 Commonhold and Leasehold Reform Act 2002, s 84(2).

506 *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 502 (LC), [2014] Landlord and Tenant Reports 6; *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC).

(3) include a statement that, where the RTM company has been given a counter-notice denying that it is entitled to acquire the RTM, the company does not acquire the RTM unless:

(a) on an application to the tribunal, it is finally determined that the RTM company was entitled to acquire the RTM; or

(b) the person by whom the counter-notice was given agrees in writing that the company was so entitled.

6.52 As with the notice inviting participation and the claim notice, there are prescribed notes which must accompany the counter-notice.

6.53 Unlike with the notice inviting participation and the claim notice, there is no statutory "saving" provision in the event of errors.[507] It has been held, however, that the "reasonable recipient" test applies to any error,[508] so that if there is any ambiguity in the counter-notice, the court considers how a reasonable person with knowledge of the context would have understood it.[509]

6.54 Once an RTM company has received a counter-notice disputing that it can exercise the RTM, it cannot acquire the RTM without a decision to that effect from the tribunal, unless the counter-notice is superseded by the person or persons who gave it.[510] We discuss the process where no counter-notice is received below.[511]

Problems with the counter-notice

6.55 The landlord is not necessarily limited to the objections raised in the counter-notice. They can, with the permission of the tribunal, raise additional arguments at a later stage, even as late as the day of the hearing.[512]

6.56 The right of the landlord to add additional arguments to those set out in the counter-notice later on in the process was much criticised by stakeholders. They argued that it leaves RTM companies open to a late ambush and, given that the RTM company risks having to pay the landlord's costs as well as its own, one which exposes the RTM company to a significant financial risk.[513]

6.57 There is no requirement for the landlord to specify details of why a negative counter-notice has been served. The 2002 Act simply requires the counter-notice to refer to the relevant section of the 2002 Act with which the RTM company has failed to

---

507 Although the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684 do provide that a form "to like effect" as the prescribed form is valid.

508 *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 541 (LC).

509 *Mannai Investment Co Ltd Appellant v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

510 Commonhold and Leasehold Reform Act 2002, ss 84(3) and (5).

511 See from para 6.62 below.

512 *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 502 (LC), [2014] Landlord and Tenant Reports 6; *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC); *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

513 See from para 10.71 for the current law on costs and our proposals for reform.

comply. For example, the landlord may simply refer to failures to comply with the requirement to serve notices inviting participation under section 78. A failure under section 78 could relate to any number of requirements (which we detail above) and it can be difficult for the RTM company to then establish the strength of the landlord's rejection.

6.58 The absence of any requirement for the counter-notice to give specific details of the objection to the RTM can lead to parties, both landlords and RTM companies, incurring unnecessary costs. Often the parties do not know the details of the objection (or the potential answers to it) until written arguments and evidence have been exchanged as part of the tribunal proceedings.

6.59 Some stakeholders told us that landlords sometimes serve negative counter-notices without valid reason, in order to force the RTM companies to incur the costs of issuing the tribunal application. Immediately prior to the hearing, the landlord then accepts the RTM company's entitlement to acquire the RTM. These practices delay the acquisition date and force the RTM company to incur unnecessary costs.

Our proposal

6.60 We consider that the right of the landlord to add additional arguments to those set out in the counter-notice is undesirable. It can encourage landlords to adopt a tactical approach in their counter-notice, perhaps holding back an argument until later in the process. We provisionally propose, therefore, that there should be a requirement to include in the counter-notice all arguments that the landlord wishes to advance. In Chapter 10, we also ask whether the RTM company's existing liability for the landlord's costs – potentially including litigation costs – should be reformed.

Consultation Question 55.

6.61 We provisionally propose that landlords should be required to state all possible objections in the counter-notice and should not generally be permitted to raise new arguments at a later stage. Do consultees agree?

Problems arising where no counter-notice is served

6.62 Where no counter-notice is given, there is deemed to be no dispute about the entitlement of the RTM company to acquire the RTM.[514] On the face of it, the RTM company therefore acquires the RTM on the date specified in the claim notice.[515] However, in the absence of a counter-notice, there is no obvious venue for determining whether a claim is valid, and no protection from challenges to the RTM being made in the future.[516]

---

514 Commonhold and Leasehold Reform Act 2002, s 90(3).

515 Commonhold and Leasehold Reform Act 2002, s 90(2).

516 We are aware of cases where this issue has arisen. The most common is where an RTM company has issued proceedings for service charge arrears and the claim has been defended on the basis that there was

6.63 This problem does not currently arise where a landlord fails to give a counter-notice in relation to enfranchisement claims under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"). If no counter-notice is given, the nominee purchaser (freehold acquisition) or leaseholder (lease extension) must apply to the county court for an order determining the terms on which they are entitled to acquire the freehold or obtain a new lease.[517] This provides a safeguard against defective claims proceeding notwithstanding the absence of a counter-notice.

6.64 In our enfranchisement consultation paper, we proposed to remove the draconian effect of a failure to serve a counter-notice. However, we provisionally proposed to retain the substantive safeguard by requiring the tribunal to determine the extent of the premises to be acquired and the terms of acquisition.[518] This will also require the leaseholders to prove they satisfy the eligibility criteria for a collective enfranchisement claim.[519]

6.65 The absence of such a safeguard in the RTM legislation is striking. It potentially works to the detriment of both leaseholders and landlords as it means there may be subsequent satellite litigation concerning the validity of the RTM claim and the rights of the RTM company.[520]

6.66 We have considered whether the failure of the landlord, or other relevant third party, to challenge the validity of the RTM claim in a counter-notice would prevent them from making the argument at a later date. However, we think it is unlikely. Even though the 2002 Act currently provides for the RTM to be acquired if no counter-notice is served, the RTM can only be exercised in respect of defined "premises".[521] The acquisition of the RTM must therefore be subject to the property meeting the qualifying criteria. Where an Act of Parliament confers a right on a specified class, parties cannot enlarge that right by, for example, requiring a court to proceed as if an Act applied where, on the facts, it does not.[522] Indeed, because the issue goes to jurisdiction, a

---

no valid RTM acquired (because, for example, the premises were not qualifying premises under the Commonhold and Leasehold Reform Act 2002).

517 Leasehold Reform, Housing and Urban Development Act 1993, ss 25 and 49. If the applicant shows that they are entitled to enfranchise, and have served the claim notice properly, the freehold or lease extension will be acquired on the terms set out in the claim notice: see Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 10.103 and 10.154. Such an application will not be necessary if the parties reach agreement as to the terms on which the transfer should be made or the lease extension granted.

518 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.9(9) and 11.125. Under this proposal, leaseholders would still be required to make an application to the tribunal, but would no longer be entitled to acquire the interest on the terms set out in their claim notice.

519 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.125.

520 For example, *Avon Ground Rents Ltd v Hayes Point RTM Co Ltd* (11 July 2017) D30CF139 High Court, Cardiff District Registry (unreported).

521 Commonhold and Leasehold Reform Act 2002, ss 71 to 72.

522 *Errington v Errington & Woods* [1952] 1 KB 260; *Rogers v Hyde* [1951] 2 KB 923.

party appears to be free to take the point on appeal for the first time, even if not taken at trial.[523]

6.67 The practical effect is that an RTM company can never be sure it has properly acquired the RTM over premises where the landlord does not serve a counter-notice.

6.68 Even if the landlord, manager and interested third parties were prevented from making challenges after RTM acquisition (because they did not raise them in response to the claim), other parties who subsequently became interested in the property would not be so prevented.[524] The issue might arise where, for example, the landlord sells the freehold after the RTM company has taken over management and the new freeholder challenges the validity of the RTM on the basis that the property comprises over 25% non-residential premises. The failure by the original landlord to serve a counter-notice raising this challenge is not relevant: the new freeholder can still seek to undo the RTM.[525]

Our proposal

6.69 We consider that the present uncertainty that arises where there has been a failure to serve a counter-notice is undesirable for all parties.

6.70 We propose that where no counter-notice has been served, the RTM company should be able to apply to the tribunal asking it to determine:

(1) that the RTM company was on the relevant date entitled to acquire the RTM; and

(2) the acquisition date on which the RTM was or will be acquired.

6.71 We would anticipate that the tribunal would be able to deal with such applications relatively easily on consideration of the relevant paperwork, as happens with applications to renew recognised tenants' associations.

6.72 We do not propose making such an application to the tribunal mandatory because of the additional costs involved. However, we think an RTM company should have this as an option and consider it would be highly advantageous for it to utilise this process. The advantage of this process is that it will ensure that there is a determination from the tribunal which should protect the RTM company against subsequent satellite litigation.

6.73 We are concerned that our proposals to restrict the ability of the landlord to raise new arguments after service of the counter-notice may encourage unscrupulous landlords to abstain from serving a counter-notice at all. This would mean that all grounds of

---

523 *Bacon v Mountview Estates Plc* [2015] UKUT 588 (LC), [2016] 1 Property, Planning & Compensation Reports DG14.

524 See *Daejan Properties Ltd v Mahoney* [1995] 2 Estates Gazette Law Reports 75, where it was held that a tenant did not become a statutory tenant by estoppel but that estoppel prevented the landlord from denying that the tenant was entitled to be treated as a statutory tenant.

525 As happened (albeit as part of a structured compromise agreement) in *Avon Ground Rents Ltd v Hayes Point RTM Co Ltd Point RTM Co Ltd* (11 July 2017) D30CF139 High Court, Cardiff District Registry (unreported).

challenge would then be available to the landlord if the RTM company applied to the tribunal for a determination that the RTM was acquired.

6.74 We therefore provisionally propose that where, in the absence of a counter-notice, the RTM company applies to the tribunal for a determination, the landlord should be required to apply to the tribunal for permission before being entitled to participate and challenge the application. We envisage that the tribunal would permit a landlord to participate in any proceedings thereafter only where it is just and equitable to do so. The tribunal would also be empowered to give permission conditional on such terms as it thinks fit. Such terms might, for example, include an order that the landlord pays the RTM company's costs or that the landlord is limited to challenging the application for the RTM only on the grounds provided in the application for permission.[526]

6.75 In Chapter 4, we propose that there should be a presumption that management functions over non-exclusive appurtenant property do not transfer to the RTM company unless there is an agreement or determination otherwise.[527] If an RTM company wished to acquire these management functions, they will need in the first instance to request them in the claim notice. We do not consider that a failure to serve a counter-notice constitutes an "agreement" by the landlord to such a request from the RTM company so as to rebut the presumption. This is because, as we discuss in Chapter 4, any agreement or determination rebutting the presumption would need to address the practicalities of dual management. If these management functions transferred simply on a failure to serve a counter-notice, these practicalities are less likely to have been addressed and this may lead to issues further down the line.

6.76 If an RTM company wished to pursue the acquisition of these management functions where the landlord had failed to serve a counter-notice, and was otherwise unable to reach an agreement with the landlord, the RTM company could apply to the tribunal for a determination. We envisage that the requirement proposed above for the landlord to apply to the tribunal for permission to participate in, and challenge, the application would similarly apply to this instance. The RTM company could seek a determination on the management functions relating to non-exclusive appurtenant property in the same application as a determination on the right to acquire the RTM and the acquisition date.

---

526 We make an equivalent proposal in our enfranchisement consultation paper. See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.129.

527 See paras 4.101 to 4.116.

Consultation Question 56.

6.77 We provisionally propose that, where a counter-notice has not been served, the RTM company should be able to apply to the tribunal to determine:

(1) that the RTM company was on the relevant date entitled to acquire the RTM;

(2) the acquisition date on which the RTM was or will be acquired; and/or

(3) the transfer of management functions in respect of non-exclusive appurtenant property.

Do consultees agree?

Consultation Question 57.

6.78 We provisionally propose that, where no counter-notice is served and an RTM company applies to the tribunal for a determination as to its acquisition of the RTM and/or the transfer of management functions in respect of non-exclusive appurtenant property, then:

(1) the landlord should have to apply to the tribunal for permission to participate in the proceedings; and

(2) the tribunal should be able to make the permission conditional on such terms as it thinks fit.

Do consultees agree?

Consultation Question 58.

6.79 Do consultees think that giving RTM companies the right to apply to the tribunal to determine their entitlement to acquire the RTM when no counter-notice has been served is likely to prevent future litigation over the validity of the RTM? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

SIMPLIFYING THE NOTICES

Problems with the current law

6.80 Despite the apparent simplicity of the current procedure and the "saving" powers in the statute[528] and created by case law, RTM companies often make a wide and varied range of errors. Some landlords seize on small and apparently insignificant errors to try and defeat RTM claims.

6.81 As we noted in our enfranchisement consultation paper:

> There is too much uncertainty, and there are too many disputes, about both the validity of notices, and whether they were properly served by the parties. Some landlords will try to prove that leaseholders' notices of claim are invalid, or not properly served, in the hope of blocking an enfranchisement claim by leaseholders who are otherwise entitled to bring such a claim.[529]

6.82 It appears that the same approach has developed in RTM claims. For example:

(1) a landlord managed to defeat an RTM claim where a notice inviting participation was not served on the Public Trustee in respect of a deceased leaseholder;[530]

(2) a landlord argued that using the previous version of the prescribed claim form invalidated the notice. The Upper Tribunal rejected this argument;[531] and

(3) challenges by landlords to the validity of claim notices on the requirement for signatures are common. Landlords unsuccessfully argued that the following were invalid:

(a) a signature by someone authorised by the directors but who was not a member or officer of the company;[532]

(b) a signature by the RTM company's solicitors;[533] and

---

528 In Wales, the use of a form "to the like effect" for a notice is permitted under regulation 8 of the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684. No equivalent saving power is provided in the corresponding regulation 8 of the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825.

529 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 10.171.

530 *Assethold Ltd v 7 Sunny Gardens Road RTM Co Ltd* [2013] UKUT 509 (LC). The position would likely have been the same if there had been personal representatives, as the personal representative would then be the qualifying tenant by virtue of section 1 of the Administration of Estates Act 1925 and section 27 of the Land Registration Act 2002; see also *Villarosa v Ryan* [2018] EWHC 1914 (Ch), [2018] Housing Law Reports 38.

531 *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC).

532 *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC).

533 *Pineview Ltd v 83 Crampton St RTM Co Ltd* [2013] UKUT 598 (LC).

(c) a signature by a director of the RTM company said to be on behalf of the company serving as the RTM company's secretary.[534]

6.83 In *Elim Court*[535] the Court of Appeal considered whether the failure of an RTM company to serve a claim notice on the intermediate landlord meant that the claim notice was defective. The court also considered whether a failure to specify Saturday or Sunday as a day for inspection of the RTM company's articles of association in the notice inviting participation meant it was defective. In each case, the court held that that these failings did not invalidate the notices. Lord Justice Lewison noted the scope for procedural challenges to be made by landlords:

> I have drawn attention to the Government's policy that the procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. That policy has not been implemented by the current procedures which still contain traps for the unwary…[536]

6.84 Lord Justice Lewison implied that action was needed to minimise the chances of an RTM claim failing on procedural grounds, suggesting two possible solutions for the Government to consider:

(1) simplifying the procedure further; or

(2) giving the First-tier Tribunal a power to grant relief against a failure to comply with the requirements if it is just and equitable to do so.

6.85 We have already proposed removing the requirement for notices inviting participation, which would simplify the existing procedure. Below, we make proposals to limit the grounds on which a notice could be challenged, and to introduce new powers for the tribunal.

Our proposals

Limiting the grounds for challenge

6.86 In our enfranchisement consultation paper, we expressed the view that not all errors in statutory notices were of the same importance and that:

> …. the proper response to such errors should depend upon the extent to which they have made it impossible or substantially more difficult for the recipient of the notice to respond. Errors which do not prevent a recipient from identifying the person making the claim, or the nature of that claim, and do not otherwise prevent the recipient from responding to the claim, should not invalidate a notice. If the other party considers that such errors mean that further information or clarification are

534 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

535 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

536 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] by Lewison LJ.

required, that should be raised in correspondence between the parties at an early stage.[537]

6.87 We are minded to adopt the same approach in RTM claims. Our Terms of Reference require us to make the process simpler for leaseholders, and this would also be consistent with the decision in *Elim Court* and the court's suggestion that the RTM process should be simplified.

6.88 For the purposes of the RTM, we propose that the validity of claim notices or counter-notices should not be challengeable unless:

(1) the prescribed form has not been used;

(2) on a claim notice, the notice fails to make clear to a reasonable recipient of the notice:

(a) that the RTM is being claimed;

(b) the identity of the RTM company; or

(c) the address at which any counter-notice should be served;[538]

(3) on a counter-notice, the notice fails to make clear to a reasonable recipient of that notice:

(a) whether the RTM company's claim to acquire management is admitted or denied;

(b) the basis for any denial of the RTM company's claim to acquire management;[539] or

(c) the landlord's address for service; or

(4) the notice has not been signed (if this requirement is retained).[540]

Extending the power of the tribunal

6.89 Case law has demonstrated that landlords frequently take technical objections to RTM notices, often in an effort to defeat an otherwise valid RTM claim. We think this is

---

537 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.117.

538 The claim notice must contain the RTM company's registered office, at which counter-notices are served (see above at para 6.31(1)). Below, we make proposals to allow RTM companies wider discretion to specify an address at which the counter-notice should be served. See from para 6.148.

539 In our enfranchisement consultation paper, we did not propose including this failure as a ground on which to invalidate the notice (see Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.9(7)). Under our provisional proposals for enfranchisement, leaseholders will still be required to apply to the tribunal for a determination of the terms of acquisition or lease extension if issues remain in dispute. However, where the RTM is claimed, the involvement of the tribunal is not always necessary. It is therefore important for RTM companies to understand why the landlord opposes their RTM claim.

540 See from para 6.99 below on the requirement for a signature on the notice.

unsatisfactory. To ensure that valid RTM claims progress without untoward challenge, we provisionally propose that the tribunal should be given wide powers to:

(1) waive a defect in a notice;

(2) permit an amendment to a notice to rectify the issue; or

(3) make any other appropriate directions.

6.90 We are tentatively of the view that waiver and amendment should be capable of being permitted either unconditionally or, where appropriate, on terms (such as a requirement that the RTM company pay the costs caused by the amendment). We consider that such waiver or amendment should be capable of making valid an otherwise invalid notice.

6.91 We are also tentatively of the view that the same approach should apply to counter-notices. We think that this would discourage landlords from making new arguments at trial. If the landlord can apply to amend the counter-notice and only does so late in the day, the delay would entitle the tribunal to refuse the amendment, or allow it only on the condition that the landlord pay the costs occasioned by the amendment and by the delay.

6.92 We are conscious that this could create a different litigation strategy for a landlord wishing to delay or frustrate an RTM claim. They could give a very general counter-notice and then apply to amend later, after the RTM company has already incurred costs dealing with the initial counter-notice. The landlord is likely to be better placed than the RTM company to absorb the costs of an amendment in order to improve its chances of successfully resisting the RTM claim.

6.93 Accordingly, we consider that, if the tribunal is to be allowed to permit amendment of the counter-notice, it should only be empowered to do so where the landlord has made a genuine mistake or other exceptional criteria are met. Amendments to add new arguments which were reasonably available at the time of the counter-notice should not be permitted

6.94 The acquisition of the RTM should be an efficient and cost-effective process for all parties. When making a direction or permitting a waiver or amendment to the notices, we consider that the tribunal will seek to achieve justice by proportionate means. We also envisage that the tribunal will have regard to, but not be bound by, the following factors when exercising its discretion:

(1) whether, notwithstanding the errors, the notice nonetheless achieves its purpose (substance over form);

(2) the cost implications (for example, if the RTM company could just re-serve the notice so as to overcome the objection, what cost benefit is there in requiring it to do so as opposed to simply amending the existing notice or waiving the requirement);

(3) the time implications (for example, what course of action achieves the fairest result in the shortest possible time);

(4) the need to treat each party fairly; and

(5) any unreasonable behaviour of the parties.

6.95 We did not make proposals to extend the tribunal's power in this way in our enfranchisement consultation paper. The pressing need for the tribunal to be able to achieve justice notwithstanding technical errors or omissions is particularly acute in the RTM context, as recognised by the Court of Appeal in *Elim Court*.[541]

Consultation Question 59.

6.96 We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the claim notice and make any other directions it considers appropriate. Do consultees agree?

Consultation Question 60.

6.97 We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the counter-notice and make any other directions it considers appropriate, provided that amendments are not permitted unless the landlord has made a genuine mistake or other exceptional criteria are met. Do consultees agree?

Consultation Question 61.

6.98 Do consultees think that giving the tribunal the power to waive defects or allow amendments in notices would reduce litigation and therefore reduce costs? If possible, please estimate how much money an RTM company might save.

REQUIREMENT FOR A SIGNATURE ON THE CLAIM NOTICE

6.99 Under the current law, the claim notice must be signed by "an authorised member or officer" under authority of the RTM company.[542]

6.100 Uncertainty over signature of notices has generated opportunities for landlords to object to RTM claims,[543] and we have considered whether the requirement for a

---

541 *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] by Lewison LJ.

542 Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825, sch 2; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2864, sch 2.

543 See para 6.82(3) above for examples of case law concerning the requirement for a signature on the claim notice.

signature should be removed. However, as we similarly argued in the enfranchisement consultation paper,[544] we consider that the signature can still serve an important function, demonstrating that this is the final form of notice given with the authority of the RTM company. Without a signature, landlords might otherwise seek proof that the claim notice was sent with the authority of the RTM company, which would create another avenue for disputes.

6.101 Consistent with our views in the enfranchisement consultation paper, we consider that, if the requirement for a signature is to be retained, it should be simplified to make it as easy as possible for RTM companies to comply with. There should be clearer rules as to who can sign the claim notice, and how.

6.102 We consider that a signature from a single officer of the RTM company should be sufficient. It should also be possible for a person (such as the RTM company's solicitor) to sign a claim notice for and on behalf of the RTM company, if that person has been authorised to do so by a single officer of the RTM company.

6.103 For the avoidance of doubt, we also consider that the signature could be applied either by hand or electronically.[545]

Consultation Question 62.

6.104 Do consultees consider that there should continue to be a requirement for the claim notice to be signed by or on behalf of the RTM company?

Consultation Question 63.

6.105 If the requirement for a claim notice to be signed by or on behalf of the RTM company is to be retained, do consultees consider that the claim notice should be signed by either:

(1) a single officer of the RTM company; or

(2) a person authorised by an officer of the RTM company to sign the claim notice on behalf of the RTM company?

---

544 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, from para 11.18.

545 In a recent consultation paper, the Law Commission concluded that an electronic signature will generally satisfy a statutory requirement for a document to be signed: Electronic execution of documents (2018) Law Commission Consultation Paper No 237.

SERVICE OF CLAIM NOTICES

Overview of the current law

6.106 We have discussed above various statutory notices which must be served during the RTM process. Currently, the 2002 Act permits (but does not require) the service of notices by post.[546] A presumption of effective service by post can arise where certain requirements have been met.[547] The 2002 Act also sets out the addresses for service on the landlord and qualifying tenants.[548]

6.107 The RTM company may serve a notice on the landlord at:

(1) the last address given for service in accordance with section 48 of the 1987 Act; or

(2) if such an address has not been given, the last address given in accordance with section 47 of the 1987 Act as the landlord's address.

6.108 However, if an alternative address in England and Wales has been provided by the landlord to the RTM company for the service of any such notices, this must be used instead.

6.109 An RTM company must serve each qualifying tenant with a copy of the claim notice and the notice inviting participation at the relevant flat, unless the tenant has notified them of an alternative service address in England and Wales for such notices.[549]

6.110 In this section, we set out provisional proposals to designate email addresses at which an RTM company can serve a claim notice, and proposals as to deemed service. These proposals are based on those in our enfranchisement consultation paper. We propose that an RTM claim notice should be capable of being validly served on the intended recipient by hand delivery, post or by email.

Service of notice by email

Landlords

6.111 We provisionally propose that the claim notice could be served on the landlord at an email address which has been given by the landlord for a relevant purpose. We suggest that suitable email addresses would be those which have been given by the landlord:

(1) to leaseholders or the RTM company as an address at which RTM notices can be served;

(2) for the purposes of serving notices, including notices in proceedings; or

---

546 Commonhold and Leasehold Reform Act 2002, s 111(1)(b).

547 Interpretation Act 1978, s 7.

548 Commonhold and Leasehold Reform Act 2002, s 111.

549 Commonhold and Leasehold Reform Act 2002, s 111(5).

(3) to HM Land Registry as an address at which the registered proprietor can be served with notices.

6.112 In our enfranchisement consultation paper, we proposed the same categories of email address for service of enfranchisement notices.[550]

6.113 We argued that deemed service of notices[551] to these email addresses would be reasonable because the landlord would have provided the relevant email address knowing that it will be used for the service of legal proceedings or other important legal documents. We said:

> We do not believe that it would be appropriate to allow leaseholders to serve notices on their landlord at email addresses provided by that landlord as an address at which he or she can be reached more generally, or at an email address that landlord has used in the past.[552]

6.114 We think that the same considerations apply in respect of RTM claims. We think that our proposals will modernise the process for all parties whilst providing adequate safeguards. As we discuss below at paragraph 6.126, actual service at an email address other than a designated address for deemed service would also be valid service.

6.115 The Supreme Court recently held that service of a copy of a notice by email through a third party, to which the intended recipient responded, was valid service for the purposes of a local authority serving a completion notice effecting liability for non-domestic rates.[553] The relevant legislative framework did not expressly provide for service by email.[554]

---

550 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.73.

551 We set out our proposed deemed service regime from para 6.119 below.

552 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.73.

553 *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, *The Times* 24 December 2018.

554 See Local Government Finance Act 1988, sch 4A, para 8; Local Government Act 1972, s 233.

Consultation Question 64.

6.116 We provisionally propose that an RTM company should be able to serve the RTM claim notice on the landlord at the following email addresses:

(1) an address they have specified for the service of RTM notices;

(2) an address they have specified for the purposes of serving notices (including notices in proceedings); or

(3) an address included on or at HM Land Registry as one at which the registered proprietor can be served with notices.

Do consultees agree?

Qualifying tenants

6.117 The 2002 Act provides that any notices to qualifying tenants can be served by the RTM company at the flat, unless it has been notified by the qualifying tenant of a different address in England and Wales.[555] It appears that an RTM company is also entitled to serve a qualifying tenant at an email address they have provided for this purpose.[556] We think the law should be clarified to confirm this.

Consultation Question 65.

6.118 We provisionally propose that the law should be clarified to confirm that an RTM company is entitled to serve a copy of the claim notice on a qualifying tenant at an email address they have confirmed to the RTM company as an email address for the service of notices under the RTM provisions. Do consultees agree?

Deemed service of the claim notice

6.119 We provisionally propose that an RTM claim notice should be deemed to have been validly served if it is delivered by hand or sent by post or email[557] to a "designated address", even if the landlord[558] does not receive it or respond to that notice. We

555 Commonhold and Leasehold Reform Act 2002, s 111(5).

556 See *Assethold Ltd v 110 Boulevard RTM Co Ltd* [2017] UKUT 316 (LC), [2017] 4 WLR 181 where the Upper Tribunal held that a copy of the RTM claim notice could be validly served on qualifying tenants by email.

557 We discuss which email addresses should be used from para 6.111 above.

558 References to the "landlord" in this section should be read to include the other relevant third parties for service of a claim notice we identified at paragraph 6.3 above.

introduced this idea in our enfranchisement consultation paper for the service of enfranchisement claim notices.[559]

6.120 In our enfranchisement consultation paper, we suggested that there should be two groups of designated addresses: Group A addresses, where there is a high probability that the notice will be received; and Group B addresses, where there is a reasonable likelihood that the notice will be received.[560] We think that this distinction should also apply in the RTM process.

6.121 We propose that the following should be Group A addresses:

(1) any address (including an email address) that has been provided by the landlord to the leaseholders or RTM company as an address at which an RTM notice may be served; and

(2) the landlord's current address.[561]

6.122 We propose that Group B should consist of:

(1) the landlord's last known address;

(2) the latest address given by the landlord for the purposes of section 47 of the 1987 Act;

(3) the latest address given by the landlord for the purposes of section 48 of the 1987 Act; and

(4) the latest email address given by the landlord for the purposes of serving notices (including notices in proceedings).

6.123 Wherever possible, a Group A address for service should be used. If an RTM company serves a notice to a Group B address, we propose below that it must also serve the notice at the address of the registered proprietor of the property on or at HM Land Registry. We proposed the same approach in our enfranchisement consultation paper.[562]

6.124 In Chapter 7, we discuss the possibility of a new preliminary stage requiring the service of an information notice by the RTM company. We envisage that the deemed service provisions above would also apply to any information notice, if that proposal is adopted.

---

559 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.61 to 11.73.

560 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.69 to 11.70.

561 In the case of a company, this will be its registered office.

562 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.70.

Consultation Question 66.

6.125 We provisionally propose that a claim notice should be deemed to have been served on the landlord if it is delivered by hand, or sent by post or email (where permitted) to one of the specified addresses in Group A or Group B.

Group A addresses for service include:

(1) any address (including an email address) that has been provided by the landlord to the leaseholders or RTM company as an address at which an RTM notice may be served; and

(2) the landlord's current address.

Group B addresses for service include:

(3) the landlord's last known address;

(4) the latest address given by the landlord for the purposes of section 47 of the Landlord and Tenant Act 1987;

(5) the latest address given by the landlord for the purposes of section 48 of the Landlord and Tenant Act 1987; and

(6) the latest email address given by the landlord for the purposes of serving notices (including notices in proceedings).

Do consultees agree?

Actual service

6.126 If our provisional proposal for a deemed service regime is adopted it will allow RTM companies to proceed with their claim with certainty knowing that their notice is deemed to have been received. However, we do not expect our deemed service regime to allow landlords to argue that an RTM claim is invalid where there was actual service at an alternative address. For example, if an RTM company serves the claim notice on the landlord at an alternative email address and the landlord responds by serving a counter-notice, the fact that a deemed service address was not used could not prevent the RTM claim from proceeding. The deemed service regime will exist in addition to actual service.

Pre-service checks

6.127 Before commencing an enfranchisement claim, we proposed that the leaseholders should be required to undertake pre-service checks to identify an address at which to serve notice on the landlord.[563] Our rationale for this proposal was that:

> A balance … has to be struck between making a regime that introduces simple, certain and cost-effective deemed service rules, and ensuring that reasonable steps are taken to ensure that landlords will generally be notified of the claim.[564]

6.128 For the same reasons, we think requiring the RTM company to complete some initial checks before serving a claim notice on the landlord is a proportionate protection.

6.129 We provisionally propose that, prior to serving an RTM claim notice, the RTM company should search HM Land Registry to identify the name and address of the current registered owner of the premises over which the RTM is claimed. We think this search should be conducted in all circumstances.

6.130 As we discuss above, if the RTM company wishes to use a Group B address for service of the claim notice on the landlord, we propose that they will also be required to serve the claim notice on the landlord's address for service listed at HM Land Registry. If the RTM company intends to use a Group B address, we consider that it should also be required to undertake further checks in case the registered proprietor is no longer the appropriate recipient of the notice. This could occur where, for example, the landlord has died or become insolvent.

6.131 We therefore propose that where an RTM company proposes using a Group B address to serve the claim notice, they should:

(1) in the case of an individual landlord:

  (a) search the Probate Register to check whether a grant of probate has been issued to anyone in respect of that landlord; and

  (b) search the Insolvency Register to check whether their known landlord has in fact become insolvent.

(2) in the case of a company landlord, search the Companies Registry to confirm the status of the company.

These checks can be carried out online and confirmation that they have been carried out should be included in the claim notice, attested by a statement of truth. This aligns with the proposals we made in our enfranchisement consultation paper.[565]

---

563 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.83 to 11.94.

564 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.84.

565 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.23 and 11.83 to 11.94.

6.132 The searches may reveal an alternative designated address for service. The RTM company should be able to serve a claim notice at the alternative designated address with confidence that their claim notice will be treated as validly served. The alternative designated addresses are:

(1) if the landlord has died:

(a) the address given for the personal representatives on the grant of probate; or

(b) where there are no personal representatives, the office of the Public Trustee.

(2) if the individual landlord has been made bankrupt, the address for the bankrupt's trustee that appears on the Insolvency Service's website.

(3) if a company landlord has been made insolvent:

(a) the address registered with Companies House for the administrator, liquidator or receiver; or

(b) where no such person has been appointed, to the Official Receiver.

6.133 When serving a notice to an alternative designated address, the notice will be deemed served if delivered by hand or sent by post.

6.134 These checks provide additional certainty by confirming that the landlord is still the correct person to serve a claim notice on. The RTM company can be confident that the claim notice will be validly served. Our provisional view is that this is only required for Group B addresses.

6.135 If the identity of the landlord is known, but the RTM company does not have an address for them falling within Group A or B, the RTM company should carry out the additional checks for Group B addresses set out at paragraph 6.131 above as well as the search at HM Land Registry. If these do not provide the RTM company with a designated address for serving the claim notice on the landlord, the RTM company should place an advertisement in the London Gazette. The advertisement should invite any owners of the identified property to contact the RTM company within 28 days. In the next section, we set out proposals for the procedure to follow if the landlord cannot be identified or located.

Consultation Question 67.

6.136 We provisionally propose that before serving a claim notice, the RTM company should be required to check the landlord's address on or at HM Land Registry. Do consultees agree?

6.137 Before service of a claim notice at a Group B address, we provisionally propose that the RTM company should be required to:

(a) search the Probate Register;

(b) search the Insolvency Register; and

(c) (in the case of a company landlord) check its status at Companies House.

6.138 We also provisionally propose the following:

(1) if an individual landlord is dead, the designated address for service should be the address of any personal representatives given in any grant of probate (or, if none, the office of the Public Trustee);

(2) if an individual landlord is insolvent, the designated address for service should be the address for their trustee in bankruptcy as shown on the Insolvency Service website;

(3) if a company landlord is insolvent, the designated address for service should be the address for its administrator, liquidator or receiver as listed at Companies House. If no such person has been appointed, the Official Receiver should be served.

Do consultees agree?

Consultation Question 68.

6.139 Do consultees consider that a claim notice should include a statement of truth confirming that specified checks (if required) have been carried out?

Consultation Question 69.

6.140 We provisionally propose that if the identity of the landlord is known, but the RTM company does not have an address for them falling within Group A or B, they should carry out the Group B checks above. If this fails to provide an address, an advertisement should be placed in the London Gazette. Do consultees agree?

MISSING LANDLORDS

The current law

6.141 Where the RTM company has sufficient members to serve a claim notice, but is unable to find or ascertain the identity of the landlord or other relevant third party[566] who would be entitled to receive a claim notice, the procedure differs from that outlined above.

6.142 In such cases, the RTM company must apply to the tribunal for an order that it is entitled to acquire the RTM over the premises.[567] The RTM company must give notice of that application to each qualifying tenant[568] and must comply with any requirement imposed by the tribunal as regards advertisement or other steps to trace the missing party.[569] Conditions usually include placing an advertisement in a local paper or (if appropriate) the London Gazette.

6.143 If the missing party is found then the tribunal may give further directions, for example on the exchange of evidence and argument as to entitlement to acquire the RTM.[570] If the missing party is not found then the tribunal may nonetheless proceed to determine that the RTM company is entitled to acquire the RTM.[571]

Our proposal

6.144 In our enfranchisement consultation paper, we proposed that leaseholders with missing landlords should apply to the tribunal for an order permitting them to proceed with their claim.[572] The tribunal would then either make an order allowing the claim to proceed, dismiss the claim, or give directions. The tribunal could also order that leaseholders' costs of making the application be paid by the landlord, or deducted from the price paid for the property interest.

6.145 The current RTM procedure is similar to our proposals for enfranchisement. However, in our enfranchisement consultation paper, we proposed that the leaseholders should conduct the pre-service checks for Group B addresses[573] before proceeding with the missing landlord procedure, where the identity of the landlord is known.[574] We also proposed that leaseholders should be required to place an advertisement in the London Gazette inviting the owners of the identified property to contact them within 28

---

566 See section 79(6) of the Commonhold and Leasehold Reform Act 2002 for the relevant parties.

567 Commonhold and Leasehold Reform Act 2002, s 85(2).

568 Commonhold and Leasehold Reform Act 2002, s 85(3).

569 Commonhold and Leasehold Reform Act 2002, s 85(4).

570 Commonhold and Leasehold Reform Act 2002, ss 85(5) to (6).

571 Commonhold and Leasehold Reform Act 2002, s 85(2).

572 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 11.79 to 11.81.

573 We explain these from para 6.130 above.

574 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.85.

days.[575] Any application to the tribunal to proceed with the enfranchisement claim should include confirmation that this has occurred.[576]

6.146 We consider that the current missing landlord procedure in the RTM should incorporate our proposals in the enfranchisement consultation paper. Completion of the pre-service checks and the requirement to advertise in the London Gazette reflects the practical steps an RTM company would likely be required to take anyway by the tribunal. Furthermore, our proposals will ensure that RTM companies do not incur wasted costs by applying to the tribunal under the missing landlord procedure only to find that the landlord is traceable through the pre-service checks.

Consultation Question 70.

6.147 We provisionally propose, in line with our proposals in the enfranchisement consultation paper, that an RTM company applying to acquire the RTM under the missing landlord procedure should be required to:

(1) conduct the pre-service checks for using a Group B address for service;

(2) place an advertisement in the London Gazette inviting the owner of the identified property to contact the RTM company within 28 days; and

(3) include confirmation that these preliminary checks have been undertaken in the application to the tribunal for a determination that the RTM company is entitled to acquire the RTM.

Do consultees agree that the procedure where there is a missing landlord should be the same for RTM as for enfranchisement claims?

SERVICE OF THE COUNTER-NOTICE

Current law

6.148 The landlord must serve a counter-notice on the RTM company at its registered office address which is to be specified in the claim notice.[577]

Our proposal

6.149 We provisionally propose that the RTM company should be permitted to specify, in the claim notice, an alternative address to the company's registered office at which the

---

575 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.93.

576 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 11.93.

577 Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684.

landlord must serve a counter-notice. This would permit, for example, service of the notice at the address of the RTM company's solicitor's address.

6.150 This could be an address in England and Wales for service by post or hand delivery, or an email address.

Consultation Question 71.

6.151 We provisionally propose that an RTM company should be able to specify in the claim notice an alternative address (other than the company's registered office) at which a landlord should serve a counter-notice. This could be:

(1) an address in England or Wales for service by post or hand delivery; or

(2) an email address.

Do consultees agree?

Chapter 7: Acquisition date and exchange of information

7.1 In this chapter, we discuss the date upon which the RTM is acquired by an RTM company. This is known as the "acquisition date".

7.2 To manage the premises effectively, the RTM company requires certain information, ideally in advance of the acquisition date. We also therefore examine in this chapter the current information exchange process and consider alternative proposals to make the process more efficient for all parties.

THE ACQUISITION DATE

The current law

7.3 The date on which the RTM company acquires management depends on what, if any, response was received by way of counter-notice.[578] It is important for all parties involved in the RTM process to understand precisely when responsibility for managing the premises passes from the landlord to the RTM company, so that there is no lapse in management.

7.4 If no counter-notice is given or a counter-notice is given which admits that the RTM company is entitled to acquire the RTM, the RTM company acquires the RTM on the date specified in the claim notice.[579] This will necessarily be more than four months after the claim notice was given because:

(1) the date specified for the giving of a counter-notice must be not earlier than one month after the giving of the claim notice;[580] and

(2) the acquisition date must be at least three months after[581] the date for the giving of the counter-notice.[582]

7.5 The RTM company can give a later date for acquisition of the RTM if the members wish: for example, in order to coincide with a service charge payment date.

---

578 Commonhold and Leasehold Reform Act 2002, s 90.

579 Commonhold and Leasehold Reform Act 2002, s 90(2).

580 Commonhold and Leasehold Reform Act 2002, s 80(6).

581 See *Windermere Court Kenley Road RTM Co Ltd v Sinclair Gardens Investments (Kensington) Limited* [2014] UKUT 420 (LC).

582 Commonhold and Leasehold Reform Act 2002, s 80(7).

7.6 Where a negative counter-notice is served but it is subsequently agreed that the RTM company is entitled to acquire the RTM, the RTM company acquires the RTM three months after the day on which the counter-notice was replaced by that acceptance.[583]

7.7 Where a negative counter-notice is served and the tribunal determines that the RTM company is entitled to acquire the RTM, the acquisition date is three months after the decision becomes final.[584] A decision becomes final once the window for an appeal has closed or any appeal has been disposed of.

7.8 Where the "missing landlord" process is used, the acquisition date is the date specified by the tribunal.[585]

Problems with the setting of the acquisition date

7.9 Ideally, the RTM company would acquire the RTM at a convenient point in the annual service charge cycle as specified in the leases.[586] That is likely to be either:

(1) at the end of a service charge year – so as to align a transfer of management functions with the end of an accounting period; or

(2) if the RTM is to be acquired during a service charge year, shortly before an interim service charge payment falls due under the leases – so as to ensure that the RTM company receives money to fund its management soon after management is acquired.

7.10 Where the date specified in the claim notice is not one of the two dates identified above, the RTM company is likely to require an advance from its members to fund initial expenditure. We have been told by stakeholders that RTM companies often do not realise that the proposed acquisition date can be chosen by the RTM company to coincide with a convenient handover point in the service charge year.

7.11 A failure by the RTM company to include the acquisition date renders the claim notice invalid, requiring the RTM company to recommence the process.[587]

Our proposals

7.12 To promote good management, the acquisition date in most cases should be the earlier of the two dates specified above. We do not wish, however, to enshrine these

---

583 Commonhold and Leasehold Reform Act 2002, s 90(5).

584 Commonhold and Leasehold Reform Act 2002, s 90(4).

585 Commonhold and Leasehold Reform Act 2002, s 90(6).

586 At paras 8.101 to 8.122, we discuss the landlord's duty to pay over the uncommitted service charges to the RTM company, and the problems with that process.

587 See *3 Kings Road Westcliff Essex RTM Co Ltd v Westleigh Properties Ltd* (27 May 2005) CAM/00KF/LRM/2005/0001 Leasehold Valuation Tribunal (unreported); *Eton House Residents Ltd v Longmint Ltd* (17 June 2011) CAM/00MD/LRM/2011/0001 Leasehold Valuation Tribunal (unreported).

dates in statute as we are aware that there may be cases where, for some reason, they are not the best dates on which to transfer the RTM.[588]

7.13 We provisionally propose to retain the rule that there should be a minimum period of three months between the date a counter-notice is to be given and the acquisition date as specified in the claim notice.

7.14 The landlord and the RTM company may subsequently agree a shorter or longer period of time. We have considered what should happen where a counter-notice is given which does not admit the RTM but is subsequently withdrawn,[589] or where the tribunal has made a final determination that the RTM company was entitled to acquire the RTM. We provisionally propose that the acquisition date should, in the absence of agreement between the landlord and RTM company, be a minimum of (rather than a set) three months after the withdrawal or tribunal determination.

7.15 Where the counter-notice is withdrawn, the RTM company will be entitled to specify the date, subject to the three-month minimum period from the date of the landlord's written withdrawal or agreement. If it does not do so, the landlord may apply to the tribunal to set the date. Where the tribunal makes the determination, the tribunal will set the date after hearing submissions as to what the appropriate date should be.

7.16 In Chapter 6, we propose that the landlord should only be able to challenge the validity of a claim notice on certain limited grounds.[590] Failure to specify the acquisition date is not one of these. This means that a claim notice would not be invalidated by the RTM company's failure to specify an acquisition date, or if it specified an acquisition date that is less than the minimum three-month period. In such cases, the parties would be free to agree a date between themselves. If an agreement could not be reached, we have considered whether the acquisition date could be determined by:

(1) the tribunal, following an application which could be made by either party (with associated costs); or

(2) applying the minimum timelines for service of a counter-notice and subsequent acquisition date (meaning an acquisition date which is four months after service of the claim notice).[591] However, this could mean that the RTM is acquired by default without the knowledge of either party. This is undesirable as both parties would be unprepared for the transfer of management responsibility. There would also be the risk of satellite litigation about when the period actually ends.

---

588 For example, the leases might not provide for interim demands, and the end of the service charge year might be almost a year away.

589 Withdrawal of the counter-notice occurs where the person who gave it agrees in writing that the RTM company was entitled to acquire the RTM under section 84(5)(b) of the Commonhold and Leasehold Reform Act 2002.

590 See from para 6.186.

591 See para 7.4 above. If no date was included for the service of a counter-notice, we envisage that the minimum one-month period required between the claim notice being given would be applied in calculating the acquisition date.

7.17 We therefore consider that, in the absence of agreement, it would be preferable for the tribunal to determine a suitable date, on the application of either party (most likely the RTM company).

7.18 We also think that the RTM company should have the right to apply to the tribunal to vary the original acquisition date specified in the claim notice, if it subsequently proves inadequate. To address the lack of awareness among RTM companies of their ability to specify a later, more convenient date for the acquisition of the RTM, we provisionally propose that the claim notice should include a statement clarifying this. By bringing the ability to choose a convenient date to the attention of the RTM company, we hope to minimise the need for RTM companies to apply to the tribunal to vary the original acquisition date specified.

Consultation Question 72.

7.19 We provisionally propose that, in the absence of agreement between the landlord and the RTM company, the minimum period between:

(1) either

(a) the withdrawal of a counter-notice opposing the RTM claim; or

(b) the tribunal's final determination that the RTM company is entitled to acquire the RTM; and

(2) the acquisition date of the RTM,

should be three months. Do consultees agree?

Consultation Question 73.

7.20 We provisionally propose that, where the claim notice does not specify a date for acquisition, this should be determined by the tribunal, following an application by the RTM company or landlord. Do consultees agree?

Consultation Question 74.

7.21 We provisionally propose that the tribunal should be able to change the acquisition date on an application from an RTM company. Do consultees agree?

RIGHT TO OBTAIN INFORMATION

Right to information in advance of the RTM claim: current law

7.22 Once formed, the RTM company has a right to request information which it reasonably requires for ascertaining the particulars required, by virtue of section 80 of the 2002 Act, to be included in a claim notice.[592]

7.23 The notice can be served on any person, who must provide any relevant information in their possession.[593] "Any person" is not further defined. It is likely that the landlord, and any managing agent employed by the landlord, would hold information likely to be of use to the RTM company. The relevant person must provide the information either by permitting the RTM company access to the documents at any reasonable time or by producing copies of those documents. If the RTM company requires copies of the documents, it must pay a reasonable fee.[594] All documentation must be provided in a readily intelligible form, and within 28 days from the day on which the request was given.[595]

7.24 The information to be provided is limited to any information needed to ascertain the contents of the claim notice. This might include who the relevant landlord is to serve the claim notice on and details of any qualifying tenants.

Right to information in advance of the RTM claim: problems with the current law

7.25 Stakeholders have advised that this provision is rarely relied upon, mainly because the scope of information which the recipient must provide is limited. The information is also usually ascertainable by carrying out other searches. The relevant landlord can, for example, be identified from Land Registry checks.

7.26 If the landlord fails to respond to a notice issued by the RTM company, its obligation to supply the information can only be enforced by an order from the county court.[596] The RTM company must make an application under section 107 of the 2002 Act. Before it can do so, it must serve the landlord or relevant party with a notice requiring them to rectify the default.[597] More than 14 days must elapse between service of the default notice and the application to the county court.[598] The county court can endorse its order with a penal notice and award costs if the landlord fails to comply with the order.[599]

---

592 Commonhold and Leasehold Reform Act 2002, s 82.

593 Commonhold and Leasehold Reform Act 2002, s 82(1).

594 Commonhold and Leasehold Reform Act 2002, s 82(2)(b).

595 Commonhold and Leasehold Reform Act 2002, s 82(3).

596 See the Civil Procedure Rules for the county court's enforcement powers.

597 Commonhold and Leasehold Reform Act 2002, s 107(2)(a).

598 Commonhold and Leasehold Reform Act 2002, s 107(2)(b).

599 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-31.

Right to information after an RTM claim has been made: current law

7.27 The 2002 Act provides a further right for the RTM company to request from the landlord any information which the RTM company might reasonably require in connection with the exercise of the RTM.[600]

7.28 This request can be issued at any time by the RTM company, including prior to acquisition. The landlord must respond within 28 days from the day on which the notice of the request was given.[601] However, the legislation also provides that the landlord is under no obligation to respond to the request until after the acquisition date.[602] It appears that the earliest date that the RTM company is entitled to receive this information is on the acquisition date (requiring the notice to have been given 28 days prior to acquisition).

7.29 The landlord must provide any such information within its possession or control.[603] The landlord must either make the information available for inspection[604] or supply a copy of it in a readily intelligible form.[605]

7.30 We have been told that the information which the RTM company may request is likely to include:

(1) the list of all leaseholders, with contact details;

(2) service charge accounts;

(3) receipts and invoices in respect of works and service charges;

(4) draft closing accounts; and

(5) insurance information, including claims history, premium and policy terms.

7.31 The purpose of this exercise is to equip the RTM company with all the information it needs in order to take over management effectively.

Right to information after an RTM claim has been made: problems with the current law

7.32 During our meetings with stakeholders, three main problems with the information process were repeatedly raised:

(1) the need for earlier exchange of information between the RTM company and the current management;

(2) doubts around what type of information is required; and

---

600 Commonhold and Leasehold Reform Act 2002, s 93(1).

601 Commonhold and Leasehold Reform Act 2002, s 93(4).

602 Commonhold and Leasehold Reform Act 2002, s 93(3).

603 Commonhold and Leasehold Reform Act 2002, s 93(1).

604 Commonhold and Leasehold Reform Act 2002, s 93(2)(a).

605 Commonhold and Leasehold Reform Act 2002, s 93(2)(b).

(3) information about (and understanding as to) the provision of shared services and management of shared appurtenant property.

The timings

7.33 The 2002 Act requires the landlord to comply with the request for information necessary for management only on or after the acquisition date. Although section 82 gives an earlier right to information, this is much more limited. Some RTM companies have reported difficulties in obtaining the relevant information. They complained that information about management contracts, insurance cover and services are not provided until far too late in the process to be of any use (often long after the RTM company has started managing), if indeed it is provided at all.

7.34 In some cases, RTM companies ask for and obtain the information prior to their legal entitlement to do so. It is our understanding that, in such cases, the acquisition process is far more effective, as the appropriate systems can be set up in advance of the acquisition date. Landlords told us that they had much more positive relationships with RTM companies which had approached them before making an RTM claim to request information about the running of the development. This enabled the leaseholders and RTM company to make an informed decision about how to proceed.

7.35 In practice, managing the premises with no or limited existing management information can be difficult. For example, if the RTM company does not have the insurance claims history, it may not be able to obtain insurance, either on good terms or at all.[606] If the RTM company does not have details of risk assessments, it will not be able to take appropriate measures in good time.

7.36 If there is a period after the acquisition date where the property is not properly managed because of the absence of information, the RTM company may be in breach of its obligations before it has even started.

The information required

7.37 The 2002 Act does not specify what information an RTM company is entitled to. It simply states that the RTM company can ask for any information it reasonably requires for ascertaining the particulars to be included in a claim notice, or, later, which it "reasonably requires in connection with the exercise of the RTM".[607]

7.38 We are not aware of any case law about the types of information that fall within these categories. It appears that the formula does not cause much difficulty in practice, although we have been told by stakeholders representing leaseholder interests that it is fairly common for landlords to fail or to refuse to provide the information requested.

7.39 The rights to information are dependent on the RTM company asking for specific information. An RTM company may not appreciate, for example, that it needs the insurance claims history in order to place valid insurance. Further, an RTM company cannot ask for a document if it does not know it exists.

---

606 We discuss issues with the provision of insurance information further in Chapter 8.

607 Commonhold and Leasehold Reform Act 2002, s 93(1).

7.40 There may be information the need for which may not come to light until it is too late. For example, the RTM company could fail to ask about disputes with neighbours and so be unaware of a settlement agreement in respect of a boundary. In line with its requirements under the lease, the RTM company could carry out works to the boundary in breach of the settlement agreement.

7.41 The Royal Institution of Chartered Surveyors ("RICS") provides guidance on required information in its Service Charge Residential Management Code.[608] The Association of Residential Managing Agents ("ARMA") and the Leasehold Advisory Service ("LEASE") have also produced guidance on documents to request from the outgoing managing agent or the landlord.[609]

7.42 Some RTM companies will appoint a solicitor or agent to act on their behalf to assist with the RTM acquisition. We have been told that, in these cases, there is more consistency as to the documents requested from the landlord. However, even then, the range of documents requested can vary considerably depending on the competence and experience of the solicitor or agent. Solicitors and agents are often unfamiliar with day-to-day management of premises and therefore may be unaware of what may be important to the RTM company going forward.

7.43 The issues with shared appurtenant property most commonly arise where one block on an estate exercises the RTM. The RTM company for that block acquires management functions in respect of all appurtenant property, including non-exclusive appurtenant property, and must share the management functions in respect of non-exclusive appurtenant property with the manager and/or landlord of the other buildings.[610]

7.44 As we explain in Chapter 4, we think that the automatic transfer of management functions in respect of non-exclusive appurtenant property leads to problems and, potentially, disputes further down the line. There, we propose that, instead of the automatic transfer, there should be a presumption that the management functions in respect of non-exclusive appurtenant property will not pass to the RTM company. However, the parties could come to an agreement to the contrary, or the tribunal could determine that the management functions should transfer to the RTM company.[611]

7.45 However, any suggestion that the parties could come to another agreement, or that the RTM company could apply to the tribunal to ask for management of the non-exclusive appurtenant property, presupposes that the parties are aware of what non-exclusive appurtenant property exists. Under the current process, neither party may be aware of this or have given any thought to it.

---

608 RICS, *Service Charge Residential Management Code* (2016) para 6.4. The Secretary of State has approved this code under the Leasehold Reform, Housing and Urban Development Act, s 87(7).

609 For example, see https://www.lease-advice.org/advice-guide/right-manage/.

610 *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988.

611 See from para 4.101.

OUR SUGGESTED "INFORMATION NOTICE" PROCEDURE

7.46 In an effort to address these problems, we have sought to develop an earlier process for information-sharing which would:

(1) assist both parties to consider the best arrangements for the management of non-exclusive appurtenant property; and

(2) give the RTM company early information about the nature and extent of management functions it would be acquiring. An earlier information process could allow the RTM company to make an informed decision as to whether to claim the RTM at all. It would allow an RTM company that makes an RTM claim to have early contact with the providers of services and otherwise make arrangements to ensure a smoother handover of management.

7.47 We have devised a new "information notice" which an RTM company could serve on the landlord. Below, we describe how the notice could work, and discuss the difficulties that we have encountered. We then consider when the notice should be served.

The types of information

7.48 We envisage that the "information notice" could request information such as:

(1) contact details[612] for all leaseholders;

(2) copies of each lease in the premises;

(3) information about the utilities: which services are shared, location of sewers, boilers and central power supply, the insurance claim history;

(4) layout of the premises – the building, exclusive appurtenant property and non-exclusive appurtenant property – which may be subject to the management functions;

(5) details of ongoing major works and long-term agreements, along with any notices served under section 20 of the Landlord and Tenant Act 1985[613] and responses;

(6) service charge accounts for the previous and current year, along with outstanding invoices, service charge arrears and payment plans;

(7) list of any disputes involving leaseholders, contractors or others;

(8) details of management contracts in respect of the premises; and

(9) health and safety information, including risk assessments.

---

612 This includes the leaseholders' names and addresses for service only.

613 These notices relate to proposed major works or long-term service contracts.

7.49 Broadly, we envisage that anything which the RTM company may reasonably require in connection with the management of the premises, along the lines of the current right to information under section 93 of the 2002 Act, should be provided at this stage.

7.50 We also consider that the notice should request information about the management functions actually carried out at the property, and envisage that the RTM company would be entitled to ask for three categories of information in this regard. Below are some examples of what could come under each category.

Category 1 – management functions relating to the premises and any appurtenant property exclusive to the premises	**Category 2 – management functions relating only to non-qualifying premises**	**Category 3 – management functions in respect of non-exclusive appurtenant property**
1. Repairing the internal parts of the premises	1. Maintaining the commercial premises	1. Repairing the sewers shared with block B
2. Maintaining the private garden of the premises	2. Maintaining the garages of the short-let properties	2. Maintaining the garden shared with block B and C
3. Cleaning the stairwell and foyer in the premises	3. Maintaining the boilers of the social tenants	3. Cleaning the parking lot for the estate
4. […] etc.	4. […] etc.	4. […] etc.

7.51 The RTM company should start filling in the boxes insofar as it has, or thinks it has, the relevant information, but ultimate responsibility for providing the information would rest with the landlord.

7.52 Category 1 management functions would be functions which always transfer to the RTM company on the acquisition date, provided there is a valid RTM claim. Category 2 functions would be those which remain with the landlord.[614] Category 3 management functions would be those functions to which our proposed presumption would apply so that these functions remain with the landlord unless there is an agreement between the RTM company and the landlord, or a tribunal determination, to the contrary.[615]

[614] See Commonhold and Leasehold Reform Act 2002, s 96(6)(a).

[615] See more detailed discussion about non-exclusive appurtenant property, and our proposals for how it should be managed, from paras 4.101.

7.53 The RTM company would be entitled to detailed information in respect of categories 1 and 3 (such as copies of relevant management contracts). In respect of category 2, it would not require detailed documentation.

7.54 Some stakeholders were concerned that the landlord would be required to advise the RTM company as to what constitutes "management functions" under the lease. This is not what we propose. The management functions will be defined by statute. Under our current thinking, the definition would be the same as it is under section 96(5) of the 2002 Act, namely services, repairs, maintenance, improvements, insurance and management. What the landlord would have to do is tell the RTM company about the premises over which these functions are exercised, and what management is, in fact, carried out. In other words, the landlord would have to advise what appurtenant property there is, which parts of it are exclusive and which are non-exclusive, and how that property is managed.

7.55 We are considering whether there should be a prescribed form for the information notice. The form could be in a format similar to the form which has to be filled in by a seller in the conveyancing process.[616] The Leasehold Property Enquiries form requires the provision of documentation and asks specific questions. We think a form could include everything we said above, and a general section where the RTM company could ask for any other information that it would reasonably require.

7.56 Nevertheless, the difficulty with prescribing such a form is that the information "reasonably" required for the management of premises could vary widely between different types of property. Trying to list specific types of information may be both under-inclusive, where complex estates are concerned, and over-inclusive, for relatively simple stand-alone properties. In some cases, the landlords may not even hold certain information which the RTM company may reasonably require for the management of the premises. For example, it would not be unreasonable to ask for the plan of the sewerage system in order to determine who is responsible for what part of it, but the landlord may have to commission a surveyor in order to provide it.

7.57 In Chapter 10, we discuss to what extent the landlord should be able to recover its reasonable costs of the RTM process from the RTM company.[617] If the RTM company is to continue meeting the landlord's costs (as under the current law) then the RTM company may prefer to request less extensive information.

Consultation Question 75.

7.58 Do consultees consider that we should prescribe a form for the information notice? The form would contain information which should always be provided, as well as information which, depending on the circumstances, it may be reasonable to request/provide.

616 Leasehold Property Enquiries form (LPE1) and Buyers' Leasehold Information Summary (LPE2).

617 See from para 10.71.

Consultation Question 76.

7.59 Do consultees think that landlords should be exempted from providing information which they cannot reasonably provide without incurring disproportionate expense (whether these costs are to be met by the RTM company or the landlord)?

What happens if the information is not provided?

7.60 Under the current legislation, there are no real consequences if the landlord fails to provide information. The RTM company's only recourse is to issue proceedings in the county court under section 107 of the 2002 Act. The county court would be able to order the landlord to produce the information. We are not aware of any occasions where an RTM company has taken this route. We have been told that this is mainly because this process can be expensive, time-consuming and daunting.

7.61 Whatever the process for requesting information, we envisage that a new financial sanction regime should be introduced, levying fines on landlords who fail to comply with the duty to provide information by the required time. One option would be to impose a fixed financial penalty per day of delay, payable to the RTM company. To protect the position of landlords who, for good reason, cannot comply, the tribunal should have a power, where appropriate, to extend the time for compliance and/or waive or reduce the penalties.

The process for serving an information notice

7.62 We have considered whether the information notice should be mandatory or optional, when it should be issued and when the landlord should be required to respond. As we explain below, our view is that a separate, early information notice should not be mandatory, since it will come at a cost and may not be necessary in all cases. We set out two alternative options below, noting the benefits and disadvantages of each. We ask consultees which option they prefer.

Rejected option: a mandatory information notice

7.63 We considered, and ultimately rejected, the possibility of making the information notice a mandatory stage in the process, separate from and in advance of the claim notice.

7.64 When considering this option, we envisaged that the RTM company would serve the claim notice, the landlord would have a set amount of time to provide the information, and the RTM company would have a further period within which to serve the claim notice. Within that claim notice, the RTM company would have to state whether it wished to claim any of the category 3 functions,[618] based on the information the landlord had provided. The landlord would then have a period to serve a counter-notice stating that it did or did not agree with the RTM company's claim to the RTM,

[618] ie functions related to non-exclusive appurtenant property; see above at para 7.50 and our proposals for management of such property from para 4.101.

and/or to any claim to acquire category 3 management functions. The process would then proceed similarly to the current law.

7.65 At our stakeholder meetings, we discussed this option in various forms. Stakeholder opinion was split as to whether the information notice would add value at that early stage of the process. Some pointed out that it may simply mean extra costs[619] and delays to the RTM process.

7.66 This process would require the landlord to provide the information even if it did not consider that the RTM company was entitled to acquire the RTM (for example, because the premises did not qualify). Because the information notice would be served before the RTM company has made the claim, the landlord would not be given the option to challenge whether the leaseholders or the building qualifies for the RTM. This means that the landlord and/or RTM company may have to pay for the information to be provided even though ultimately the RTM cannot be acquired. As we discuss below, this risk may be justified in some cases, such as where the RTM company needs the information in order to decide whether or not to apply for the RTM at all. However, in the case of less complex premises where the management functions are fairly obvious, the early information notice may be an unnecessary delay and expense. We do not therefore propose a mandatory early information notice.

Option 1: information as part of the counter-notice

7.67 This process would not require a separate "information notice". The RTM company could serve the request for information as part of the claim notice. The request would not be mandatory, as some RTM companies may feel that they have all the information they need. If it chose to request the information as part of the claim notice, the RTM company would do its best to outline the management functions that it is seeking, using the division of categories in the table above. As part of this, it would also set out its proposal, as far as possible, for the transfer of any category 3 management functions about which it is already aware, if it did not wish the presumption to apply.

7.68 The landlord would then be required to provide at the counter-notice stage the same information that would have been provided as part of the "information notice". Serving a counter-notice would therefore become mandatory under this process, even where the landlord accepted the RTM claim, because of the need to provide the information. Provision of the counter-notice would be subject to a deadline, as under the current law. And as set out above, we envisage that there would be costs consequences for failing to provide the information.

7.69 We envisage that the process would be straightforward where the landlord served a "positive" counter-notice, namely one accepting that the RTM company is entitled to acquire the RTM. There, the landlord would provide the information and, if relevant, respond to any proposals about the division of the management functions. If after 15 days from receipt of the counter-notice the parties had not agreed the allocation of

[619] We discuss who should meet these costs from para 7.96 below, and more generally from para 10.71.

management functions, the RTM company would be entitled to make an application to the tribunal for a determination on the issue.[620]

7.70 If the information revealed details about the category 3 management functions which the RTM company had not previously known, such as the existence of additional non-exclusive appurtenant property, the RTM could then request these management functions from the landlord if it wished them. If the parties could not agree, the RTM company could apply to the tribunal for a determination as to the category 3 management functions.

7.71 A "negative" counter-notice which disputed the RTM company's entitlement to the RTM would be more complicated.

7.72 We envisage that, where a negative counter-notice was served, the following steps should apply:

(1) The landlord serves the negative counter-notice, together with the requested information. The counter-notice must contain a detailed outline of the grounds on which it is alleged that the RTM company is not entitled to the RTM.[621]

(2) The RTM company applies to the tribunal for a determination of its entitlement to RTM. If the management information was not provided with the counter-notice, the RTM company can also apply to the tribunal to impose financial penalties on the landlord.

(3) The landlord could at this stage apply to the tribunal for a waiver of the financial sanctions. The landlord would have to demonstrate to the tribunal that its failure to provide the information was reasonable (for example, because it had a strong argument against the RTM company's entitlement to acquire the RTM).

(4) If the tribunal determines that the RTM company is entitled to the RTM, there may still be an outstanding dispute as to the split of category 3 management functions if the RTM company has set out an alternative to the default position. If the parties cannot agree, they may ask the tribunal to make a determination.

Early views on option 1

7.73 We think that this has benefits over the mandatory information notice. It avoids a completely separate stage, and means that the landlord has an opportunity to challenge the RTM company's right to acquire the RTM instead of providing the information (risking financial sanctions if it did this unjustifiably). However, it does not allow for such an early provision of information. It means that the RTM company has to serve the claim notice without the benefit of the information, so its decision is less informed. It also removes the opportunity for the RTM company to receive any category 3 information on non-exclusive appurtenant property before making the RTM claim. It would have to claim the category 3 management functions in the claim form

620 In Chapter 10, we ask whether mediation or arbitration could be beneficial here.

621 See para 6.60.

and then come to an agreement with the landlord, or apply to the tribunal, later in the claim process once it has any further information on these management functions.

7.74 It is worth noting these drawbacks are likely to be more significant for some RTM companies than for others. In the case of a stand-alone building, it may be fairly obvious what the management functions are, and the leaseholders may not need any more information before deciding that they wish to pursue an RTM claim. Similarly, "category 3" information is only likely to be relevant to estates or more complex buildings. For most stand-alone buildings, it will be irrelevant as there will not no non-exclusive appurtenant property.

7.75 If the landlord were to provide the requested information at (1) above despite arguing that the RTM claim was not valid, the associated costs of providing the information would still have to be borne by one of the parties.[622] This would be the case even if it was found that the RTM claim was not in fact valid. It seems unlikely that the landlord would take this course, particularly if the landlord was liable for some or all of the associated costs.

7.76 Under the current law, the right to receive the information arises only after the RTM company acquires the RTM. Option 1 therefore brings some benefits to the existing process, in that information is (at least potentially) provided at the counter-notice stage.

7.77 There is an obvious tension between the need to ensure the early provision of information and the proportionality of requiring landlords to provide information when they are asserting that the RTM company is not entitled to the RTM in any event. We think this option draws a good balance between these two conflicting principles. However, this balance will inevitably depend on the way in which the tribunal decides to exercise its discretion in imposing financial penalties for non-provision of the information.

Option 2: optional information notice, with information provided by the counter-notice stage at the latest

7.78 Option 2 introduces the option for the RTM company to serve an early, stand-alone information notice in advance of the claim notice. It would not be mandatory, but we envisage that it would be desirable, particularly in the case of more complex premises.

7.79 If the RTM company chose not serve an information notice, the steps would be as for option 1 (optional information notice at claim stage).

7.80 If it did elect to serve an early information notice, we envisage the steps as follows:

(1) The RTM company would be entitled to serve the information notice at any stage after it has sufficient membership to enable it to serve an RTM claim.[623]

---

622 See from para 10.71 for a discussion as to who should bear the landlord's costs.

623 See para 6.29 for the number of qualifying tenants who must be members.

(2) The landlord would have a set period – currently 28 days[624] – to respond to the information notice and provide all the relevant information.

(3) The RTM company would consider the information, and serve a claim notice if it wished to proceed. In the claim notice, the RTM company would have to state whether it wished to claim any of the category 3 functions. If the landlord failed to provide the information, the RTM company could pursue enforcement of this obligation or choose to serve a claim notice in any case.

7.81 The process would then proceed as under option 1, with the landlord having the option to serve a counter-notice if it wished to object to the RTM claim or the RTM company's claim to any category 3 functions.

7.82 If the landlord provided the information in response to the early request, and then did not serve a counter-notice, the RTM company would acquire the RTM on the acquisition date set out in the claim notice, as under the current law.[625] The RTM company would not acquire the category 3 management functions in this scenario unless otherwise agreed or determined.[626]

Early views on option 2

7.83 Option 2 sets out a process for obtaining information in advance of the claim, in circumstances where this is desirable. The RTM company may discover, on considering information received in response to an optional early information notice, that exercising the RTM is more difficult than envisaged or less financially viable, and may decide not to pursue the claim. Conversely, the information provided may strengthen the RTM company's claim to the RTM and make it more difficult to challenge through a negative counter-notice. Because that stage would not be mandatory, it would not delay the process in straightforward cases.

7.84 If the RTM company did serve an early notice, it might end up receiving (and possibly paying for – see Chapter 10) information that it might already have, or which may later turn out to be irrelevant because the RTM claim is not valid. We discussed these issues in the context of the mandatory information notice above. This is a risk of this option. However, it would eventuate in fewer cases than under a mandatory information notice process and may be justified because of its potential benefits in other cases.

7.85 We are aware that, when faced with an optional extra stage and potential costs, RTM companies may be unlikely to exercise this option. However, we hope that advisors would be able to point out the benefits (as well as the risks) in appropriate cases where early information would be a real advantage.

7.86 Inevitably, the question of which option is preferable is linked to the question of costs. In Chapter 10,[627] we ask questions about whether the RTM company should have to

---

624 See our discussion as to timing below from para 7.89.

625 There is a more detailed discussion of the situation where no counter-notice is served from para 6.62.

626 See from paras 6.75.

627 See from para 10.71.

pay any of the landlord's non-litigation costs in connection with the RTM process and, if so, whether those costs should be fixed or be the subject of a cap. In any case, bringing the provision of information forward before determination of the RTM claim means that one or both parties might be paying for the provision of information in circumstances where the RTM claim is ultimately invalid.

Consultation Question 77.

7.87 Do consultees think that the provision of information before the RTM company finds out whether it is actually entitled to exercise the RTM is a good idea? If so, which of the two options relating to the timing of the provision of information would you prefer and why? Please also provide any further comments on your preferred option which may improve it.

7.88 If possible, when setting out your preferred option for the timing of the provision of information, please set out how you consider the costs should be allocated, and estimate the cost/impact of the different options.

Time for compliance

7.89 We have been told by many stakeholders, mostly representing landlord interests, that the current 28 days is insufficient time to provide the required information.

7.90 While we accept that any set number of days is inevitably arbitrary, we had suggested 28 days based on current statutory timeframes for the provision of information to leaseholders.[628] We are also mindful, given our Terms of Reference, not to prolong the acquisition of the RTM.

7.91 Leaseholders can separately, and not pursuant to the RTM regime, request a summary of the insurance policy,[629] which must be provided by the landlord within 21 days from the date of the request. Leaseholders also have a statutory right to request a summary of the service charges from the landlord. The landlord must comply within one month from the date of the request, or within six months from the end of the accounting period, whichever is later.[630]

7.92 We accept that the landlord must be allowed a reasonable period to provide the requested information. However, we think that most of the information which can be obtained under our proposed procedure is information that the landlord should already have as part of everyday management. For example, the landlord should already have to hand the insurance policy, schedule and claims history, service charge accounts for the last three years, and the list of contractors used to maintain and repair the building.

---

628 Commonhold and Leasehold Reform Act 2002, ss 82(3) and 93(4).

629 Landlord and Tenant Act 1985, s 30A and the schedule.

630 Landlord and Tenant Act 1985, s 21.

7.93 While many stakeholders have suggested that 28 days seems to be an appropriate response time, there may be occasions where this is not reasonably practicable for the landlord. For example, the freeholder may have recently died or gone into liquidation. In such cases, the landlord could be given a right to apply to the tribunal to extend the deadline from 28 days to a maximum of 60 days.

7.94 Alternatively, it was suggested by stakeholders that we should provide for a longer period in any event, as the information required under the proposed new process exceeds in some respects the leaseholders' current entitlement to information. One of the suggestions, which was popular among landlord stakeholders, was to extend the standard time for responding to 60 days. If this proposal was adopted, we do not think there should be grounds for extension.

Consultation Question 78.

7.95 Do consultees think that the landlord should have:

(1) 28 days, with a possible extension in exceptional circumstances; or

(2) a fixed period of 60 days,

in order to provide the information needed by the RTM company in connection with the RTM?

Who should pay for the provision of this information?

7.96 Under section 88 of the 2002 Act, the RTM company[631] is required to pay any reasonable costs incurred by the landlord or other party in connection with the RTM claim (including in respect of the provision of information notices). We have noted concerns from our stakeholders that instigating a more robust and comprehensive system for provision of information such as we describe above may significantly increase costs. If passed onto the RTM company, these costs could be prohibitive.

7.97 We deal with the issue of costs more generally in Chapter 10,[632] and ask to what extent, if at all, the RTM company should compensate the landlord. Below, we set out specific considerations related to the costs incurred in providing the information discussed in this chapter (although ultimately these would be subsumed within the general non-litigation costs of dealing with an RTM claim).

7.98 First, the landlord could simply incur the cost directly without being able to pass this onto the RTM company or through the service charge fund. This would be a significant departure from the current system but it is arguable that the information the landlord will be required to provide should already be in their possession. Much of the information would also be information which any leaseholder has the right to request

631 Members of the RTM company may be jointly and severally liable for the consequential costs of giving a claim notice if the RTM claim is expressly or deemed to be withdrawn, pursuant to section 89(3) of the Commonhold and Leasehold Reform Act 2002. We do not make proposals to change this.

632 See from para 10.71.

by virtue of their leases or other statutory provisions (although the leaseholders would have to meet the landlord's reasonable costs in those cases).

7.99 Secondly, the RTM company could continue to pay the reasonable costs incurred by the landlord, as is currently required. We understand that the costs charged by landlords vary considerably, and that challenging the reasonableness of the costs involves expense which many RTM companies and leaseholders cannot afford. Satellite litigation is likely to arise in relation to what is "reasonable" in the circumstances, with the result that there would be a lack of certainty or transparency for the RTM company.

7.100 Lastly, both parties could contribute to the costs of providing the information, either on a fixed price-per-unit basis, or up to a capped cost. In Chapter 10, we explore these possibilities in our discussion around the landlord's non-litigation costs. The fixed amount(s) could be reviewed periodically by the Secretary of State.

7.101 We acknowledge that fixing or capping fees may encourage landlords to provide inadequate responses, but our proposals for enforcement, costs penalties and the possibility of providing a prescribed form is intended to deter landlords from conduct of this kind.

7.102 If the RTM company were required to pay some or all of the landlord's costs of providing information before a claim notice was given, which could occur under option 2, the legislation would have to be amended to provide for this. This is because they would not be costs incurred by the landlord in connection with the RTM claim within the meaning of section 88. Indeed, a claim notice might never be given under option 2.

7.103 See Chapter 10 for a fuller discussion of these issues, and the relevant consultation questions.

What about information which is outdated by the time the RTM company acquires management?

7.104 The date of the original provision of information and the acquisition date may be months apart, especially where there has been a dispute and the case has been referred to the tribunal. It is possible that some of the information originally provided may therefore have become outdated, for example, if one of the flats has been sold in the meantime, or works have been commenced.

7.105 We think that the landlord should have to inform the RTM company of any material changes to the information provided as soon as the landlord becomes aware of the changes. This duty should apply to any changes which occur between the time when the information is provided and the acquisition date. On the acquisition date, the landlord should confirm that there are no material changes to the information previously provided that have not been already notified. This could be done using a standard declaration form.

Consultation Question 79.

7.106 We provisionally propose that the landlord should be under a duty to notify the RTM company of any material changes to the information previously provided and confirm, on the date of acquisition, that there are no material changes that have not been notified. Do consultees agree?

DATA PROTECTION AND LEASES

7.107 Leaseholders' contact information, including their name and address for service, constitutes "personal data" for the purposes of data protection legislation.[633] The legislation restricts the situations in which personal data can be disclosed by the "controller" of that data.[634] Before acquisition of the RTM, the controller is the landlord.

7.108 We consider that data protection is relevant to two areas of our proposals. First, earlier in this chapter, we propose that RTM companies receive copies of every lease as part of the information notice process. With no further stipulations, this might mean that RTM companies would possess leaseholders' personal details before the RTM has been acquired, in cases where the current leaseholder is also the original leaseholder named on the lease.[635]

7.109 Secondly, it is possible that an RTM company may require leaseholders' contact details[636] to deliver service charge demands. Ordinarily, this will not be the case, as most leases incorporate section 196 of the Law of Property Act 1925. This provides that service of a demand at a leaseholder's last known address will be deemed to be valid service, even if the demand was not received. It is not necessary for such demands to include the leaseholder's name.

7.110 However, where a lease does not incorporate section 196, the RTM company would be required to prove that the demand was received by the leaseholder.[637] We believe that, for proof of receipt to be possible, RTM companies must have access to leaseholders' names and service addresses from the acquisition date onwards. Otherwise, they will have no practical means of delivering the demand to the leaseholder.

7.111 In our view, none of the lawful reasons for disclosing personal data currently set out in data protection legislation would allow the landlord to disclose leaseholders' contact

---

633 General Data Protection Regulation No 679/2016, Official Journal L 119 of 04.05.2016 p 33, art 4(1); Data Protection Act 2018, s 3(2).

634 General Data Protection Regulation No 679/2016, Official Journal L 119 of 04.05.2016 p 33, art 6.

635 The RTM company does not need the name or service address of each qualifying tenant in order to serve a copy of the claim notice, as this can be served at the flat: Commonhold and Leasehold Reform Act 2002, s 111(5).

636 We refer here to the leaseholder's address for service.

637 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 12-10.

details to the RTM company. However, disclosure would be lawful if it was "necessary for compliance with a legal obligation to which the controller is subject".[638]

7.112 We therefore provisionally suggest that the RTM legislation contain an obligation requiring landlords to disclose leaseholders' names and service addresses to the RTM company on the date the RTM is acquired.

7.113 It could be argued that our above suggestions would interfere with leaseholders' rights to respect for private life under article 8 of the ECHR. However, if any such interference was found, we believe it would be justified on the basis of proportionality,[639] for the following reasons.

7.114 In our view, it is necessary for RTM companies to receive:

(1) copies of all the leases in advance of acquisition of the RTM, in order for them to properly understand their obligations; and

(2) leaseholders' names and service addresses on the date of acquisition, to enable delivery of service charge demands under leases which do not incorporate section 196 of the Law of Property Act 1925.

7.115 There is no less restrictive way of ensuring RTM companies have access to the information listed in (1) and (2). There is no guarantee that landlords will make the information available unless compelled to do so.

7.116 We have considered whether our proposals are affected by the fact that the leases will be available from HM Land Registry, and leaseholders' names and addresses will be available from HM Land Registry's proprietorship register. However, the fact that the information is in the public domain does not mean that the data protection legislation is inapplicable. Exceptions exist for particular circumstances,[640] but in general there must be a lawful reason for processing personal data, irrespective of the public nature of that data. Additionally, the RTM company may not always be able to access the information it needs for two reasons:

(1) copies of every lease will not always be obtainable from the Land Registry; and

(2) whilst lease copies are available for a relatively small fee of £3 each, the total cost to an RTM company could be prohibitive in premises with a large number of units.

7.117 Requiring leaseholders' contact details to be provided *on* the acquisition date,[641] and redacting leaseholders' details from the leases given to RTM companies

---

638 General Data Protection Regulation No 679/2016, Official Journal L 119 of 04.05.2016 p 33, art 6(1)(c); Data Protection Act 2018, sch 2, para 5(2).

639 European Convention on Human Rights, art 8(2).

640 Data Protection Act 2018, sch 1, para 32 (in relation to criminal convictions); Data Protection Act 2018, sch 8, para 5 (in relation to sensitive personal data).

641 Or the nearest working day following the acquisition date, where this falls on a weekend or public holiday.

pre-acquisition, ensures RTM companies are not given leaseholders' personal data any sooner than is necessary for them to fulfil their management obligations.

Consultation Question 80.

7.118 Do consultees think that RTM companies need a copy of every lease to understand their management obligations? Is a copy of each lease provided to or obtained by RTM companies at the moment?

Consultation Question 81.

7.119 Do consultees consider that the benefits of the RTM company accessing a copy of each lease would outweigh the additional time and cost incurred in preparing these?

NOTICES RELATING TO MANAGEMENT CONTRACTS: CURRENT LAW

Management contracts

7.120 Prior to acquisition, the landlord, either directly or through managing agents, will have entered into management contracts to perform the management obligations.

7.121 The 2002 Act defines a "management contract" as a contract between an existing manager of the premises and a contractor, under which the contractor agrees to provide services, or do any other thing, regarding a function which is transferring to the RTM company.[642]

7.122 The manager of the premises in this context is one of the following: the landlord, a manager party to the lease, or a manager appointed by the tribunal to take over the landlord's management functions under section 24 of the Landlord and Tenant Act 1987. Managing agents instructed by the landlord are not "managers", they are the contractors themselves. For convenience, in this section we will refer to the "manager" under the 2002 Act as the "landlord".

The notification procedure

7.123 After acquisition, the RTM company is entitled to use its own agents and contractors to perform the management functions.[643] The 2002 Act requires the landlord to give notice of any management contracts to the RTM company ("contract notice") and notice of the RTM acquisition to any contractors ("contractor notice").[644] The notices must be given on, or as soon as possible after, the determination date which is:

---

642 Commonhold and Leasehold Reform Act 2002, s 91(2).

643 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 5(i) to (k). RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, paras 5(i) to (k).

644 Commonhold and Leasehold Reform Act 2002, ss 91 and 92.

(1) where the RTM claim is not disputed, the date by which the counter-notice must be given;

(2) where the tribunal determines the RTM claim, the date when the decision becomes final; or

(3) where the RTM is initially disputed but the objections are subsequently withdrawn, the date on which they are withdrawn in writing.

7.124 In the case of management contracts entered into by the landlord after the determination date but before acquisition of the RTM, the contractor and RTM company must be notified on the date the contract is entered into or as soon as possible afterwards.[645]

7.125 Each notice must set out specific information. A contractor notice must state:

(1) which contract the notice relates to;[646]

(2) that the RTM is to be acquired by an RTM company[647] and the acquisition date;[648]

(3) the name and registered office of the RTM company;[649] and

(4) that, should the contractor wish to provide the same services to the RTM company as it did to the landlord, it is advised to contact the RTM company at the address given in the notice.[650]

7.126 A contract notice must state:

(1) the details of the contract in relation to which the notice is given and of the contractor to that contract, including their address;[651] and

---

645 Commonhold and Leasehold Reform Act 2002, s 92(2).

646 Commonhold and Leasehold Reform Act 2002, s 92(3)(a).

647 Commonhold and Leasehold Reform Act 2002, s 92(3)(b).

648 Commonhold and Leasehold Reform Act 2002, s 92(3)(d).

649 Commonhold and Leasehold Reform Act 2002, s 92(3)(c).

650 Commonhold and Leasehold Reform Act 2002, s 92(3)(e); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825, reg 6; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684, reg 6(1).

651 Commonhold and Leasehold Reform Act 2002, s 92(7)(a) and(b); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825, reg 7(a); Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684, reg 7(a).

(2) that, should the RTM company wish for the contractor to provide the same services to the RTM company as it did to the landlord, it is advised to contact the contractor at the address given in the notice.[652]

7.127 Contract and contractor notices provided in relation to premises in Wales must include additional information prescribed in regulations.[653]

7.128 Contractors and sub-contractors have the duty to pass a copy of the contractor notice down the chain of sub-contractors and to give the RTM company a contract notice in relation to the sub-contract.[654] They must do so either on, or as soon as possible after, the date when they receive the contractor notice or, for contracts entered into after receipt of the notice, the date of the contract.[655]

PROBLEMS WITH THE CURRENT PROCESS

No provisions as to the termination of management contracts

7.129 While prescribing the notice procedure, the 2002 Act does not make provision for the actual termination of existing management contracts. We have been told by stakeholders that the contracts themselves rarely contain provisions about termination on acquisition of the RTM.

7.130 As a matter of law, an RTM company is not liable under, or bound by, any contracts made by the landlord prior to the acquisition of the RTM. This is because the RTM company is not a party to those contracts. Conversely, the contractors cannot continue to perform their contracts with the landlord once the management has passed to the RTM company, unless the RTM company expressly adopts those contracts.

7.131 Some management contracts have short notice periods, which means they can be validly terminated during the transition period between the date when the RTM company becomes entitled to the RTM and the acquisition date.

7.132 Fixed-term contracts or contracts with long notice periods may not be terminated in accordance with their terms in the time available before acquisition depending on the commencement of the contract. Examples may include ongoing contracts for lift maintenance, major works or simply for shorter works for which no early termination is provided under the contract. The fate of these contracts could therefore become an issue between the landlord and the contractors.

7.133 Landlords have told us that, in practice, many contractors waive any rights they would have had under the contracts in order to preserve the ongoing relationship with the landlord. Where the landlord has portfolio-wide management whereby they engage a

---

652 Commonhold and Leasehold Reform Act 2002, s 92(7)(b); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010/825, reg 7(b); Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684, reg 7(b).

653 Commonhold and Leasehold Reform Act 2002, ss 92(3)(e) and 92(7)(b); Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011/2684, regs 6(2), 7(c) and 8(4) to (5).

654 Commonhold and Leasehold Reform Act 2002, s 92(4).

655 Commonhold and Leasehold Reform Act 2002, ss 92(6)(a) to (b).

contractor under a single contract to manage all their properties, the properties can usually be freely substituted or removed under the terms of the contract.

7.134 However, in some cases, contractors will suffer financial loss because of the termination and will look to recover this loss from the landlord who may in turn look to recover the loss from the leaseholders via the service charge.

Frustration or breach?

7.135 There are two main views on the possible impact of the RTM on management contracts:

(1) the contract could be frustrated; or

(2) the contract could be breached.

7.136 A contract is "frustrated" when it is discharged because something has occurred after its formation rendering it physically or commercially impossible to perform, or making the obligation to perform radically different from that undertaken at the moment of entry into the contract.[656]

7.137 The main question in the context of the RTM is whether it could have been reasonably foreseen that the leaseholders would acquire the RTM. The courts have held that among the factors which must be considered in deciding whether a contract was frustrated are:[657]

(1) the terms of the contract and its context;

(2) the parties' knowledge, expectations, assumptions and contemplations, especially as to risk, at the time of contract, as far as these can be ascribed mutually and objectively; and

(3) the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

7.138 Contracts could fall into two categories:

(1) Contracts entered into before the 2002 Act was passed, which will almost certainly be deemed to be frustrated. [658] It could not have been reasonably foreseen that the leaseholders would acquire management because that right simply did not exist before commencement of the 2002 Act.

(2) Contracts entered into after the 2002 Act was passed. Here, whether the contract was frustrated would depend on the circumstances of the case. We think that, in most cases, it is unlikely that the contract would be held to be

---

656 *Chitty on Contracts* (32nd ed 2017) para 23-001.

657 *Edwinton Commercial Corp & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 1 Commercial Law Cases 876 at [111] by Rix LJ.

658 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-11.

frustrated. This is because it would be reasonably foreseeable that qualifying tenants would exercise their statutory rights.

7.139 We are not aware of any case law in respect of the frustration or breach of management contracts on acquisition of the RTM. We have therefore considered, by analogy to the circumstances in (2) above, the context of compulsory purchase, where the owner's contracts would have to cease on the land being compulsorily acquired in accordance with the existing law.

7.140 In *Walton Harvey Ltd v Walker,*[659] a lessee of a hotel and an advertising company contracted for the erection and display of an advertising board. The hotel was subsequently the subject of compulsory purchase. The Court of Appeal held that the contract was not frustrated as the lessee of the hotel was deemed to have been aware that the local authority could acquire the premises and did not provide against this risk in the contract:

> They could have provided against that risk, but they did not…The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement.[660]

7.141 In *E. Johnson & Co (Barbados) Ltd v N.S.R. Ltd,*[661] the Privy Council held that the exercise of compulsory purchase powers after the exchange of contracts for the sale of the land, but before completion, did not frustrate a contract:

> It will be presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. The risk of interference with land-owning rights by the Crown or statutory authorities is always present. A threat of compulsory purchase … does not radically alter the nature of the contract of sale. What it does is simply to increase the likelihood of an existing albeit remote risk becoming an eventuality.[662]

7.142 Similarly, the Court of Appeal held that a contract of sale of a building was not frustrated where, two days after the sale, the building was listed as one of architectural or historic interest by the exercise of the powers of the Secretary of State under section 54 of the Town and County Planning Act 1971:[663]

> It seems to me that the risk of property being listed as property of architectural or historical interest is a risk which inheres in all ownership of buildings. In many cases it may be an extremely remote risk. In many cases it will be a marginal risk. In some cases it may be a substantial risk. But it is a risk, I think, which attaches to all

---

659 *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274.

660 *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, 282 by Lord Hanworth MR.

661 *E Johnson & Co (Barbados) Ltd v N.S.R. Ltd* [1997] AC 400; see also *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627.

662 *E Johnson & Co (Barbados) Ltd v N.S.R. Ltd* [1997] AC 400, 406 to 407 by Lord Jauncey of Tullichettle.

663 *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164.

buildings and it is a risk that every owner and every purchaser of property must recognise that he is subject to.[664]

7.143 In light of the above case law, the risk of the RTM may be considered "incidental to land ownership" and "inherent in the ownership of buildings". The parties to the management contracts could be deemed to have known about the law on the RTM and thus expected to provide in their contracts for termination on acquisition of the RTM. In our view, it is very unlikely for management contracts to be considered frustrated where they were concluded after the entry into force of the 2002 Act.

Consequences of frustration

7.144 On frustration, the contract terminates automatically.[665] Where the Law Reform (Frustrated Contracts) Act 1943 applies,[666] the parties remain liable for breaches of contract which occurred before the contract was frustrated.[667] The landlord could recover sums paid or payable to contractors for services not yet performed and the contractor could claim for expenses they incurred before the contract was discharged.[668] No other compensation, including for early termination, is available.[669]

7.145 If the contract is not frustrated, it may be breached if the result is that the contract is impossible to perform, unless the contract provides otherwise.[670] The contract will consequently be discharged, freeing the contractor from their obligations under it, and leaving the landlord liable to damages arising from non-performance.[671]

7.146 It is possible that a management contract would be neither frustrated nor breached following acquisition of the RTM. For example, upon acquisition of the RTM, the RTM company may place its own insurance policy mid-way through the year. If the landlord insures the premises through a portfolio policy rather than an individual insurance contract, they may simply remove the block from the policy. If agreed between the insurance company and the landlord, this amendment will amount to a variation of contract and the original contract would continue to exist.

Payment of damages

7.147 In most cases, we think that the management contracts terminated early would be breached, as a matter of law. That means that the landlord would be liable to the contractors for their loss. This could take the form of damages, payable by agreement

---

664 *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164, 173 by Buckley LJ.

665 *Chitty on Contracts* (32nd ed 2017) para 23-071.

666 It applies to most contracts, with the exception of, among other things, contracts of insurance and contracts for the sale of specific goods which perish before the risk has passed to the buyer.

667 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-12.

668 Law Reform (Frustrated Contracts) Act 1943, s 1(2).

669 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-12.

670 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-13.

671 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-13.

or following a court decision. Alternatively, the management contract will sometimes provide for termination fees or liquidated damages.

7.148 In such cases, the landlord may recover the fees and, arguably, the damages,[672] from the leaseholders through service charges. This could be unfair to leaseholders, especially those who are not members of the RTM company and have not sought the RTM. The leaseholders would not have had any power to prevent the landlord from entering into contracts containing onerous termination provisions or fees. Fees or liquidated damages could even exceed the contractor's loss, as in these cases the contractor has no duty to mitigate.[673]

7.149 We have been told by stakeholders that entry phone systems and lift maintenance contracts are particularly problematic. These contracts are usually concluded for prolonged periods of time such as five or 10 years. It seems that many of these contractors tell RTM companies that they should either agree to take over these contracts or face hefty termination fees, which are beyond the means of the RTM company. We were informed that there are only a few companies that provide entry phone systems and lifts and that they use this scarcity as leverage against the RTM companies. Whilst the RTM company is not liable to pay the termination fees, it may pay under duress or because it does not know what its rights are. We are also aware of anecdotal evidence that contracts for entry phone systems may reserve the provider's proprietary interest in the equipment. Providers may remove their equipment if the contract is cancelled, creating the need for a difficult and expensive replacement fit.[674]

Comparison with freehold acquisition

7.150 The Leasehold Reform, Housing and Urban Development Act 1993 does not currently provide for what happens to existing management contracts on completion of a freehold acquisition. The process for freehold acquisition is generally longer than the RTM process, and gives the parties more time to attend to these contracts, and either terminate them or provide for their assignment to the nominee purchaser. It is our understanding, however, that leaseholders who purchase their freeholds have the same difficulties that we have identified in this chapter.

Late service of management contract notices

7.151 In practice, the contractor and contract notices are often sent much later than the timescale envisaged in the 2002 Act. We understand that the notices are sometimes sent even after the acquisition date. Receiving the notice close to or after the acquisition date gives the contractor and RTM company little time to consider their options. The contractor may lose out on the opportunity to find alternative work for the

---

672 Landlords can recover legal costs through service charges even where they were incurred in breach of a covenant: see *Continental Property Ventures Inc v White* (10 February 2006) LRX/60/2005 Lands Tribunal, [2007] Landlord and Tenant Reports 4. Accordingly, it would seem arguable that they can recover damages payable to third parties as well.

673 *Chitty on Contracts* (32nd ed 2017) para 26-186; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, [2015] 1 Commercial Law Cases 143 at [70] by Leggatt J.

674 This issue is also considered in Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, para 9.149.

period after the acquisition date. This can have devastating consequences on smaller contractors for whom the management contract may be the principal source of work.

7.152 The RTM company is also prejudiced, albeit to a lesser extent, because it can always arrange new contracts for the provision of services. However, some of the existing contracts may contain more favourable terms than new ones, so the RTM company may have sought to agree the same terms had they known the details of those contracts in good time. The leaseholders may have to bear the cost of termination fees or damages where the management contracts are terminated too late, even though there is no contractual obligation to do so.

Practical issues

7.153 On acquisition of the RTM, the landlord might be mid-way through a major works project at the building, an insurance dispute or complex service charge case.[675] In such cases, it may be practically difficult for the landlord to simply stop and hand over to the RTM company.

7.154 In the case of major works where there are contractors on the site, this is a particularly significant issue. A contractor may be in the process of replacing the roof, having removed the existing roof and put on a temporary cover. If, the day after, the landlord notifies the contractor of the RTM acquisition, they would now be prohibited from discharging any management function[676] and, on one view, cannot therefore authorise the contractor to finish the work but must hope that the RTM company does so. If the RTM company fails to do so then the contractor could argue that the management contract had been breached and subsequently leave the site without finishing the job and sue the landlord for any losses.

MANAGEMENT CONTRACTS: PROPOSALS FOR REFORM

7.155 As identified above, there are numerous issues concerning how the management contracts are dealt with during the acquisition process. We propose a more transparent and timely system for dealing with management contracts.

The process

7.156 We provisionally propose that the landlord must send the following prescribed information as part of the information notice (whether, as discussed above, this is a free-standing notice or as part of the information provided with the counter-notice):

(1) a list of all the management contracts and contractors, with contact details; and

(2) a copy of the contracts or, alternatively, details of the management contracts, including the term of the contracts, the cost and the notice period, if any.

7.157 At the same time, the landlord should be required to serve notice on the contractors, in line with the current process. The notice should also advise that the contract will be terminated on the acquisition date if the RTM company and the contractor do not agree that the contractor should continue to provide the services after the RTM is

675 Landlord and Tenant Act 1985, s 27A.

676 Commonhold and Leasehold Reform Act 2002, s 96.

acquired. If the acquisition date is unknown at this time (for example, because the landlord intends to challenge the claim) the landlord should inform the contractor of this.

7.158 On receipt of the list of contractors, the RTM company should consider whether it may wish to continue involvement with the contractor and:

(1) As soon as reasonably practicable,[677] contact directly any contractor parties with which it might wish to commence negotiations to enter into new contracts, and advise the landlord of any agreement reached. If the existing contractor parties do not wish to engage with the RTM company, or the parties cannot agree terms, the RTM company will need to speak with other contractors promptly to ensure continuity of services post-acquisition.

(2) Within one month of the determination date, respond to the landlord identifying with which contractor parties it does not wish to, or cannot agree terms on which to, maintain a contractual relationship. This part of the process will be a statutory requirement.

7.159 On receipt of the RTM company's notice, the landlord should within 14 days:

(1) Notify those contractor parties which the RTM company does not wish, or cannot agree, to retain, that their services shall no longer be required from the acquisition date. This part of the process could be prescribed so as to make it clear that the landlord considers the contract terminated as a matter of law as it will no longer be managing the premises post-acquisition.

(2) Notify the second category of contractor parties that the RTM company has indicated a preference to maintain a relationship, but that regardless of the outcome of those discussions, the landlord considers the management contract terminated as a matter of law as it will no longer be managing the premises post-acquisition.

7.160 This process should be completed before the acquisition date and therefore give all parties the best chance possible to ensure continuity of service.

7.161 Our proposals aim to streamline the current procedure regarding the exchange of management contract information to provide more clarity and sufficient preparation time for all parties involved in the management of the premises.

[677] What is reasonably practicable will depend on the circumstances, namely whether a claim notice has been served and whether the landlord has objected to or admitted the claim.

Consultation Question 82.

7.162 We provisionally propose to require the landlord, RTM company and contractor parties to communicate within prescribed periods to clarify how existing contracts will be dealt with prior to the RTM acquisition date. Our proposals would require:

(1) the landlord to provide copies or details of the management contracts, (including the contract terms, cost and notice period) in response to the information notice or with the counter-notice, depending on the preferred option for provision of information;

(2) the RTM company to notify the landlord of the contractor parties which it does not wish to, or cannot agree terms with on which to maintain a contractual relationship within one month of the determination date; and

(3) the landlord to notify the RTM company's preference to the contractor parties within 14 days. The landlord should also confirm that it considers the contract terminated as a matter of law as it will no longer be managing the premises post-acquisition.

Do consultees consider that these additional requirements will provide sufficient clarity and certainty for all parties involved in the management of the premises?

MANAGEMENT CONTRACTS AND EMPLOYMENT RIGHTS

7.163 Some contractors may be directly employed by the landlord, such as a resident caretaker. The contractor may therefore have additional rights under employment law.

Transfer of employees under TUPE

7.164 The Transfer of Undertakings (Protection of Employment) Regulations 2006[678] ("TUPE") set out rules for preserving the rights of employees on the transfer of the undertaking by which they are employed. It is possible that, at least in some circumstances, a contractor such as a resident caretaker directly employed by the landlord will be entitled to transfer to the RTM company's employment under TUPE.

7.165 Employment rights arise under TUPE where there is:

(1) An employee – This means an "individual who works for another person whether under a contract of service … or otherwise but does not include anyone who provides services under a contract for services".[679] In the case of the RTM, the management contract should be clear as to whether the contractor is employed or not. If not, there may be other circumstances which

678 SI 2006 No 246.

679 For the elements of contract of service see *Christa Ackroyd Media Limited v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 69 (TC), (10 February 2018) TC/2016/04992 First-tier Tribunal (Tax Chamber) at [131] to [132] by Judge Jonathan Cannan.

indicate an employment relationship, such as evidence that the landlord pays the contractor party's income tax and national insurance.

(2) A transfer of an undertaking – TUPE applies to the transfer to another person of an undertaking, business or part of an undertaking or business where there is a transfer of "an economic entity which retains its identity".[680] An economic entity is "an organised grouping of resources which has the objective of pursuing *an economic activity*" (emphasis added).[681] Whether there is an "economic entity" in the RTM scenario therefore depends on whether the landlord's management functions constitute an "economic activity".

7.166 TUPE can apply even where an undertaking is not operating for gain.[682] The fact that the landlord is not necessarily carrying out their management functions for profit would not prevent those functions constituting an economic activity.

7.167 Where there is a "relevant transfer" under TUPE, the employment contract of any person employed by the transferor and assigned to the economic entity being transferred will not be terminated. Instead, any such person shall, after the transfer, become employed by the transferee on the same terms and conditions.[683]

7.168 The question of whether an economic entity "retains its identity" is a complicated one. It requires consideration of numerous factors, which include:[684]

(1) the type of business;

(2) the degree of similarity of activities before and after transfer; and

(3) whether the majority of staff were taken over by the new employer.

7.169 It appears that no single factor is decisive, and that not all the criteria need be satisfied.[685] In an RTM acquisition, the management functions which constitute the "economic activities" being transferred will be identical pre- and post-transfer. This supports the conclusion that TUPE applies.

7.170 This view has support from some RTM commentators, such as the authors of *Service Charges and Management,* who consider that the acquisition of the RTM constitutes a relevant transfer of undertakings which binds the RTM company.[686]

---

680 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 3(1)(a).

681 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 3(2).

682 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 3(4)(a).

683 *Tolley's Employment Handbook* (32nd ed 2018) para 53.13.

684 Case 24/85 *Spijkers v Gebroeders Benedik Abattoir CV* [1986] ECR 1119.

685 *IDS Employment Law Handbooks* (Vol 11 2018) paras 1.43 and 1.78.

686 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-09.

Consequences if TUPE applies

7.171 If TUPE applies, the employees' jobs transfer to the new company and continuity of employment is maintained.[687] This could have various implications on the acquisition process. The landlord would be required to provide certain prescribed information about the employee to the RTM company,[688] and the landlord and the RTM company may have responsibilities relating to the provision of information to, and consultation with, employees affected by the transfer.[689] This would increase the administrative burden on the landlord in the acquisition process and potentially have timing implications. The employee would also have the right to object to the transfer, with the result that their employment contract would terminate rather than transfer.[690]

7.172 Provided the employee does not object to the transfer then, broadly speaking, the RTM company and landlord would not be permitted to dismiss the employee or vary their employment terms to the extent that the sole or principal reason for this is the relevant transfer.[691] This may present issues for the RTM company if it wished to reduce the employee's hours or terminate the contract and could not demonstrate that this was for an economic, technical or organisational reason entailing workforce changes rather than as a result of the transfer.

7.173 Subject to certain exceptions, where the RTM company takes on an employment contract following a relevant transfer, any acts or omissions of the landlord prior to the transfer are deemed to be acts or omissions of the RTM company.[692] This could mean that the RTM company becomes liable for the previous acts or omissions of the landlord.

Employees' rights to occupy premises

7.174 Employed contractors, such as caretakers, may have the benefit of accommodation on the premises. As part of the employment package, the employee could have the right to live in one of the flats in the premises at a reduced rent or for free. If the employee is a "service occupier",[693] they would not have security of tenure over the flat,[694] but it is conceivable that they may have been granted a tenancy or additional rights in relation to the occupation of the flat by contract.

---

687 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 4(1) and (2).

688 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 11.

689 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, regs 13 and 13A.

690 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, regs 4(7) and (8).

691 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, regs 4(4) to (5C) and 7. There are certain exceptions to this, including where the sole or principal reason for the dismissal or variation is an economic, technical or organisational reason entailing workforce changes (provided, for a variation, that the employer and employee agree the variation).

692 Transfer of Undertakings (Protection of Employment) Regulations 2006/246, reg 4(2)(b).

693 For the definition of "service occupier" see *Commissioner of Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708, 1722 and *Langley v Appleby* [1976] 3 All ER 391.

694 *Street v Mountford* [1985] AC 809, 817H to 818E.

7.175 The RTM legislation does not make any provision for what happens in these circumstances and stakeholders (particularly in the housing association sector) have told us that it is a significant problem.

7.176 We have been told that, in practice, the RTM company and landlord negotiate a licence in favour of the RTM company, so that the RTM company can continue to provide accommodation for the employee. There is, however, no requirement to do so and we have also been made aware of cases where the RTM company simply ceased providing the services previously provided by the employee.

The need to take legal advice

7.177 We have flagged above the issues which could arise on acquisition of the RTM in respect of the employment and occupation rights of the landlord's employees. We have been told by stakeholders that they are generally unsure whether TUPE would apply to the transfer of the RTM as a matter of principle and that most of the time RTM companies do not even realise they need to consider the position of the landlord's employees.

7.178 As we said above, there are strong indications, including from legal textbooks, that the RTM is a "relevant transfer" to which TUPE would apply. However, we do not consider that we can prescribe in the RTM legislation when the personnel engaged by the landlord would be "employees" for the purposes of TUPE. Nor can RTM legislation provide for what should happen in relation to an employee's rights to occupy a flat. These matters fall to be decided by application of general employment law, depending on the particular circumstances of the case. RTM companies will need to seek legal advice to determine whether TUPE applies upon their acquisition of the RTM and what ramifications it will have on the transfer in terms of employees' rights.

7.179 To determine whether this is a prevalent issue and whether we could or should offer further guidance, we would encourage consultees to share with us their experiences of TUPE and landlord's employees' rights in the context of the RTM.

Consultation Question 83.

7.180 We invite consultees to share their experiences of TUPE where the RTM has been acquired. Did the landlord's employees, who were involved in management of the premises, transfer over to the RTM company? If so, in what circumstances? If not, what happened to them once the RTM transferred?

Consultation Question 84.

7.181 Do consultees have experience in relation to a caretaker or landlord's employee's rights to occupy a flat in the premises? What happened once the RTM was transferred?

REGISTRATION

7.182 The acquisition of the RTM, but not the existence or service of a claim notice, can be noted against the landlord's title at the Land Registry.[695] An application for the entry of a notice must be accompanied by evidence to satisfy the registrar that:

(1) the applicant is an RTM company;

(2) the RTM is in relation to premises comprised in the registered estate;

(3) the registered proprietor of the registered estate is the landlord under a lease of the whole or part of the premises; and

(4) the RTM has been acquired, and remains exercisable by, the RTM company.[696]

We are told that, in practice, the Land Registry requires a copy of the claim notice.

7.183 If the RTM is not registered then, when the landlord's interest is disposed of, the purchaser will not be able to tell from the Land Register that an RTM company is managing. However, any prudent purchaser would be so aware in view of the ability to raise pre-purchase enquires. The acquisition of the RTM will bind any purchaser of the landlord's interest whether or not it is registered, assuming the RTM claim was valid in the first place.[697]

7.184 We have considered whether or not to make registration compulsory, and/or whether registration of itself would bind a landlord's successor so they would not subsequently be able to argue the RTM has not been properly acquired.

7.185 We do not believe that the Land Registry is the appropriate forum for any dispute about whether or not the RTM has been properly acquired. As a result, we do not believe that the existence of a notice on the register should force a landlord's successor in title to accept that the RTM has been validly acquired. Our proposals in Chapter 6 to allow the RTM company to make an application for an order that they have acquired the RTM even where no counter-notice is served will serve this function.

7.186 We believe that the acquisition of the RTM should be capable of being noted on the landlord's title and would encourage RTM companies to so register. It not only ensures that the landlord's successor in title is aware that the right is being exercised, but also improves the chances of purchasers of any of the flats becoming aware of the right at the time they purchase. We do not suggest that registration should be compulsory. The only possible consequence of failing to register would be a loss of the right, which is not something we wish to entertain.

---

695 The Commonhold and Leasehold Reform Act 2002 as originally enacted dealt with registration in section 104. The Land Registration Act 2002 repealed section 104 so the Commonhold and Leasehold Reform Act 2002 no longer deals expressly with registration at all.

696 The Land Registration Rules 2003, s 79A.

697 An invalid claim which is registered would not, arguably, bind the landlord's successor (or the original landlord – see discussion from para 6.62 and particularly 6.68).

Chapter 8: Management functions

8.1 In Chapter 7 we discuss the RTM company's right to receive information from the landlord to assist it to acquire and then exercise the RTM. On acquisition of the RTM:

(1) all management functions under the lease pass to the RTM company insofar as they relate to the qualifying premises (this is to the exclusion of the landlord);

(2) management functions in relation to the non-qualifying part of the premises remain with the landlord;

(3) accrued uncommitted service charges must be transferred to the RTM company;

(4) the RTM company acquires the right to enforce tenant covenants (this is in addition to the landlord's right to enforce);

(5) the RTM company acquires the right to grant or withhold approval under the lease for the qualifying premises (this is a right shared with the landlord); and

(6) the landlord is liable to the RTM company for the part of the service charges which are due in respect of the non-qualifying premises.

8.2 Below we address points (1) to (4) above, and in the next chapter points (5) and (6).

8.3 We look at the management functions which are transferred, and note factors which can sometimes lead to confusion as to what has been transferred. We then look at two particular functions in more detail: regulated activities (such as the provision of personal care services) and insurance. Finally, we consider the issues related to the payment of uncommitted service charges to the RTM company.

WHAT IS TRANSFERRED TO THE RTM COMPANY?

8.4 Acquisition of the RTM is a statutory transfer of responsibility. The legislation sets out that the RTM company will acquire the landlord's "management functions" under the lease. These are defined as functions in respect of:[698]

(1) services;

(2) repairs;

(3) maintenance;

(4) improvements;

(5) insurance; and

---

698 Commonhold and Leasehold Reform Act 2002, s 96(5).

(6) management.

8.5 The 2002 Act does not provide any further clarification on each of the types of "management functions" beyond the list set out above. That list mirrors the matters for which a service charge is payable under the Landlord and Tenant Act 1985.[699] It appears that Parliament intended that anything for which a service charge is payable should be included in the "management functions" to be transferred to the RTM company.

8.6 It is worth noting that the RTM company can only acquire functions which the lease permits the landlord to undertake. Acquisition of the RTM does not create new rights or obligations and does not affect the proper construction of the lease.[700] For example, if the lease does not contain an express power for the landlord to carry out improvement works, the RTM company cannot do so as a matter of law. The consent of the landlord would be required because the works would affect the nature of the property, and the consent of the leaseholders would be required so that the RTM company could recover the cost from the service charge fund.

Restrictions on the landlord

8.7 The 2002 Act provides that the landlord cannot undertake any management functions which the RTM company is "empowered or required" to undertake, unless this has been agreed with the RTM company.[701]

8.8 In *Francia Properties Limited v Aristou*,[702] it was held that the word "empowered" means that "management functions" includes powers, not just obligations or duties. The RTM company therefore acquires not only the landlord's management obligations, but also discretionary powers that the landlord has in relation to management. For example, if the lease states that the landlord "may" carry out improvement works, then post-acquisition the RTM company will have the power to carry out improvement works, but will not be obliged to do so.

8.9 Furthermore, the 2002 Act contains anti-avoidance mechanisms which prevent landlords circumventing the operation of the RTM provisions.[703] It deems to be void any agreement relating to a lease insofar as it:

(1) purports to exclude or modify the right of any person to be, or do any thing as, a member of an RTM company;

(2) provides for the termination or surrender of the lease if the leaseholder becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing; or

---

699 Landlord and Tenant Act 1985, s 18(3).

700 *Wilson v Lesley Place (RTM) Co Ltd* [2010] UKUT 342 (LC), [2011] Landlord and Tenant Reports 11.

701 Commonhold and Leasehold Reform Act 2002, s 97(2).

702 [2017] Landlord and Tenant Reports 5 at [63].

703 Commonhold and Leasehold Reform Act 2002, s 106.

(3) provides for the imposition of any penalty or disability if the leaseholder becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing.

The elements of "management functions"

8.10 "Services" are not defined by case law or legislation. They are generally set out in the lease. Common examples are gardening, cleaning, pest control, provision of communal electricity central heating, water, lifts and the appointment of professional advisers (like solicitors, managing agents or accountants). In some cases, services may include the provision of a concierge or caretaker's services.

8.11 "Repairs" will include the repairs of any aspect of the premises which the landlord is currently obliged to repair under the lease. This may include repairing broken glass, damage to the communal door or repairing the roof.

8.12 "Maintenance" of the premises may include maintaining the roof or exterior redecoration of the premises. This is similar to repairs, save that repair works fix issues which have already arisen, whereas maintenance prevents issues from arising in the future.

8.13 "Improvements" are works which upgrade aspects of the premises. Examples include adding a video surveillance system or replacing single glazed windows with double glazed windows. We understand that the inclusion of the word "improvements" has caused confusion for RTM companies, who see the definition in the legislation but understandably do not realise that it only applies if the lease allows for improvement works to begin with. We are told that most leases granted by private landlords do not provide for improvements. Some RTM companies carry out improvement works charged to the service charge fund without any legal basis for doing so and can run into difficulties when one or more leaseholders, or the landlord where they contribute, challenges their obligation to pay.

8.14 "Insurance" requirements will be set out in the lease. This will typically include buildings insurance, and possibly third-party liability insurance. It will not usually include insurance in respect of the RTM company, such as directors' and officers' liability insurance or public liability insurance. We include a separate section on insurance below because of its importance to all parties.

8.15 The meaning of "management" has attracted judicial scrutiny.[704] The definition of "management function" is circular because it includes "management" which is itself not defined.[705]

8.16 Overall, there is little case law on the definition and interpretation of "management functions". This may be because the definition does not cause enough difficulty to make it worthwhile to challenge in court. Stakeholders have told us that they are not aware of any significant difficulties with the definition.

---

704 *Francia Properties Limited v Aristou* [2017] Landlord and Tenant Reports 5.

705 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-04.

8.17 The current definition of "management functions" is broad as it needs to cater to all types of leases. We do not think we could or should come up with an exhaustive list of "management functions". Neither do we think it would be a worthwhile exercise to define each part of the existing definition in greater detail. The more prescriptive the definition, the greater the risk of leaving out certain functions. However, if consultees consider that the definition of "management functions" causes significant difficulties, we could consider providing some further guidance.

Issues which can lead to uncertainty

8.18 In theory, on the acquisition date, the RTM company takes over the management functions and the landlord continues to manage everything that relates exclusively to non-qualifying premises. In practice however, we are told that disputes arise because a lack of clarity in the legislation leaves some uncertainty as to what has transferred. Below, we discuss some factors which can lead to confusion. These tend to be fact-specific issues, and so are not things which legislation could make specific provision for.

Practice which does not reflect the lease

8.19 The lease may not accurately reflect how the building has been managed in practice. For example, the lease may only provide for the landlord to insure the building and maintain the roof. Despite this, the landlord may perform additional services, such as cleaning, communal redecoration and gardening, for which the leaseholders have been happy to pay through service charge payments.

8.20 It is also not uncommon for a block to be managed in direct contravention of the lease, for practical reasons. For example, if a balcony is used exclusively by one leaseholder but not demised under the lease, it may be the landlord's responsibility to maintain and repair it. However, in practice, the leaseholder may maintain and repair it, as that is the easiest arrangement for all concerned.

8.21 These practical scenarios can lead to disputes as to where the boundaries of management functions lie. The legislation only provides for management in accordance with the proper construction and strict interpretation of the lease.[706] It does not allow for any modification or the creation of any new management rights outside the lease.[707]

8.22 However, in one case, the court was prepared to interpret the lease more widely to include a settlement agreement between the landlord and leaseholder outside of the lease. There, Recorder Cohen QC held:

> one thing that the intervention of an RTM company does not do is give to the RTM company the right to walk away from arrangements which existed at the date of the assumption of management functions.[708]

---

706 Commonhold and Leasehold Reform Act 2002, s 96(2).

707 *Wilson v Lesley Place (RTM) Co Ltd* [2010] UKUT 342 (LC), [2011] Landlord and Tenant Reports 11.

708 *AHM Block 5 RTM Co Ltd v Crystal Water Ltd* (28 July 2016) Central London County Court (unreported) at [54] to [56] by Recorder Cohen QC.

8.23 While this case provides some guidance where any divergence from the lease has been addressed by the parties in a settlement agreement, it is a county court decision of no binding authority. It also does not address any informal or unwritten arrangements.

Lack of awareness as to the functions acquired

8.24 If the division of management functions is not clearly established from the outset, this can lead to significant uncertainty, disputes and, potentially, costs for both sides in the future. We hope that our suggested "categories" of information, discussed in Chapter 7, will ensure that parties are aware from the outset what the management functions for the particular premises are.

8.25 Further, some additional statutory obligations which usually sit with the landlord are transferred to the RTM company. Some such functions are found in the body of the 2002 Act, whereas others are set out in schedule 7. Many parts of the 2002 Act cross-refer to other legislative provisions, such as the Landlord and Tenant Act 1985, for the detail of the obligations. We discuss these provisions in Chapter 9.

Management functions which the RTM company may not wish to acquire

8.26 The legislation provides that a landlord can retain some management functions if this is agreed with the RTM company.[709] The RTM company cannot unilaterally insist on the landlord retaining certain management functions and the landlord cannot keep management functions which the RTM company wishes to acquire.

8.27 A situation may arise where it is in the interests of both parties to allow the landlord to continue with certain management functions. For example, in a multi-building estate where the RTM is only acquired in relation to one building, it may be cheaper to permit the landlord to continue insuring the whole estate.

8.28 A further example might be where there are shared drains with neighbouring premises. Both the premises over which the RTM is being acquired and the neighbouring premises will be required to contribute towards the cost of upkeep of the shared drains. Arranging for the landlord to manage these functions would be more advantageous than the RTM company attempting to collect a contribution from the neighbouring premises.

8.29 The legislation does not set out a procedure or mechanism for the form or scope of agreement as to the allocation of management functions. It is therefore up to the parties to agree this between them.

8.30 We understand that generally, where there is a transfer of a specific function back to the landlord, the arrangement is made informally, usually by an exchange of emails. The issue with an informal arrangement is that it can create disputes. The landlord may not perform the task to the satisfaction of the RTM company and the RTM company may fail to pay the landlord for the task. The exact scope of the delegated task may not be clear, and the landlord may do too much or too little. There may also be confusion as to how long the agreement lasts for.

---

709 Commonhold and Leasehold Reform Act 2002, s 97(2).

8.31 It is our understanding that management functions are rarely transferred back to the landlord. We are keen to know how frequently this type of transfer occurs and what the difficulties are.

Consultation Question 85.

8.32 Do consultees consider that any amendments could be made to the definition of "management functions", or more information provided by way of guidance, to improve clarity and certainty?

Consultation Question 86.

8.33 Are consultees aware of cases where the RTM company and landlord have arranged for certain management functions to remain with, or transfer back to, the landlord? If so:

(1) What functions, and why?

(2) Did any disputes arise from the agreement to transfer them back?

REGULATED ACTIVITIES

8.34 In most cases, the management functions will be relatively standard and straightforward to manage. We have, however, been told by stakeholders that there are some cases where those functions are harder to manage, and require specific expertise. A failure to undertake the function properly could leave vulnerable leaseholders at risk and have criminal implications. This is particularly the case in the context of retirement accommodation.

8.35 In the case of retirement accommodation, one of the services often provided under the lease is 24-hour care for more vulnerable leaseholders. This might include the administration of prescription medication. These services may be governed by the Care Quality Commission ("CQC"),[710] a Government organisation tasked with regulating health and social care services. The provider of any regulated activities must be registered with the CQC, failing which the provision of these services is a criminal offence.[711]

[710] https://www.cqc.org.uk/.

[711] Health and Social Care Act 2008, s 10. For Wales, see Regulation and Inspection of Social Care (Wales) Act 2016, ss 5, 6, 44 and 51.

8.36 The definition of a "regulated activity" is broad.[712] For example, the provision of personal care at the place the person is living is a regulated activity.[713] "Personal care"[714] includes physical assistance with eating or drinking, toileting, washing or bathing, dressing, oral care, or the care of skin, hair and nails. It also includes prompting someone and supervising them to perform these activities. Other regulated activities include:

(1) transport services to carry someone who needs treatment or medical advice, or triage provided remotely over the phone or by email;

(2) surgical procedures; and

(3) provision of treatment for a disease, disorder or injury by or under the supervision of a health care professional or social worker.[715]

8.37 If the RTM company is under an obligation to provide any of the above under the lease, it would need to register with the CQC.[716]

8.38 An RTM company may not have the knowledge or resources to manage such care, and may even be unaware that it must be registered with the CQC. The consequences of not providing these services at all or providing them to a sub-standard level could be significantly more severe than a failure to provide other management function services, as they directly impact vulnerable leaseholders and their health. An RTM company may also commit an offence where an individual providing care to another as part of the RTM company's care arrangements ill-treats or wilfully neglects the individual being cared for.[717]

8.39 In light of the seriousness and importance of regulated activities being management functions, we have considered whether there should be specific conditions or exclusions from the management functions acquired by the RTM company and, if so, what these should be. Given that our Terms of Reference require us to make the acquisition of the RTM easier for leaseholders, we think that any conditions or exclusions should meet a high threshold. We are conscious not to withdraw unnecessarily management functions that RTM companies already have the right to acquire. However, we think that restricting or removing certain regulated activities from the scope of a management function could make the exercise of the RTM more attractive and achievable in some cases.

8.40 We have considered the following four options:

---

712 Health and Social Care Act 2008, ss 8 and 97.

713 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936, sch 1, para 1(1).

714 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936, reg 2.

715 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936, sch 1.

716 CQC, *What is registration?*, https://www.cqc.org.uk/guidance-providers/registration/what-registration.

717 Criminal Justice and Courts Act 2015, s 21.

(1) excluding any regulated activity from the definition of "management functions", leaving the landlord to continue managing the regulated activity;

(2) providing that any management function constituting a regulated activity is transferred only once the RTM company has met the requirements of the relevant regulatory bodies;

(3) maintaining the current position, whereby all management functions transfer to the RTM company on the acquisition date, regardless of whether they are regulated, but ensuring that RTM companies are better educated as to their obligations; and

(4) providing for a presumption that a regulated activity is excluded from the management functions to be transferred, unless the RTM company specifically wishes to acquire it and either the landlord agrees or the tribunal makes a determination to this effect.

8.41 The first option has the advantage of ensuring that vulnerable leaseholders who need regulated services are protected at all times. However, it is the option most restrictive to RTM companies, and removes rights which RTM companies currently have.

8.42 The second option provides initial protection, allowing the RTM company to take over all the management functions upon satisfying regulatory requirements. However, the option may not provide safeguards in the long term, as the RTM company could change providers during their management and inadvertently use a company which is not CQC-registered. Furthermore, this option could lead to a dispute over the evidence required before the landlord is satisfied that the RTM company has complied with the requirement to appoint a CQC-registered service provider. For example, the landlord may challenge the scope of the retainer or level of insurance obtained by that CQC-registered service provider.

8.43 The third option does not provide any safeguards but we are told that it is rare for retirement blocks which benefit from that high level of care to be subject to the RTM. The stakeholders we have spoken to were not aware of any such cases. We also consider that better education of directors at the outset would help mitigate the risks.

8.44 The fourth option gives the RTM company some choice over whether to acquire the regulated activity as a management function. We think this would ensure leaseholders can acquire the RTM such blocks without being forced to undertake a regulated activity which they may not want to undertake, but also enable them to acquire the function if they want to do. We consider that any agreement with the landlord, or determination by the tribunal, would require that the RTM company has demonstrated an awareness of its regulatory obligations. For example, this option could be coupled with the second option, so that, if the RTM company opts to acquire the function, it would only transfer once the RTM company had complied with the relevant regulatory requirements.

8.45 Our provisional view is that any regulated activity, whether in the context of the provision of care or any other services, ought to be excluded entirely, but we ask consultees for views. Any exclusion (or other restriction) would relate only to the

regulated activity and not the management of the building in which the activity was being provided.

Consultation Question 87.

8.46 Do consultees think that regulated activities, such as the provision of personal care, should be excluded from the definition of "management functions", so that they do not transfer to the RTM company?

Consultation Question 88.

8.47 If consultees do not think that regulated activities should be excluded from the definition of "management functions", do they consider that any changes are needed to the current law, under which the RTM company acquires the obligation to carry out any regulated activities specified in the lease?

Consultation Question 89.

8.48 Are there any regulated activities other than the provision of care which consultees think RTM companies should not, or might not want to, acquire?

INSURANCE

8.49 During our discussions with stakeholders, it has become clear that insurance is a key concern at all stages of the process. RTM companies report that obtaining insurance information from the landlord before the acquisition date can be difficult, making it harder or more expensive for the RTM company to obtain insurance. Landlords have raised various concerns regarding the adequacy of the insurance purchased by RTM companies and, particularly, the amount the building is insured for.

8.50 Moreover, some landlords have told us that their approach (which some stakeholders have described to us as aggressive and highly technical) in responding to RTM companies' claim notices is largely driven by a concern that RTM companies will not place insurance adequate to protect landlords' interests after acquisition of the RTM.

The current law

8.51 Most leases oblige the landlord to insure the building. The lease will set out the scope of the insurance to be placed, and will typically include insuring to the full reinstatement value and for all "usual" insurance risks, such as flooding or fire. The cost of placing the buildings insurance is typically recoverable from leaseholders as an item of the service charge.

8.52 Some leases may also require, or permit at the landlord's discretion, the landlord to place other insurance. This might include, for example, third party liability insurance for communal pathways or insuring common facilities such as a gymnasium. As with the other management functions, the transfer of functions relating to insurance includes both mandatory and discretionary functions.

8.53 Whilst the general obligation to insure rests with the RTM company, the landlord (or any other third party) is entitled to continue insuring the building at its own expense.[718]

Problems with insurance under the RTM

8.54 We have been made aware of multiple issues relating to insurance, from the perspectives of both RTM companies and landlords.

RTM company issues

8.55 Stakeholders representing RTM companies have told us that they regularly come across the following problems.

(1) RTM companies do not acquire sufficient information (such as the claims history) quickly enough to enable them to place insurance on, or with effect from, the acquisition date. If they can place insurance, it is often at a higher cost because they cannot provide a full claims history.

(2) RTM companies do not have any credit history (RTM companies usually having been formed less than a year prior to acquisition), which makes obtaining competitive insurance difficult.

(3) Landlords often cancel the existing insurance policy immediately after the RTM is acquired, forcing RTM companies to obtain, often expensive, insurance at very short notice and without having the service charge funds[719] to do so.

(4) Uncertainty about the wider insurance position. For example, the RTM company may want to purchase directors' liability and officers' insurance and seek to recover the costs of this from all leaseholders through the service charge. However, this is rarely permitted by the terms of the lease.

8.56 We have also been told that, prior to the RTM acquisition, landlords often benefit from large insurance commissions, which are recouped by the insurers from the leaseholders through higher insurance costs. Insurance commissions received by landlords before the acquisition of the RTM are beyond the scope of this project. The Upper Tribunal has recently concluded that leaseholders are entitled to challenge the reasonableness of these costs in the same way as other service charges.[720] A fee for a service, such as where the landlord deals with claims handling issues on behalf of

---

718 Commonhold and Leasehold Reform Act 2002, s 97.

719 See from para 8.101 below for the problems with uncommitted service charges payable on acquisition.

720 *Cos Services Ltd v Nicholson* [2017] UKUT 382 (LC), [2018] Landlord and Tenant Reports 5.

the insurance company, is a legitimate cost which can be recovered as a service charge, subject to it being reasonable.[721]

Landlord issues

8.57 Landlord stakeholders have told us that much of the opposition to RTM claims stems from a fear that the RTM company will not properly, or sufficiently, insure the building in the long term. The absence of any statutory mechanism for landlords to protect their reversionary interest in the building and recover the costs of doing so from the leaseholders has led many landlords to deploy technical objections to try to prevent RTM claims.

8.58 Stakeholders representing landlords have told us that they often come across the following particular problems with RTM companies and insurance provision.

(1) Post-acquisition, some RTM companies under-insure, either to lower the service charges payable by leaseholders or because they are not aware of the correct reinstatement value of the building.

(2) The RTM company may be unaware that regular insurance valuations are advisable to ensure the policy cover remains sufficient.[722]

(3) Landlords often find it difficult to get information about insurance from the RTM company, even though landlords have a statutory right to this information.[723]

(4) If both the landlord and the RTM company place insurance, there may be a dispute about what each insurer should pay out in the event of an incident.

Scope of the insurance policy

8.59 The lease will set out the risks to be insured by the landlord, such as flooding or fire. Where properties are subject to a mortgage, mortgage companies usually set out their own list of minimum risks to be insured in the mortgage contract,[724] some of which go beyond the obligations or powers in the lease. A common example given to us was a requirement to obtain terrorism cover. There may be no requirement on the landlord to obtain terrorism cover under the leases, but failing to do so puts leaseholders in breach of their mortgage conditions. We have been told by landlord stakeholders that they obtain insurance to the minimum UK Finance standard to protect those leaseholders. As we understand it, landlords usually recover this additional cost from the service charge fund, despite it not being recoverable under the leases as a matter of law, and this is not generally challenged by leaseholders.[725]

---

721 *Williams v Southwark LBC* (2001) 33 Housing Law Reports 22.

722 See the Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code* (2016) para 12.4.

723 Commonhold and Leasehold Reform Act 2002, sch 7, para 5.

724 See *UK Finance Mortgage Lenders' Handbook* (2017).

725 *Qdime Ltd v Bath Building (Swindon) Management Co Ltd* [2014] UKUT 261 (LC) did not concern an RTM company, but was a case in which the leaseholders challenged the landlord's service charges. The Upper

8.60 This problem is not related to the acquisition of the RTM – it applies whether the property is being maintained by the landlord or an RTM company. However, landlords have told us that RTM companies often exclude terrorism cover to keep the cost of the policy down. If mortgage companies require such cover, and the RTM company fails to insure such risks, the leaseholders with mortgages are vulnerable.

8.61 This is not an issue which can be fixed by the RTM legislation or our proposals. As a matter of law, the RTM company is required to comply with the insurance requirements in the lease. Where additional insurance is desirable because, for instance, the leaseholders' mortgage agreements impose it, this must be a matter for agreement between the leaseholders and the party responsible for placing the insurance.

Insurable interest and the indemnity principle

8.62 Buildings insurance policies are contracts of indemnity.[726] They insure the policyholder against losses suffered as a result of damage or destruction to the building. Indemnity insurance is governed by the indemnity principle, which means that a policyholder can only recover what they have lost.[727] To make a successful claim, the policyholder must show that they have suffered loss, and will be compensated only for the amount of that loss.

8.63 In addition, it is generally accepted that the law also requires the insured to have an "insurable interest" in the subject matter of the insurance. At its simplest, the doctrine of insurable interest requires that someone taking out insurance gains a benefit from the preservation of the subject matter of the insurance or will suffer a disadvantage should it be lost. In the context of indemnity insurance, insurable interest has been interpreted relatively narrowly, so that the policyholder must have a legal or equitable interest in the subject matter of the insurance.[728] The law on insurable interest is being considered by the Law Commission as a separate project and a detailed analysis is beyond the scope of this project.[729]

Tribunal held that a requirement for the landlord to insure against the "usual comprehensive risks", with reference to the CML recommendations, meant that they were required to insure against terrorism. The Upper Tribunal also held that a requirement to insure against explosion included explosions caused by acts of terrorism.

726 R M Merkin, *Colinvaux's Law of Insurance* (11th ed 2017) para 20-003.

727 *Halsbury's Laws of England* (2018) vol 60 *Insurance* para 3 citing *Castellian v Preston* (1883) 11 QBD 380, 386, by Brett LJ. See also J Birds, S Milnes and B Lynch, *MacGillivray on Insurance Law* (13th ed 2017) para 1-014.

728 See, for example, *Lucena v Craufurd* (1806) 2 Bosanquet & Puller's New Reports, Common Pleas 269; *Macaura v Northern Assurance Co Ltd* [1925] AC 619. See also Insurance Contract Law: Post Contract Duties and Other Issues (2011) Law Commission Consultation Paper No 201; Scottish Law Commission Discussion Paper No 152, para 10.1.

729 See https://www.lawcom.gov.uk/project/insurance-contract-law-insurable-interest/. As part of this project, we discuss the fact that the legal basis for the indemnity principle in indemnity insurance is unclear and may not in fact still be good law. However, we understand that the insurance industry generally proceeds as if insurable interest is still a requirement for valid insurance. See also Insurance Contract Law: Post Contract Duties and Other Issues (2011) Law Commission Consultation Paper No 201; Scottish Law Commission Discussion Paper No 152, ch 10.

8.64 The RTM company acquires a legal obligation under the lease to repair the premises[730] which gives rise to an insurable interest. If the building requires repair, the RTM company has the obligation to carry out those repairs and will be liable for the costs of repair or for damages if it fails to do so. This therefore satisfies the indemnity principle and the RTM company would be able to claim on the policy (provided that the particular loss or damage is covered by the policy).

8.65 However, the definition of "repair" does not usually include rebuilding.[731] The covenant to repair in the lease will accordingly not usually oblige the RTM company to rebuild the property if it is destroyed rather than merely damaged. The definition of management functions under the 2002 Act does not include reinstatement.[732] There is therefore some doubt as to whether the RTM company has an insurable interest in rebuilding the premises because it does not appear to have any legal obligation to rebuild in the event of insurable damage.

8.66 If the RTM company has no legal obligation to rebuild the premises if they are destroyed rather than just damaged, it is unlikely to satisfy the requirements for insurable interest or actual loss (for the purpose of the indemnity principle). For insurance purposes, a loss must leave the policyholder "financially poorer than before".[733] The RTM company, as a corporate entity distinct from its leaseholder members, would not suffer a loss if the building was destroyed. Any potential loss suffered, such as the loss of management functions, would not extend to the full reinstatement value of the property. This may leave the RTM company unable to recover the full value of the property insured under the policy.

8.67 It is common for a covenant to insure the building in the lease to provide for the insurance proceeds to be used towards reinstatement of the premises.[734] The problem is that it is unclear whether the RTM company would acquire the landlord's obligations under the covenant, given that the transferred management functions are limited to "repair" under the 2002 Act.

8.68 However, if the lease does not impose a requirement on the landlord to use the insurance money for reinstatement, there is no general obligation on them to do so.[735] Nevertheless, the court has required a landlord to use the policy proceeds towards

730 Commonhold and Leasehold Reform Act 2002, s 96(5).

731 See the definition of "repair" in *Osborn's Concise Law Dictionary* (12th ed 2013).

732 Commonhold and Leasehold Reform Act 2002, s 96(5).

733 M A Clarke, *Law of Insurance Contracts* (5th ed 2006) ch 16-2A.

734 J Furber and J R Moss (eds), *Hill and Redman's Law of Landlord and Tenant* (Issue 116, 2018) Division A – General Law, ch 10, para 3547.

735 A leaseholder may require the landlord to use the insurance policy proceeds to reinstate the premises under section 83 of the Fires Prevention (Metropolis) Act 1774 in limited circumstances, although this provision is rarely used.

reinstatement in the absence of a covenant to reinstate, where the leaseholder paid the insurance premiums and had a right to check that the policy was adequate.[736]

8.69 Noting the landlord's interest on the insurance policy will not make them a party to the insurance contract.[737] It does not give the landlord a right to enforce the insurance policy in their own right if, for example, the RTM company was found to be unable to claim.

8.70 We have been told that insurers would take a pragmatic approach to a claim, recognising that the RTM company holds the insured on behalf of the leaseholders and landlord whose properties have been destroyed. Insurance industry stakeholders told us that they would therefore pay out in spite of any technical legal issues. We agree that this will be the case in the vast majority of cases. However, we do not think it is desirable that a rogue insurer could rely on technical points to avoid paying if it wished to do so.

Our proposals

Claims history

8.71 We have heard differing views from stakeholders about whether an RTM company is disadvantaged if it does not have the claims history when it places insurance in its own name. Some have given anecdotal evidence of RTM companies receiving competitive quotes on the basis that they are new customers and could not reasonably be expected to know the claims history. We have been told by other stakeholders that insurers would expect to be provided with a claims history relating to the premises. In general, we think that RTM companies will find it easier to obtain suitable cover, either at a better price, or at all, the more information they have available to them.

8.72 We discuss in Chapter 7 our proposals for the provision of information earlier in the RTM acquisition process. We consider that, as part of this, a full copy of the current insurance policy, the claims history and a copy of the last reinstatement valuation should be provided to the RTM company. This proposal will enable the RTM company to obtain accurate insurance quotations in good time prior to the acquisition date.

Consultation Question 90.

8.73 We provisionally propose that a copy of the current insurance policy, the insurance claims history and a copy of the last reinstatement valuation should be part of the documentation provided by the landlord to the RTM company before acquisition of the RTM. Do consultees agree?

---

736 See *Mumford Hotels Ltd v Wheeler* [1964] Ch 117 where the court held the insurance was intended for the benefit of both parties. In this case, the landlord had an insurable interest in the property and could be said to have suffered loss, so the situation was different than it may be for an RTM company.

737 R M Merkin, *Colinvaux's Law of Insurance* (11th ed 2017) para 15-024.

Consultation Question 91.

8.74 Do consultees think that landlords providing a copy of the current insurance policy, claims history and a copy of the last reinstatement valuation would lower the cost of securing insurance for RTM companies? If possible, please provide an estimate of how much could be saved.

Landlord cancelling the policy

8.75 In most situations the landlord will know the cost of the insurance premium before the start of the service charge financial year. The landlord will typically also have monies in the service charge account to pay for the insurance. We have been told by stakeholders that landlords sometimes cancel their insurance policy when the RTM company takes over. Stakeholders queried why the landlord should be able unilaterally to cancel the policy in circumstances where the leaseholders have already paid the annual insurance costs. They would prefer for the insurance cover to continue, at least until the RTM company has been able to obtain a suitable replacement policy.

8.76 We have considered whether, where an insurance policy has been placed before the RTM is acquired, the landlord should be entitled to cancel that policy only with the consent of the RTM company. We reached the conclusion that this would not be a viable proposal. If the landlord were to be the only policyholder after the RTM company took over the RTM, the landlord would not be able to recover the insurance monies in respect of repairs, for example. This is because the landlord would no longer be liable for repairs and would not satisfy the requirements for an insurable interest and recoverable loss.

8.77 Instead, to avoid the leaseholders having to pay for the same cover twice, the RTM company could co-ordinate the acquisition of the RTM with the date on which the insurance is due for renewal. To the extent that the insurance premium is recoverable for the period after the cancellation, the leaseholders are entitled to be refunded those monies by the landlord once the landlord is refunded by the insurance company.

Insurable interest and the indemnity principle

8.78 It would be possible to provide in statute that the RTM company is deemed to have an insurable interest in rebuilding the premises covered by the RTM.[738] In Scotland, owners' associations, which are bodies corporate responsible for the management of a development, are presumed to have an insurable interest in the development or any part of it.[739]

8.79 The problem with the indemnity principle is more difficult to solve. Even if the RTM company has, or is deemed to have, an insurable interest, it is still only entitled to recover to the extent that it has suffered loss. If the RTM company does not have an

---

738 See Civil Partnership Act 2004, s 253.

739 Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009/729, sch 1, para 3(2)(c).

obligation to rebuild or reinstate, it does not suffer any loss when the building is destroyed. The leaseholders suffer loss, but they are distinct in law from the RTM company. The landlord also suffers loss by virtue of its reversionary interest and, possibly, pursuant to an obligation to reinstate under the lease.

8.80 We have considered a number of options.

(1) Could the RTM company be required to insure the property in the joint names of the RTM company and the landlord? However, this would not work unless the RTM company and the landlord can agree on the cover to be taken. If they do agree, there is no need for a legal requirement, as they could take joint insurance in any event. If the landlord disagrees with the RTM company's proposed policy cover, the law should not force them into a joint contract of insurance.

(2) Could the RTM company be said to be the agent of the landlord when taking insurance covering rebuilding or reinstatement? Again, this would only work if the landlord agrees with the cover being taken. To deem the RTM company to be the landlord's agent even where the landlord opposes obtaining the insurance would go against the principles of agency law. In an agency relationship, the agent acts on instructions and under the authority of the principal, not the other way around.

(3) Could the definition of the "management functions" acquired by the RTM company under the 2002 Act be extended to include reinstatement? This would mean that, provided the lease required the landlord to reinstate the property or use the insurance policy proceeds towards reinstatement if destroyed, the RTM company would acquire this responsibility. This would satisfy the indemnity principle, as the RTM company would be required to account to the leaseholders if this covenant was breached.

8.81 We think that option 3 is the most viable, and we provisionally propose that reinstatement should be included in the management functions transferred to the RTM company. Examination of the terms of each lease would be important for an RTM company to understand the extent of its responsibility: if a lease has a covenant to reinstate, this is more onerous than a covenant to use the insurance proceeds towards reinstatement.[740] It would also mean that the RTM company would be required to reinstate even where it may not be practical to do so, for example if it is unable to obtain planning permission.[741]

8.82 This solution would not assist in situations where the landlord is not required by the lease to use the insurance proceeds towards reinstatement. We do not think that we can go so far as to say that the RTM company should have the obligation to reinstate even where the landlord is not under that obligation in the lease. To do so would expand significantly the scope of the RTM (which is based on the landlord's

---

740 A covenant to reinstate requires the landlord to do all works required regardless of whether the costs exceed those recovered under the policy: see T M Aldrige QC and P Butt, *Aldridge Leasehold Law* (2012) vol 1 para 4.156.

741 See *Sturcke v SW Edwards Ltd* (1972) 23 Property and Compensation Reports 185, where the court held that inability to obtain planning permission is not a defence to breach of obligation to reinstate.

obligations under the lease). It may also be an unjustifiable interference with the landlord's rights. If there is no obligation to reinstate, the landlord is entitled to pocket the insurance payment if it wishes. While this in itself may be undesirable, it is beyond the remit of this project to consider a general change to the law to require landlords to reinstate in all cases. Where a lease does not require reinstatement, the leaseholders could apply to have the lease varied.

8.83 An RTM company in this position may not be entitled to recover the reinstatement value under an insurance policy in its sole name. It would need to seek a practical solution to this problem, such as:

(1) purchasing insurance jointly with the landlord or also in the names of the leaseholders;

(2) taking reinstatement insurance as agent for the landlord, with the landlord's agreement;

(3) splitting the buildings insurance, with the landlord insuring for the rebuild value and the RTM company for everything else; or

(4) arranging for the landlord to obtain top-up insurance for anything that the RTM company cannot insure for.

8.84 These are also the options that would be open to any RTM company if the law were not changed as we suggest.

8.85 We acknowledge that the above solutions under the current law require either co-operation between the RTM company and the landlord, or additional costs, as split insurance tends to be more expensive than a single policy. Alternatively, we could propose that the "split insurance" solutions in (3) and (4) are enshrined into the law, as opposed to leaving them to the parties' discretion.

Consultation Question 92.

8.86 Do consultees think that it should it be made explicit in legislation that the RTM company has an insurable interest?

Consultation Question 93.

8.87 We provisionally propose that the RTM company should acquire the duty to reinstate the building, provided that the lease places this duty on the landlord. Do consultees agree?

8.88 If not, should there be a solution based on separate insurances obtained by the RTM company and the landlord respectively ("split insurance")?

Rights for the landlord to obtain information and apply to the tribunal for a determination about insurance

8.89 The landlord already has a right to request certain insurance information from the RTM company, which the RTM company must provide within 21 days.[742] This includes a summary of the insurance policy: amount insured, terms of cover, and exclusions. However, the landlord currently has no right to ask for a copy of the insurance policy or policies purchased by the RTM company. This does not seem right, especially if, as proposed above, the landlord is to be a joint insured or, as proposed below, the landlord is entitled to challenge the adequacy of the insurance.

8.90 We think that the landlord should be entitled to a copy of any policy relating to the premises, but not to related but separate insurances such as directors' and officers' liability insurance.

Consultation Question 94.

8.91 We provisionally propose that the RTM company should provide the landlord with a copy of any contract of insurance entered into by the RTM company in respect of the premises, within 21 days of a request from the landlord. Do consultees agree?

8.92 If the landlord considers the insurance taken out by the RTM company to be inadequate, they are already entitled to procure insurance (whether for the whole rebuild cost or on a "top-up" basis). We have considered whether the landlord should have additional rights in this regard, given that it is in the interests of all parties for adequate insurance to be obtained.[743] The problems that can occur where an under-insured building is damaged by an insurable risk are obvious.

8.93 We therefore propose that the landlord should be entitled to apply to the tribunal for a determination that the insurance obtained by the RTM company is defective in scope or inadequate in amount.

8.94 If the tribunal is satisfied that the RTM company has under-insured, we provisionally propose that it should be able to make one or both of two directions:

(1) that the "top up" element of the insurance procured by the landlord is recoverable from the RTM company or the leaseholders as a service charge; and/or

(2) that, for the future, the RTM company must procure insurance which satisfies particular criteria (for example, to cover full rebuild value).

---

742 Landlord and Tenant Act 1985, s 30A and sch 1, as modified by Commonhold and Leasehold Reform Act 2002, sch 7. We discuss this in Chapter 7.

743 It is almost invariably a term of a residential mortgage that adequate insurance be in place: *UK Finance Mortgage Lender's Handbook* (2017) s 6.14.1.

8.95 Additionally, the RTM company should arguably be required to obtain reinstatement valuations periodically throughout the term of their management, such as every three or five years, or in line with recommendations made by relevant institutions or professional bodies outside of the Law Commission.[744]

Consultation Question 95.

8.96 Do consultees have experience of landlords purchasing additional insurance for a premises subject to the RTM because an RTM company failed to secure comprehensive insurance? If so, what was the cost of this additional insurance?

Consultation Question 96.

8.97 We provisionally propose that the landlord should be able to apply to the tribunal for a determination that the RTM company has under-insured. Do consultees agree?

Consultation Question 97.

8.98 We provisionally propose that, if the tribunal finds that the RTM company has under-insured, the tribunal should be able to:

(1) direct that legitimate costs of "top up" insurance are recoverable; and/or

(2) make a direction for the future insurance of the building to be procured by the RTM company.

Do consultees agree?

Consultation Question 98.

8.99 Do consultees consider that RTM companies should be required to obtain reinstatement valuations periodically?

[744] Such as the Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code* (2016).

Consultation Question 99.

8.100 In consultees' experience, how much does it cost to obtain a reinstatement valuation?

DUTY TO PAY ACCRUED UNCOMMITTED SERVICE CHARGES

8.101 On the acquisition date, or as soon as possible afterwards,[745] the landlord must pay to the RTM company any accrued uncommitted service charges held by them on the acquisition date.[746]

8.102 Uncommitted service charges consist of the total of any sums which have been paid by way of service charges and any investments which represent such sums, less any costs incurred prior to the acquisition date but not yet processed.[747] Accrued uncommitted service charges include reserve funds, sinking funds and any other contributions carried over from previous years.[748]

8.103 If the amount of the uncommitted service charges is disputed, either party may make an application to the tribunal for a determination as to the amounts payable.[749]

Issues with uncommitted service charges and proposals for reform

Delays

8.104 There is no end date by which the landlord must transfer the funds. The landlord must wait for final bills to be produced by third parties before settling those bills and preparing the closing accounts. Where the lease requires it, the closing accounts must be certified or audited by a qualified accountant. This can take time and cause delay in paying the funds to the RTM company.

8.105 RTM companies will usually be reliant on these funds to pay contractors from the date of acquisition onwards. As identified in Chapter 7, the landlord is not required to provide the leaseholders' contact details until on or after the acquisition date. Until the RTM company has the leaseholders' contact details, the RTM company cannot serve a service charge demand on the leaseholders.

8.106 Furthermore, the RTM company can only demand service charge monies in accordance with the terms of the lease, which often provide that interim service charges can only be collected twice yearly. If, for example, the lease provides that interim service charges can be collected on 25 March and 29 September, and the

---

745 Commonhold and Leasehold Reform Act 2002, s 94(4).

746 Commonhold and Leasehold Reform Act 2002, s 94(1).

747 Commonhold and Leasehold Reform Act 2002, s 94(2).

748 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-17.

749 Commonhold and Leasehold Reform Act 2002, s 94(3). The tribunal cannot order the landlord to actually pay over the funds; that can only be done by the county court. See Chapter 10 for our proposals on expanding the jurisdiction of the tribunal.

RTM company acquires management on 26 March, it must wait until 29 September before it can collect service charges. In this example, the leaseholders would have paid the service charges due on 25 March to the landlord, and the RTM company will therefore be dependent on the landlord to transfer these funds promptly so that the RTM company can pay its bills.

8.107 A delay in handing over funds to the RTM company can therefore have a serious impact on the finances of the RTM company and on day-to-day management post-acquisition.

8.108 We have considered whether the legislation should provide a "long-stop" date for transferring funds. This could be three months from the acquisition date. However, this would leave the RTM company without funds during that three-month period when they will be incurring service charge expenses. Conversely, landlords are concerned that three months may not be long enough, especially in larger blocks or estates.

8.109 An alternative is for the legislation to provide that 50% of the estimated uncommitted service charges should be paid at the latest on the acquisition date, with the remaining 50% payable once the closing accounts have been finalised. The landlord's duty to transfer the funds would arise on the determination date. This is the date of service of a positive counter-notice or of the withdrawal of a negative counter-notice or, where no counter-notice is served, the latest date upon which the counter-notice should have been served when the RTM company's right to the RTM is established. The landlord would have at least three months between the determination date and the acquisition date to pay over the first 50%.

8.110 It would be for the landlord to provide a reasonable estimate of what the closing balance is likely to be. If the RTM company considered that the landlord had underestimated the final service charge amount in order to advance less funds, the RTM company could apply to the tribunal for a determination which would require the landlord to demonstrate the basis for its estimate. This would be akin to the existing right for the RTM company to apply to the tribunal to determine the amount of payment which must be made under section 94(3) of the 2002 Act.

8.111 The second half of the payment could be subject to a deadline of around six months. This would provide funds to the RTM company more promptly to assist its cash flow, whilst allowing the landlord more time to prepare the closing accounts.

8.112 Failure to comply with any such deadlines would be enforceable in the same way as any other breach. Details of the enforcement options are set out later on in Chapter 10.

Consultation Question 100.

8.113 In consultees' experience, how common is it for RTM companies to recover accrued service charge arrears from the landlord? What are the consequences for the financial security of the RTM company if arrears are not recovered?

Consultation Question 101.

8.114 We provisionally propose that the landlord should be required to pay to the RTM company 50% of the estimated uncommitted service charges at the latest on the acquisition date, with the remainder payable within six months of the acquisition date. Do consultees agree?

Uncommitted service charges "held by" the landlord

8.115 Under the 2002 Act, the RTM company is entitled to receive what is "held by" the landlord at the acquisition date.[750] What is held may or may not be what should be in the account. There may be a shortfall in the account, where the landlord has spent more than it has collected, so that there is nothing to be transferred to the RTM company, or where there has been some criminal activity on the part of the landlord's agent.

8.116 Where some leaseholders are in service charge arrears at the acquisition date, there is no requirement on the landlord to take steps to recover the arrears and pass them to the RTM company on receipt.[751] The RTM company has no right to pursue service charges in respect of costs incurred pre-acquisition.[752]

8.117 The lack of obligation on the landlord to recover the arrears or right of the RTM company to pursue them can lead to a situation whereby any arrears incurred pre-acquisition (including while the RTM claim is progressing) are simply never collected. In such cases, the RTM company loses the benefit of those monies, with the landlord being entitled to deduct from its payment to the RTM company any amount required to cover costs incurred pre-acquisition.

8.118 This contrasts with the situation where money is wrongly deducted from the service charge funds before their transfer to the RTM company. Where money was deducted for invoices which were not due prior to acquisition, the Upper Tribunal has held that the sum wrongly deducted must be accounted for by the landlord.[753] Where service charge funds were misappropriated by the landlord prior to acquisition, the Upper Tribunal has suggested that the RTM company would also have a right to recover the funds.[754]

8.119 Although the law does not require the landlord to recover arrears incurred pre-acquisition, we have been told by stakeholders that the landlord sometimes agrees to collect the arrears and pay them to the RTM company. The landlord alternatively might grant a deed of assignment of the debt to the RTM company.

---

750 Commonhold and Leasehold Reform Act 2002, s 94(1). See also *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC), [2011] 1 Estates Gazette Law Reports 97.

751 See also *164 Willesden Lane RTM Co Ltd v Starklane Developments Ltd* (08 January 2009) LON/AE/LSC/2008/0256 Leasehold Valuation Tribunal (unreported).

752 Commonhold and Leasehold Reform Act 2002, s 97(5).

753 *Gateway Property Holdings Ltd v Westwood (Colchester) RTM Co Ltd* [2016] UKUT 489 (LC).

754 *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC), [2011] 1 Estates Gazette Law Reports 97.

These solutions rely on the landlord's cooperation and can be subject to further complications. For example, when the RTM company attempts to collect these charges post-acquisition under the assignment, the leaseholder may file a defence to say that the service charge amount is unreasonable or not properly due. As the arrears were incurred prior to the acquisition date, the RTM company will depend on the landlord's ongoing and prompt co-operation to be able to refute the leaseholder's arguments.

8.120 We have considered two options.

(1) First, whether the landlord should be required to pay to the RTM company the uncommitted service charges which should have been in the service charge account at the acquisition date, regardless of whether these have actually been recovered. It would then be up to the landlord to pursue any deficit from the leaseholders.

(2) Alternatively, whether the landlord should, as under the current law, pay what is in the service charge account at the acquisition date, but be under an obligation to use reasonable endeavours to pursue any service charge arrears. To the extent recovered, it would be required to pay these over to the RTM company.

8.121 Our view is that the second option is preferable. The landlord is better placed to pursue these arrears and will be aware of any disputes already raised by defaulting leaseholders. The RTM company should not have to incur the costs of making the landlord's case.

Consultation Question 102.

8.122 We provisionally propose that the landlord should be required to use reasonable endeavours to pursue service charge arrears accrued prior to the acquisition date, and to pay any recovered funds to the RTM company. Do consultees agree?

Control over expenses between service of the notice and the date of acquisition

8.123 Many months can elapse between service of the RTM company's claim notice and the acquisition date, especially where the claim is disputed. During this period, the landlord remains in control of the service charge fund and will continue to incur expenses.

8.124 Anecdotal evidence suggests that, on occasion, a landlord who has received an RTM claim notice will deliberately embark on works which it might not otherwise have carried out at that time, effectively draining the service charge account. While reputable landlords do not do this, it does occasionally happen and is a risk.

8.125 We do not consider this an area where it would be appropriate for us to suggest reforms. As we understand it, this situation only arises in exceptional cases and restricting the landlord's ability to spend service charges lawfully due under the lease during this transitional period would be disproportionate. Leaseholders maintain their

rights to challenge the reasonableness of service charges if they consider service charges are being incurred unnecessarily.

Major works

8.126 It is not uncommon for RTM claims to commence because leaseholders have received statutory major works consultation notices. Leaseholders may commence an RTM claim in an attempt to avoid major works which they do not consider necessary or because they are concerned that the cost of the works is unreasonable. In other cases, major works may become an issue during the acquisition process.

8.127 There are practical difficulties, such as what happens if the works are due to commence shortly after the RTM claim notice has been served. The landlord is entitled to proceed with the works, thereby reducing the amount in the service charge account. Another difficulty may arise where the works have already commenced, but are not due to be completed until after the acquisition date. The parties need to determine who manages the works post-acquisition, and how they are paid for. The landlord may need to retain funds for a long time post-acquisition until the bills have been settled.

8.128 These issues cannot be provided for in the legislation. If major works are about to commence or have already commenced, the parties will have to agree how the works should be dealt with.

Service charges held on trust

8.129 It is a statutory requirement that all service charge monies must be held on trust.[755] This is intended to ensure that the leaseholders' monies are properly protected and cannot be used for any purpose other than to pay the service charge expenses. It also ensures that, if the holder of the service charges, whether the landlord or a managing agent, becomes insolvent, these monies are held for the benefit of the leaseholders and cannot be paid to other creditors of the insolvent party.

8.130 The amount held in the service charge account can be large, especially in bigger blocks or on estates. The balance can be particularly high where money for major works has been collected.

8.131 The RTM company becomes the trustee of the service charge fund on acquisition.[756] We have been told that some RTM companies are unaware that the service charges are held on trust. Some RTM companies keep the funds in an individual director's personal bank account. This is arguably a breach of trust, which also leaves leaseholders (especially those who are not members of the RTM company) vulnerable, as the trust funds can be dissipated more easily. The leaseholders, as beneficiaries, would have remedies against the RTM company and possibly the directors under trust law.

---

755 Landlord and Tenant Act 1987, s 42. There is also legislative provision that the service charges should be held in a designated service charge fund, although this has not yet been implemented: Landlord and Tenant Act 1987, s 42A.

756 Commonhold and Leasehold Reform Act 2002, sch 7, para 11.

8.132 As we discuss in Chapter 5, we hope that education and training for RTM company directors will improve to increase awareness of issues such as this.

Chapter 9: Post-acquisition rights and obligations

9.1 As we discuss in the previous chapter, the management functions under the lease are transferred from the landlord to the RTM company on the acquisition date.[757] In this chapter, we discuss additional consequential rights and obligations which transfer to the RTM company, either exclusively or to be shared with the landlord.[758] The landlord retains all other lease obligations and gains various new rights enforceable against the RTM company.[759] The leaseholders retain all existing rights and obligations, save that those matters which have transferred to the RTM company become enforceable by, or against, the RTM company in place of the landlord. In Chapter 10, we discuss the mechanisms for enforcement of these rights.

9.2 This chapter is largely descriptive of the current law and practice, although we make proposals in respect of the process for granting lease consents and the information to be included by the RTM company on a service charge demand.

THE RELATIONSHIPS

9.3 As identified in the preceding chapters, the legislation sets out the management functions to be taken over by the RTM company. After appropriate division of the lease functions, the following relationships will exist.

RTM company and landlord (as joint managers of the property)

9.4 On acquisition, the RTM company takes over management and any related functions under the lease,[760] but the landlord retains all other lease rights and obligations such as ground rent collection and management of non-residential units.[761] Between them, the landlord and the RTM company fulfil all the landlord's functions in the lease.

9.5 It is important to ensure that all lease functions are performed by either the RTM company or the landlord, otherwise leaseholders may be left vulnerable. For example, if neither takes responsibility for maintaining a roof which straddles both commercial and residential premises, this could lead to leakages, causing loss to the leaseholder. It would be good practice for the RTM company and landlord to enter into a protocol for the property, recording each party's responsibilities, to avoid future confusion or disputes.

---

757 Commonhold and Leasehold Reform Act 2002, s 96(2).

758 These are set out, or referred to, in the Commonhold and Leasehold Reform Act 2002, ss 98 to 103 and sch 7.

759 Set out in the Commonhold and Leasehold Reform Act 2002, sch 7.

760 For example, granting of lease consents. All such related functions are discussed in this chapter.

761 Commonhold and Leasehold Reform Act 2002, ss 96 and 97.

RTM company and landlord (as landlord and tenant)

9.6 Post-acquisition, the 2002 Act grants various rights and obligations to the landlord as if it were a leaseholder.[762] In turn, the RTM company assumes the landlord's role for the purposes of these rights and obligations. For example, where the landlord is required to contribute to the service charge fund,[763] it acquires the right to challenge the reasonableness of the charges[764] demanded by the RTM company in the same way a leaseholder can, pursuant to the Landlord and Tenant Act 1985.[765] We discuss these rights and obligations in more detail below.

RTM company and leaseholders (as landlord and tenant)

9.7 As part of its acquisition, the RTM company assumes the role of "landlord" to the leaseholders in respect of the management functions.

9.8 The RTM company also acquires all statutory responsibilities that come with performance of these functions. These statutory obligations are enshrined in multiple pieces of legislation,[766] and are passed onto the RTM company by the 2002 Act.[767] They include, for example, the obligation to include the RTM company's name and address for service of statutory notices in the service charge demands.[768]

9.9 As well as the RTM company complying with the lease and legislation, the leaseholders – whether members of the RTM company or not – must continue to comply with the terms of the lease. Any obligations owed by the leaseholders to the landlord in connection with the management functions are instead owed to the RTM company post-acquisition.[769] In the event that the leaseholders breach the terms of their leases, the RTM company has the right to enforce them in place of the landlord (although the landlord may also continue to enforce certain covenants).[770]

9.10 In effect, the 2002 Act provides for the RTM company to step into the landlord's shoes for the purposes of the management functions.[771]

---

762 Commonhold and Leasehold Reform Act 2002, s 97(1).

763 Under Commonhold and Leasehold Reform Act 2002, s 103; discussed in more detail at para 9.83.

764 Commonhold and Leasehold Reform Act 2002, s 102 and sch 7, para 4.

765 Landlord and Tenant Act 1985, s 27a.

766 Such as the Landlord and Tenant Act 1985 and Landlord and Tenant Act 1987.

767 Commonhold and Leasehold Reform Act 2002, s 102 and sch 7.

768 Landlord and Tenant Act 1987, ss 47 and 48 and Commonhold and Leasehold Reform Act 2002, sch 7, para 12.

769 Commonhold and Leasehold Reform Act 2002, s 96(2).

770 Commonhold and Leasehold Reform Act 2002, s 100.

771 Save for re-entry and forfeiture, which is discussed later in this chapter.

Landlord and leaseholders (as landlord and tenant)

9.11 The landlord retains responsibility for all lease functions which are not management functions, such as ground rent collection. The leaseholders' corresponding obligations to the landlord remain unaffected.

RTM company and the members

9.12 In addition to the various landlord and tenant relationships, there will also be a relationship between the RTM company and its members, governed by its articles and by company law.[772] This may include the landlord if the landlord decides to become a member.[773] As with any other company, the RTM company may take action against its members, or the members may take action against the RTM company for any breach of the articles or legislation. We explore the relevant law in more detail in Chapter 5.

THE RTM COMPANY'S RIGHTS AND OBLIGATIONS

9.13 Sections 95 to 103 of the 2002 Act, together with schedule 7, address the "exercise" of the RTM by the RTM company from the acquisition date. They set out the general rights and obligations which the RTM company acquires, certain rights and obligations of the landlord and certain shared functions.

9.14 The RTM company acquires rights and obligations in respect of the following:

(1) management functions under the leases,[774] which we discuss in Chapter 8;

(2) functions relating to lease consents,[775] which, as we discuss below, are effectively shared with the landlord;

(3) enforcement of tenant covenants;[776]

(4) monitoring and reporting of tenant covenants;[777]

(5) repair of defective premises;[778]

(6) repair in the case of shorter leases;[779]

(7) compliance with statutory service charge provisions;[780]

---

772 We discuss the company law aspects of the relationship in more detail in Chapter 5.

773 See para 5.56.

774 Commonhold and Leasehold Reform Act 2002, ss 96 and 97.

775 Commonhold and Leasehold Reform Act 2002, ss 98 and 99.

776 Commonhold and Leasehold Reform Act 2002, s 100.

777 Commonhold and Leasehold Reform Act 2002, s 101.

778 Commonhold and Leasehold Reform Act 2002, sch 7, para 2.

779 Commonhold and Leasehold Reform Act 2002, sch 7, para 3.

780 Commonhold and Leasehold Reform Act 2002, sch 7, para 4.

(8) holding service charges on trust;[781]

(9) ensuring administration charges are reasonable;[782] and

(10) furnishing tenants with information for service of notices.[783]

9.15 Other than management functions, we discuss each of these in more detail below.

Functions relating to lease consents

9.16 Leases will always contain restrictions on what the leaseholder can and cannot do with their premises. Some of these restrictions will amount to an outright prohibition (known as an "absolute" covenant) where the leaseholder can never do a particular thing (unless the landlord waives the prohibition). More commonly, the lease will provide that something cannot be done without the landlord's consent (known as a "qualified" covenant). For example, consent may be required before the leaseholder can carry out structural alterations to the premises, keep a pet or sublet the premises. The lease will stipulate when and how consent is required – usually requiring the landlord's prior written consent.

9.17 The Landlord and Tenant Act 1927 provides that, where the landlord's consent is required for certain leaseholder actions, that consent must not be unreasonably withheld.[784] The landlord can charge a reasonable fee for granting the consent.[785] The Landlord and Tenant Act 1988 further provides that such consent must be considered within a reasonable period of time.[786]

Lease consents post-acquisition of the RTM: current law

9.18 The 2002 Act expressly provides that the grant of lease consents in respect of qualifying premises becomes a function of the RTM company.[787] The 2002 Act also extends this to dealing with notices of assignment[788] and the granting of certificates required for HM Land Registry restrictions.[789]

9.19 The RTM company, by implication, must not withhold consent unreasonably but may charge reasonable fees.[790] The grant of consents is not limited to those that are connected to "management functions", but instead to all lease consents. The landlord however retains both a right to remain involved in the grant of those consents, as well

---

781 Commonhold and Leasehold Reform Act 2002, sch 7, para 11.

782 Commonhold and Leasehold Reform Act 2002, sch 7, para 16.

783 Commonhold and Leasehold Reform Act 2002, sch 7, para 12.

784 Landlord and Tenant Act 1927, s 19.

785 Landlord and Tenant Act 1927, s 19.

786 Landlord and Tenant Act 1988, s 1(3).

787 Commonhold and Leasehold Reform Act 2002, ss 98(1) to (2), 99 and sch 7, para 13.

788 Commonhold and Leasehold Reform Act 2002, sch 7, para 1.

789 Commonhold and Leasehold Reform Act 2002, s 98(7).

790 Commonhold and Leasehold Reform Act 2002, sch 7, para 1.

as control over consent for parts of the premises over which the landlord retains management (such as commercial premises).[791]

9.20 The 2002 Act sets out the procedure for the grant of consents post-acquisition.[792] The leaseholder applies to the RTM company, which must then give at least 30 days' notice to the landlord for consents about certain issues, or 14 days' notice in all other cases.[793] If the landlord wishes to object to granting consent, it must give notice to both the RTM company and the relevant tenant[794] before the time when the RTM company would first be entitled to grant it (that is, within the 30 or 14 day period).[795] The landlord can only object, or give a conditional consent, if the landlord would have been entitled to make that objection or condition before the RTM was acquired.[796]

9.21 In the event that such an objection is made, the RTM company cannot give consent without either the landlord giving consent, or an order from the tribunal.[797]

9.22 If the landlord does not object, or fails to respond, the RTM company may proceed to give consent to the leaseholder unless the RTM company wishes to object in its own right.

9.23 It is worth noting that if the RTM company rejects the consent application, there is no obligation on the RTM company to refer this to the landlord, even if the landlord disagrees and might otherwise grant consent.

Problems with the existing procedure

9.24 The fact that the RTM company and landlord have an input into the granting of lease consents gives rise to several practical problems variously prejudicing the interests of the landlord, the RTM company and the leaseholder.

9.25 The procedure can cause problems if the RTM company delays forwarding the request for consent to the landlord.[798] For example, in the context of a proposed sale of a flat, any delay in granting consent to assign the lease may delay the transaction. There is no requirement that the RTM company forward the request within a certain time frame – there is simply a requirement to handle the application within a reasonable period of time.[799] The whole process can therefore take months by the

---

791 Commonhold and Leasehold Reform Act 2002, s 98(1).

792 Commonhold and Leasehold Reform Act 2002, s 98(4).

793 Commonhold and Leasehold Reform Act 2002, s 98(4). 30 days' notice is required for approvals relating to assignment, underletting, charting, parting with possession, the making of structural alterations or improvements or alternations of use.

794 Commonhold and Leasehold Reform Act 2002, s 99(4).

795 Commonhold and Leasehold Reform Act 2002, s 99(1).

796 Commonhold and Leasehold Reform Act 2002, ss 99 (2) and (3).

797 Commonhold and Leasehold Reform Act 2002, s 99(1).

798 If the RTM company receives the notice, processes it (possibly appointing its own solicitor), then forwards it to the landlord which then has a period to respond, the whole process may take two months or longer.

799 See *Footwear v Amplight Properties* (1999) 77 Property, Planning and Compensation Reports 418 on what may constitute a reasonable period of time.

time the RTM company forwards the request, waits for a reply then issues the consent.

9.26 In other cases, the RTM company may not realise it is supposed to forward the notice to the landlord, and may purport to give the leaseholder consent without the landlord having the opportunity to object. It is not clear whether such a consent would be valid. A recent Court of Appeal decision held that where the RTM company fails to forward the request, it is not withholding consent unreasonably, even where the RTM company's failure is intentional.[800] The burden is on the leaseholder to apply to the tribunal for an order to compel the RTM company to notify the landlord.

9.27 Equally, landlords may be served with the notice directly, and they may purport to grant consent without checking with the RTM company whether it wishes to object.

9.28 We have also heard that in some cases, such as where proposed works affect the structural integrity of the building, the current 30-day notice period given to landlords is insufficient time to allow for the necessary consideration. The landlord may, for example, wish to take advice from a surveyor before deciding whether consent for structural alternations should be granted.

9.29 Finally, and importantly, both the RTM company and the landlord may now be entitled to charge a reasonable fee for granting consent to the applicant leaseholder,[801] meaning the leaseholder may have to pay twice for the same consent. In more complex cases, such as the grant of consent for structural alterations, the fees may be considerable if both the RTM company and the landlord appoint legal advisors, surveyors and/or structural engineers.

Possible solutions

9.30 We have considered whether this process could be improved, focussing on two particular questions.

(1) Which party or parties should grant consent?

(2) What costs should be payable by the leaseholder for that consent?

9.31 We have considered a number of options.

9.32 Option 1: the law could be changed so that either the RTM company or the landlord would have the right to grant all lease consents. This would be a significant departure from the current position and would prejudice whichever party was excluded from the process. It could allow for the excluded party to be notified after the granting of a consent, but would not allow that party to object. This option would speed up the consents process and ensure that the leaseholder would face only one set of costs.

---

800 *Reiner v Triplark Ltd* [2018] EWCA Civ 2151.

801 Commonhold and Leasehold Reform Act 2002, s 158, sch 11, para 2 and sch 7, para 16. Where a covenant is conditional upon the landlord giving his consent, such consent not to be unreasonably withheld, it is reasonable to require that the leaseholder pay the professional fees associated with obtaining consent: *Holding & Management (Solitaire) Ltd v Norton* [2012] UKUT 1 (LC).

9.33 Option 2: consents could be split into categories, with the RTM company retaining responsibility for some consents (such as requests to keep pets) and the landlord the others (such as for structural alterations). We are not best placed to separate the different types of consents into our proposed new categories. We envisage that consents would be allocated to the party which would be most affected by the particular consent, and therefore suffer the most prejudice if they were excluded from the process. However, we think there could be considerable difficulties drawing up exhaustive categories given the huge variance in leases and therefore the occasions on which consent might be required. This option would however achieve speed and ensure that only one set of fees was payable by the leaseholder.

9.34 Option 3: the RTM company and landlord could be required to appoint one set of advisors jointly. We envisage that the leaseholder would apply to the RTM company who would appoint an expert or experts (or managing agent) to advise. That expert would then be retained jointly by the RTM company and the landlord. If the landlord did not approve of the appointed expert, the landlord could then choose to appoint its own expert, but at its own cost. If the expert was appointed jointly and a conflict of interests arose[802] the parties would then be entitled to appoint their own advisors. We think that this would be at the leaseholder's expense, provided there was a genuine conflict of interests. This option would reduce the time taken to grant consent and limit payment to one set of fees only for the leaseholder (unless a conflict of interest arose).

9.35 Option 4: the existing system could be reviewed in order to improve some of the practical issues currently faced. For example, some of the delays and confusion could be minimised if the leaseholder was required to serve both the RTM company and the landlord separately. Each would then have a limited amount of time to respond (such as the current 30 days), and the response would have to be served on both the leaseholder and the other party. The leaseholder would still require the consent of both parties but the landlord's consent would no longer have to be routed through the RTM company. Alternatively, the RTM company could be obliged to forward the leaseholder's request to the landlord within seven days from receipt, which would again speed up the process.

9.36 On the question of costs for option 4, there are further alternatives to consider.

(1) The costs could be fixed or capped. Whilst the leaseholder would still have to pay two sets of fees, they would be finite. The RTM company would have no funds to cover any costs it incurred for which it was not reimbursed.

(2) The costs could be capped to allow recovery of one set of fees only, to be split equally between the landlord and RTM company in all cases. This poses a problem in that costs may be inflated deliberately to accommodate only 50% of them being recoverable. Again, the RTM company may not be able to pay any costs which were not met by the leaseholder.

(3) Two sets of fees could remain payable.

---

802 For example, Solicitors Regulation Authority, *Code of Conduct* (October 2018) ch 3.

Our preliminary views

9.37 Generally, the purpose of lease consents is to protect not just the landlord, but also other occupants in the building. For example, if a leaseholder wishes to extend their flat into the garden, the landlord will want to ensure the structural integrity of the building will not be compromised. This is in the collective interest of the landlord and the leaseholders. Given that the landlord retains their interest in the building, we do not think it should be excluded from the right to grant consents.

9.38 There are also more prosaic issues. In the alterations example, how much noise and mess the builders make is more of an issue for leaseholders than for the landlord. Another example is where consent is sought to keep pets. The RTM company is likely to be better placed to address this. Moreover, in some cases, such as a request to assign a lease, the RTM company is better placed than the landlord to know whether the applicant leaseholder is in arrears with their service charge payments. We think therefore there are good reasons to maintain the current right for the RTM company to be involved in the grant of lease consents. We are not therefore in favour of option 1, where one party is excluded from the consents process.

9.39 We recognise that involving both parties in more straightforward cases could be excessive. For example, if the application is to put up a TV aerial externally, it seems excessive for a leaseholder to need to secure consent from both the RTM company and the landlord, incurring both sets of costs. However, as we set out in option 2, we think it would be very difficult to provide in the legislation that applications for certain consents should go to the landlord, and others to the RTM company. Different leases contain different requirements for consent, which it may not be possible to cover. Some issues will involve the interests of both the landlord and the RTM company and create disputes as to whether the leaseholder has applied to the correct party or not. The second option does not therefore seem viable.

9.40 On the basis that options 1 and 2 do not seem to be viable, we think that options 3 and 4 remain open for consideration. We have not formed a provisional view as to which of these options (if either) is preferable. We would like to hear consultees' views on these options and on whether there are any other ways in which some of the existing delays and duplication of costs associated with lease consents under the RTM regime could be avoided.

Consultation Question 103.

9.41 We invite consultees' views on the following points.

(1) Do consultees consider that there is a practical solution to avoid some of the existing delays and duplication of costs associated with lease consents under the RTM regime?

(2) If so, do consultees consider:

(a) that the RTM company and landlord should be required to appoint joint advisors (chosen by the RTM company), in order to keep down the costs to be met by the leaseholder ("option 3");

(b) that the existing process should be sped up, by requiring the leaseholder to seek consent from the RTM company and landlord concurrently, or requiring the RTM company to pass the request to the landlord within a set period of time ("option 4"); or

(c) that there is another model which would work better (in which case, please give details)?

(3) In relation to option 4, do consultees agree that the RTM company and/or landlord should have a limited period within which to respond? How long would be appropriate? We suggest 30 days as an initial position. How could costs be kept down?

Consultation Question 104.

9.42 What experiences of delays and/or duplication of costs have consultees experienced in relation to lease consents under the RTM regime? If possible, please give an indication of the costs incurred.

Retrospective consents and consent in respect of absolute covenants

9.43 Where a lease contains a qualified covenant, the landlord's consent must not be unreasonably withheld.[803] However, there is no such limitation in respect of absolute covenants. Indeed, the Court of Appeal found recently that a landlord who granted consent in respect of something prohibited by the lease was in breach of its obligations to the other leaseholders to enforce the lease covenants.[804] The

[803] Landlord and Tenant Act 1927, s 19.

[804] *Duval v 11-13 Randolph Crescent Limited* [2018] EWCA Civ 2298.

suggestion was that a landlord should not grant consent in respect of absolute covenants.

9.44 Equally, where a leaseholder fails to obtain prior consent in respect of a qualified covenant, and subsequently does something in breach of the lease, there is no legal obligation on the landlord to grant retrospective consent if the leaseholder seeks it.[805] If the landlord refuses that retrospective consent, the leaseholder remains in breach of the lease, which is actionable by the landlord (potentially giving rise to an injunction, an action for damages or forfeiture action).

9.45 No express provision is made in the RTM legislation for the grant of consents under an absolute covenant (which involve overriding the lease provisions) or for retrospective consents (which involve remedying a breach which has taken place). It appears, at face value, that the RTM company is only able to grant consents which the leaseholder is entitled to apply for under the lease: that is, qualified consents only. However, the authors of *Service Charges and Management* take a contradictory view and suggest that granting other consents may be within the RTM company's jurisdiction, if "under the lease" is interpreted more broadly.[806]

9.46 We think there would be a benefit to clarifying the law to avoid future disputes. However, we do not consider that it would be appropriate to provide for the RTM company to grant retrospective consents, or consents in respect of absolute covenants, as these are not lease functions and cannot therefore be transferred to the RTM company on acquisition. We therefore ask consultees if the law should be clarified to confirm that the RTM company cannot validly grant these consents. A leaseholder seeking such a consent would have to apply directly to the landlord.

Consultation Question 105.

9.47 Do consultees consider that the law should be clarified to make clear that the RTM company is not entitled to grant retrospective consents or consents in respect of absolute covenants?

9.48 We have been told by stakeholders that RTM companies may be unaware of the difference between absolute or qualified covenants, or why the grant of retrospective consent is not possible. Purporting to grant consent in either of these cases could be detrimental both to the landlord and to the leaseholder, who may be under the impression that valid consent has been granted and may then act accordingly. However, if RTM companies understand their responsibilities, it should arise less frequently in the RTM context. As we have discussed elsewhere, we hope that improved training and education for RTM directors will assist.[807]

---

805 *Avon Freeholds Ltd v Garnier* [2016] UKUT 477 (LC).

806 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-023.

807 See Chapter 5.

An obligation to monitor and report tenant covenants

9.49 As the landlord still retains ownership of the building, the landlord has a right to expect its interests to be protected. It may however be difficult for the landlord to ensure this where the landlord does not manage the building on a day-to-day basis, and may no longer be attending or inspecting the building on a regular basis.

9.50 The 2002 Act therefore requires the RTM company to ensure that all tenant covenants set out in the leases are complied with.[808] This is not limited to covenants pertaining to management functions, but extends to tenant covenants for which the landlord retains responsibility. The RTM company must report any breach to the landlord within three months of the date on which the RTM company first becomes aware of the breach. [809] The matter need not be reported to the landlord if the failure has been rectified by the leaseholder, reasonable compensation has been paid, or the landlord has advised the RTM company that it does not need to be notified.[810]

9.51 We have been told by stakeholders that some RTM companies are not aware of their duties under this requirement. This means there could be a breach of the lease which puts the building at risk, of which the landlord is not made aware. One stakeholder gave the example of an extension being built onto a ground floor flat without prior consent (in breach of the lease). The work was carried out poorly causing damage to the structural integrity of the building, which was only discovered by the landlord at a later date. We hope that situations like this can be addressed by better information and education for RTM company directors, which we discuss in Chapter 5.

9.52 The landlord and RTM company may have individual claims against the defaulting leaseholder, but may also need to bring a joint claim. We discuss enforcement generally in Chapter 10.

A right to enforce tenant covenants

9.53 Untransferred tenant covenants are obligations of the leaseholder under the lease that do not pass over to the RTM company on acquisition. The 2002 Act permits the RTM company to enforce any untransferred tenant covenants, although this excludes the right to re-entry or forfeiture.[811] If the leaseholder breaches such a covenant, the RTM company has the right to enforce it by virtue of this provision, notwithstanding that it is not responsible for monitoring that covenant, and that the landlord could also enforce it.

An obligation to repair defective premises

9.54 If a landlord lets premises under a lease (including a long lease) which contains an obligation to maintain and repair the premises, they have a statutory duty of care to ensure that those premises are properly maintained and repaired.[812] This statutory

---

808 Commonhold and Leasehold Reform Act 2002, s 101.

809 Commonhold and Leasehold Reform Act 2002, ss 101(2)(b) and 101(3).

810 Commonhold and Leasehold Reform Act 2002, s 101(4).

811 Commonhold and Leasehold Reform Act 2002, s 100.

812 Defective Premises Act 1972, s 4. “Tenancy” is defined in s 6(1).

obligation is in addition to any repair and maintenance obligations set out in the lease. The effect of the 2002 Act is that, from the date of acquisition of the RTM,[813] the relevant obligations apply to the RTM company.

An obligation to repair in the case of shorter leases

9.55 It is not uncommon to have premises let on shorter leases[814] within a block made up mainly of longer leases. Broadly speaking, where there is a lease of fewer than seven years,[815] there is a statutory requirement on the landlord to ensure that it keeps the structure and exterior of the building, installations (such as utility supplies), and heating in good repair and working order.[816]

9.56 The RTM company does not acquire day-to-day management of any non-qualifying premises (such as fixing a broken boiler in a short-let flat), but does take over maintenance and repair of the structure of the building. The 2002 Act passes on the obligation to repair from the landlord to the RTM company.[817] If the RTM company fails to comply with its statutory obligations, the sub-tenant can apply for an order for specific performance compelling the RTM company to fulfil its repair obligations.[818]

9.57 If there is a problem with the water supply, for example, the sub-tenant may have to identify where the problem is before knowing who is liable. Generally, the RTM company would be liable for the water supply from the mains on the street to the building but the supply inside each flat (for example, a broken boiler) would remain the responsibility of the landlord under a short lease.

An obligation to comply with statutory service charge provisions

9.58 The Landlord and Tenant Act 1985 sets out various rights that leaseholders have in connection with service charges. These include the right to challenge the reasonableness of service charges,[819] to be consulted in advance on any major works projects,[820] or before the landlord enters into any qualifying long term agreements,[821] together with various rights to request information.[822]

9.59 Post-acquisition of the RTM, there are two changes:[823]

---

813 Commonhold and Leasehold Reform Act 2002, sch 7, para 2(3).

814 Such as an assured shorthold tenancy agreement.

815 Landlord and Tenant Act 1985, s 13. This may include an assured shorthold tenancy or assured tenancy.

816 Landlord and Tenant Act 1985, s 11.

817 Commonhold and Leasehold Reform Act 2002, sch 7, para 3.

818 Landlord and Tenant Act 1985, s 17.

819 Landlord and Tenant Act 1985, s 27A.

820 Landlord and Tenant Act 1985, s 20.

821 Landlord and Tenant Act 1985, s 20.

822 Landlord and Tenant Act 1985, s 21.

823 Commonhold and Leasehold Reform Act 2002, sch 7, para 4.

(1) the RTM company must now comply with the above insofar as they relate to management functions, and leaseholders' rights are now enforceable against the RTM company;[824] and

(2) if a landlord now makes service charge contributions,[825] they enjoy the benefits of the rights above as if they were a leaseholder.[826] In these circumstances, the landlord also gains the right to challenge any issues that arise from the service charges as a result of the RTM company's management.

An obligation to hold service charges on trust

9.60 Any service charges payable by leaseholders must be held on trust by the party collecting those service charges.[827] Any party to whom the funds are payable[828] must hold them in this manner, including an RTM company.[829] Where service charge monies are to be paid by the landlord,[830] these must also be held by the RTM company on trust.[831]

An obligation to ensure that administration charges are reasonable

9.61 The 2002 Act introduced a general requirement that any variable administration charges (that is, those whose amount is not specified in, or calculated in accordance with, the lease) must be reasonable, even if the lease does not provide that the charge must be reasonable.[832] An administration charge is widely defined. It includes any fees chargeable to a leaseholder for the grant of consent or for enforcing the terms of the lease, such as non-payment of service charges.[833] If a leaseholder successfully challenges the reasonableness of a non-variable administration charge, the tribunal may vary the lease accordingly.[834]

9.62 From the date of acquisition, the requirement that administration fees are reasonable also applies to any such fees demanded by the RTM company.[835] Any action taken by the leaseholder in respect of an administration charge made by the RTM company would be against the RTM company, not the landlord.

---

824 Commonhold and Leasehold Reform Act 2002, sch 7, para 11(4).

825 See below at para 9.83 and also Commonhold and Leasehold Reform Act 2002, s 103.

826 Commonhold and Leasehold Reform Act 2002, sch 7, para 4(3).

827 Landlord and Tenant Act 1987, s 42. Provision has also been made requiring service charges to be held in a designated account, but this is not yet in force: s 42A. Once in force, a failure to comply would result in the landlord being guilty of an offence liable to summary conviction: s 42B.

828 Landlord and Tenant Act 1987, s 42(1).

829 Commonhold and Leasehold Reform Act 2002, sch 7, para 11.

830 Commonhold and Leasehold Reform Act 2002, s 103.

831 Commonhold and Leasehold Reform Act 2002, sch 7, para 11(4).

832 Commonhold and Leasehold Reform Act 2002, s 158 and sch 11, para 2.

833 Commonhold and Leasehold Reform Act 2002, sch 11, para 1(1).

834 Commonhold and Leasehold Reform Act 2002, sch 11, para 3.

835 Commonhold and Leasehold Reform Act 2002, sch 7, para 16.

9.63 The landlord may still collect administration charges for non-management functions such as the process of collecting ground rents if the leases permit the landlord to do so. Any action in respect of these charges would be against the landlord.

An obligation to furnish the leaseholders with a name and address

9.64 Prior to acquisition, the landlord has a duty to include, on any service charge or ground rent demands, the landlord's name and address[836] and an address in England or Wales for service of notices and documents.[837] For as long as the landlord fails to comply with these obligations, then the leaseholder need not pay the relevant ground rent, service or administration charge.[838]

9.65 The 2002 Act provides that, from the acquisition date, references to the landlord in the relevant provisions include references to the RTM company. The RTM company and landlord then each have the responsibility to provide the relevant information, either upon receipt of a request or according to the relevant demands (service charge demands in the case of the RTM company, and ground rent demands for the landlord).[839] The landlord also obtains the right to receive this information from the RTM company in cases where the landlord contributes to the service charge fund.[840]

9.66 The RTM company must provide its own name and address (and a separate address for service of notices in England or Wales if relevant).[841] It must also provide such information to the landlord.[842] There has been a case suggesting that the RTM company should include the landlord's name and address on service charge demands,[843] although this is open to doubt when the service charges are no longer payable to the landlord.

9.67 We do not think that the RTM company should be responsible for providing the landlord's address when it issues service charge demands. Such an obligation could put the RTM company in breach of its obligations if the landlord has not provided the RTM company with the correct address. We provisionally propose that the legislation should be clarified to make clear that the RTM company need only include its own information, and not that of the landlord.

9.68 We are aware that, in some circumstances, the leaseholders may not have an address for their landlord. They may not even be aware of the difference between the landlord and the RTM company (or other management company), particularly where the landlord is not issuing service charge demands. However, we think this is an issue

836 Landlord and Tenant Act 1987, s 47.

837 Landlord and Tenant Act 1987, s 48.

838 Landlord and Tenant Act 1987, ss 47(2) and 48(2). *Tedla v Cameret Court Residents Association Ltd* [2015] UKUT 221 confirmed that section 47(2) is suspensory only. By serving fresh notices with the details required under section 47, a landlord can retrospectively validate the original demands: *Johnson v County Bideford Ltd* [2012] UKUT 457 (LC).

839 Commonhold and Leasehold Reform Act 2002, sch 7, para 12.

840 Commonhold and Leasehold Reform Act 2002, sch 7, para 12(2).

841 Commonhold and Leasehold Reform Act 2002, Explanatory Notes, sch 7, para 331.

842 Commonhold and Leasehold Reform Act 2002, sch 7, para 12(3).

843 *Dougall v Barrier Point RTM Co Ltd* [2017] UKUT 0207 (LC).

for the landlord, beyond the RTM regime, and not something which we can or should try to fix within this consultation.

Consultation Question 106.

9.69 We provisionally propose that the law should require the RTM company to include its own name and address for service on service charge demands, but not those of the landlord. Do consultees agree?

THE LANDLORD'S RIGHTS AND OBLIGATIONS

Rights of the landlord

9.70 The 2002 Act provides that the landlord is not entitled to carry out any of the management or related functions which the RTM company is required or empowered to carry out.[844] However, the landlord still retains control in certain circumstances and, in particular, retains the following functions:[845]

(1) management of premises not covered by the RTM;

(2) ground rent collection;

(3) forfeiture of leases;[846] and

(4) development rights of non-qualifying premises.

Management of premises not covered by the RTM

9.71 The landlord retains management functions for premises not covered by the RTM (such as units not let on long leases or commercial premises).[847] This includes the grant of lease consents in respect of non-qualifying units.[848] There is no requirement to consult with the RTM company in relation to such lease consents.

Ground rent collection

9.72 As the RTM company is restricted to management, the landlord retains control over the collection of ground rents.[849] This includes dealing with any arrears and any ground rent review.

---

844 Commonhold and Leasehold Reform Act 2002, s 97(2).

845 Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-01.

846 Commonhold and Leasehold Reform Act 2002, s 96(6)(b).

847 Commonhold and Leasehold Reform Act 2002, s 96(6)(a).

848 Commonhold and Leasehold Reform Act 2002, s 98(1).

849 See for example *Francia Properties Ltd v Aristou* [2017] Landlord and Tenant Reports 5 at [65] to [66].

Forfeiture of leases

9.73 The 2002 Act specifically excludes the ability of the RTM company to forfeit (terminate) a lease.[850] A landlord has a right to forfeit a lease in limited circumstances:

(1) where the leaseholder has failed to make payments of ground rents (if the amount is more than £350 or has been owed for more than three years);[851] or

(2) where there is some other breach of the lease, such as non-payment of service charges or unauthorised alterations.

9.74 It is irrelevant whether the breach relates to a function under the RTM company's control – if forfeiture is available as a result of any breach, only the landlord has the right to proceed. If the breach relates to a function under the RTM company's control, the RTM company can request that the landlord take forfeiture action, but there is no obligation on the landlord to do so. The landlord may have its own reasons for claiming forfeiture, particularly if its interests are at risk as a result of the breach.

9.75 Some stakeholders representing leaseholder interests have argued that the RTM company should have the right of forfeiture where a leaseholder is in service charge arrears, or is otherwise in breach of the lease, and the landlord has failed to take action. We have been told by these stakeholders that, without this option of last resort, RTM companies can be left out of pocket with no effective remedy to remove the non-paying leaseholder.

9.76 Although we are sympathetic to this argument, we do not think that granting the right of forfeiture to the RTM company, even as an option of last resort, would be appropriate. The right of forfeiture is a security against the leaseholder residing in the property over which the landlord has a proprietary right. To allow the RTM company to terminate the lease against the landlord's will would be a significant interference with that proprietary right.

9.77 The RTM company can take other enforcement action in respect of breaches pertaining to management functions, such as an application for an injunction or debt proceedings. We discuss enforcement in more detail in Chapter 10.

Development rights in relation to non-qualifying premises

9.78 The transfer of management functions to an RTM company does not restrict the landlord's ability to develop any of the retained property, such as adding a new unit on the roof or in the basement, or building new garages. The right to carry out development works is a property right. If the exercise of the RTM were to remove that right, the landlord would have to be compensated for its loss.

9.79 The development works, or works which the landlord wishes to carry out to the non-qualifying premises, may have an impact on the premises over which the RTM has

---

850 Commonhold and Leasehold Reform Act 2002, s 96(6)(b).

851 Commonhold and Leasehold Reform Act 2002, s 167; Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004/3086 and Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (Wales) Regulations 2005/1352.

been exercised. The 2002 Act does not specifically provide for this possibility, but the point was raised recently in *Francia Properties Ltd v Aristou* ("*Francia*").[852] The court held that the landlord was permitted to carry out development works (in that case, building additional flats on the roof) provided it had taken all reasonable steps to minimise disruption to the management functions during and after the works.

9.80 While *Francia* provides a limited degree of clarity, as a first-instance decision it is not authoritative. It also leaves several questions unanswered. For example, how severe must the effects of development be before the landlord could be deemed incapable of having taken all reasonable steps to minimise disruption to management functions?[853] Another question is whether the RTM company or the landlord will manage the new units.

9.81 However, we do not consider that this is something that legislation can provide for. It will depend on the facts (for example, is the new unit a qualifying unit on a long lease, or commercial premises) and may rely to some extent on the cooperation of the parties. Either party has the option to pursue an injunctive application or a claim for damages in the event that there is an infringement of rights.

Obligations of the landlord

9.82 The landlord has the following obligations:

(1) to contribute towards the service charge in certain circumstances;[854] and

(2) to serve a right of first refusal notice on the RTM company.[855]

An obligation on the landlord to contribute towards the service charges

9.83 Where the premises subject to the RTM includes a flat or other unit which is not a qualifying unit (which we refer to as an "excluded unit"), the landlord may become liable for any shortfall in the service charge fund corresponding with that unit.[856] For example, the landlord may have retained a flat for a resident caretaker or to rent on the open market, or there may be commercial units. This obligation does not extend to any shortfall arising other than because of excluded units, for example because of leaseholders who are in arrears.

9.84 In a case where there is a head lease, the obligation falls on the immediate landlord.[857]

9.85 The landlord is obliged to pay any shortfall where there are excluded units and the aggregate contribution does not add up to 100% of the relevant costs. We have been told by stakeholders of situations where the landlord has been reluctant to pay the

---

852 *Francia Properties Ltd v Aristou* [2017] Landlord and Tenant Reports 5 at [76].

853 *Francia Properties Ltd v Aristou* [2017] Landlord and Tenant Reports 5 at [79].

854 Commonhold and Leasehold Reform Act 2002, s 103.

855 Commonhold and Leasehold Reform Act 2002, sch 7, para 7.

856 Commonhold and Leasehold Reform Act 2002, s 103(2).

857 Commonhold and Leasehold Reform Act 2002, s 103(5)(b).

service charge contribution to the RTM company, typically where there has been a fraught landlord-tenant relationship in the past. In other cases, RTM companies have experienced difficulties where the landlord is a large corporation or where there is an intermediate landlord. The RTM company has the right to pursue any such arrears, but this can be prohibitively expensive, especially where the amounts due fall within the jurisdiction of the small claims court, where generally no costs are recoverable even if a claim is successful. We discuss enforcement and costs in Chapter 10.

An obligation on the landlord to serve a right of first refusal notice on the RTM company

9.86 A landlord is at liberty to sell its reversionary interest at any time for any reason. However, it must, in most cases, offer the interest to the leaseholders prior to any sale by giving notice in accordance with statutory provisions.[858] Failure to do so is a summary offence.[859]

9.87 Post-RTM acquisition, the landlord must also serve the right of first refusal notice on the RTM company.[860] The requirement is for notification only – the legislation does not extend to allowing the RTM company to participate in the process in its own right. The right to purchase the freehold is for the leaseholders to exercise, not the RTM company.[861]

Right to acquire landlord's interest is disapplied

9.88 Part 3 of the Landlord and Tenant Act 1987 ("1987 Act") provides a mechanism for leaseholders, by way of application to court, to obtain an order acquiring the landlord's interest in their building in certain circumstances where the landlord is in breach of the management obligations.

9.89 The 2002 Act provides that, where the RTM has been exercised, the leaseholders' rights under Part 3 of the 1987 Act are disapplied.[862]

9.90 The explanatory notes to the 2002 Act clarify that this is because the right of compulsory acquisition is only exercisable where the landlord is at fault. The tenants should not therefore be entitled to exercise it where the landlord has been divested of the management functions as a result of the RTM, which is a "no fault" regime.

SHARED RIGHTS OF THE LANDLORD AND LEASEHOLDERS AGAINST THE RTM COMPANY

9.91 From the acquisition date, the landlord acquires certain rights which reflect the existing rights of leaseholders:

---

858 Landlord and Tenant Act 1987, Pt 1. There are exceptions to the general rule; see section 4 of the 1987 Act.

859 Landlord and Tenant Act 1987, s 10A.

860 Commonhold and Leasehold Reform Act 2002, sch 7, para 7.

861 See Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, ch 2.

862 Commonhold and Leasehold Reform Act 2002, sch 7, para 9.

(1) the right to request information on insurance;[863]

(2) the right to apply for the appointment of a manager;[864]

(3) the right to vary the leases;[865] and

(4) the right to a management audit.[866]

9.92 Both the landlord and the leaseholders are entitled to enforce these rights against the RTM company.

Right to request information on insurance

9.93 Leaseholders generally have the right to request insurance information from the landlord,[867] which must include a summary, the insured amount, the name of the insurer and the risks included.[868] This information must be provided by the landlord within 21 days of receiving the leaseholder's request.[869]

9.94 Post-acquisition, the leaseholders must instead make this request to the RTM company.[870] Provided that the landlord contributes towards the service charges as discussed above, it also has the right to request this information from the RTM company.[871] We address insurance more generally in Chapter 8.

Right to apply for the appointment of a manager

9.95 In the event that the landlord fails properly to manage the building in accordance with its obligations, a leaseholder can make an application[872] to request that a tribunal-appointed manager is appointed in place of the landlord.[873] The application can be made by a single leaseholder, as long as there are at least two flats in the building.[874]

---

863 Commonhold and Leasehold Reform Act 2002, sch 7, para 5.

864 Commonhold and Leasehold Reform Act 2002, sch 7, para 8.

865 Commonhold and Leasehold Reform Act 2002, sch 7, para 10.

866 Commonhold and Leasehold Reform Act 2002, sch 7, para 14.

867 Landlord and Tenant Act 1985, s 30A.

868 Landlord and Tenant Act 1985, sch, para 2(4).

869 Landlord and Tenant Act 1985, sch, para 2(4).

870 Commonhold and Leasehold Reform Act 2002, sch 7, para 5.

871 Commonhold and Leasehold Reform Act 2002, sch 7, para 5(3).

872 Currently to the First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales. See Landlord and Tenant Act 1987, s 21(8).

873 Landlord and Tenant Act 1987, s 24.

874 Landlord and Tenant Act 1987, s 21(2).

9.96 Post-acquisition, the leaseholders may apply for the replacement of the RTM company, rather than the landlord, with a tribunal-appointed manager, in the event that the RTM company fails to perform its management obligations.[875]

9.97 The landlord also acquires the right to make such an application against the RTM company[876] and must do so on the same grounds as the leaseholders.[877] Unlike other landlord rights post-acquisition, this is not dependent on the landlord making payments towards the service charge fund.

9.98 In the event that such an application by the landlord or a leaseholder is successful, the RTM is terminated.[878] We discuss termination in more detail in Chapter 11.

Right to vary the leases

9.99 A landlord or leaseholder can unilaterally vary a lease or leases in limited circumstances.[879] Either party can apply to the tribunal at any time,[880] subject to satisfying one of the grounds set out in the legislation.[881]

9.100 The 2002 Act applies the relevant provisions to the RTM company as if it were a party to the lease.[882] This permits the involvement of the RTM company in any such application, whether as an applicant, respondent or interested party. If, for example, the lease was defective because it did not have an adequate insurance clause, the RTM company would need to be involved in any application to vary the lease to address this, given its responsibility for insurance as part of its management functions.

Right to a management audit

9.101 Leaseholders have a right to have the landlord's management audited[883] to establish whether the landlord is discharging its obligations under the lease efficiently and effectively.[884] Once the RTM has been acquired, the leaseholders retain this right but any such right pertaining to management functions is enforceable against the RTM company, not the landlord.[885] If the landlord contributes towards the service charges,[886] the landlord also secures this right against the RTM company.[887] The

875 Commonhold and Leasehold Reform Act 2002, sch 7, para 8.

876 Commonhold and Leasehold Reform Act 2002, sch 7, para 8(3).

877 Set out in the Landlord and Tenant Act 1987, s 24(2).

878 Commonhold and Leasehold Reform Act 2002, s 105(4).

879 Landlord and Tenant Act 1987, Pt IV.

880 Currently to the First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales. See the Landlord and Tenant Act 1987, s 35(9).

881 See for example, Landlord and Tenant Act 1987, s 35(2) or 36(3).

882 Commonhold and Leasehold Reform Act 2002, sch 7, para 10.

883 Leasehold Reform, Housing and Urban Development Act 1993, s 76.

884 Leasehold Reform, Housing and Urban Development Act 1993, s 78(1).

885 Commonhold and Leasehold Reform Act 2002, sch 7, para 14.

886 Under Commonhold and Leasehold Reform Act 2002, s 103.

887 Commonhold and Leasehold Reform Act 2002, sch 7, para 14(3).

leaseholders continue to have this right against the landlord in respect of non-management lease functions.

THE RIGHTS OF RECOGNISED TENANTS' ASSOCIATIONS

9.102 The following rights are preserved for recognised tenants' associations against the RTM company:

(1) the right to be consulted about an RTM company's managing agent;[888] and

(2) the right to appoint a surveyor to advise on matters relating to service charges.[889]

Right to be consulted about an RTM company's managing agent

9.103 A recognised tenants' association may request to be consulted on the appointment of any managing agent instructed by the landlord.[890] Post-acquisition, this right applies in respect of any managing agent appointed by the RTM company,[891] with the recognised tenants' association serving the requisite notice on the RTM company.

9.104 This right may be of limited use in practice, because it is likely that the members of the recognised tenants' association are the same, or substantially the same, as the members of the RTM company.

Right to appoint a surveyor to advise on matters relating to service charges

9.105 A recognised tenants' association has the right to appoint a surveyor to advise on matters relating to service charges,[892] which includes a right to access documentation and inspect the premises to enable the surveyor to perform this task.[893] On acquisition, this right will continue, and if it relates to service charges incurred as a result of management functions, the right will be enforceable against the RTM company.[894] As above, this may be of limited use in practice.

ENFORCEMENT OF RIGHTS AND OBLIGATIONS

9.106 In this chapter, we have discussed the various rights and obligations attaching to the RTM company, the landlord and the leaseholders after acquisition of the RTM. In the next chapter, we discuss how the parties can enforce those rights and obligations in the tribunal or court, and the costs of litigation.

---

888 Commonhold and Leasehold Reform Act 2002, sch 7, para 6.

889 Commonhold and Leasehold Reform Act 2002, sch 7, para 15.

890 Landlord and Tenant Act 1985, s 30B.

891 Commonhold and Leasehold Reform Act 2002, sch 7, para 6.

892 Housing Act 2006, s 84.

893 Housing Act 2006, sch 4.

894 Commonhold and Leasehold Reform Act 2002, sch 7, para 15.

Chapter 10: Dispute resolution and costs

10.1 Acquiring the RTM necessarily incurs costs for the RTM company and, in many cases, the landlord and third parties. Where the RTM claim is contested by the landlord, there may also be litigation costs. Once the RTM has been acquired, the RTM company, landlord and leaseholders have reciprocal rights and obligations owed by and to each other. If things go wrong, this can lead to disputes.

10.2 Currently, disputes concerning the RTM company may be allocated to the tribunal,[895] the county court or the High Court, depending on subject matter, value, complexity and the remedy sought. Partly as a result of this fragmented allocation of jurisdictions, there is no consistency as to the rights and liabilities of the RTM company with regard to legal costs.

10.3 In this chapter we examine the various disputes in which an RTM company might become involved, and the various costs for which the RTM company and its leaseholder members may become liable. We make proposals to reform the current rules relating to the allocation of matters between the tribunal and the courts for different types of disputes, and for reforms to the costs rules.

DISPUTES INVOLVING THE RTM COMPANY

10.4 During the RTM acquisition process and post-acquisition, the RTM company may become involved in disputes with the landlord, leaseholders and/or third parties. The nature of the dispute will determine whether the court or the tribunal has jurisdiction.

Disputes between the RTM company and the landlord

10.5 There are three main scenarios in which an RTM company may find itself engaged in a dispute with the landlord:

(1) in the tribunal to determine whether the RTM has been acquired;[896]

(2) in the tribunal to determine the amount of uncommitted service charges which are due to be transferred to the RTM company;[897] and

(3) in respect of post-acquisition rights and obligations, for example:

---

895 The First-tier Tribunal (Property Chamber) in England, and the Residential Property Tribunal Wales in Wales.

896 Commonhold and Leasehold Reform Act 2002, s 84.

897 Commonhold and Leasehold Reform Act 2002, s 94.

(a) a claim in the court by way of a debt action brought by the RTM company if the landlord is liable to make a service charge payment in respect of retained property (for example, a retained flat)[898] and fails to do so; or

(b) court proceedings where a landlord, in the exercise of their retained rights, proposes or undertakes a course of action which unreasonably interferes in the RTM company discharging its functions (for example, the landlord constructs new units on the roof).[899]

Proceedings to determine whether the RTM has been acquired

10.6 As discussed in Chapter 6, where an RTM company has received a counter-notice which denies that it is entitled to acquire the RTM, then (unless the counter-notice is later withdrawn), it cannot acquire the RTM without a determination by the tribunal.[900]

Proceedings to determine the amount of uncommitted service charges

10.7 Once the RTM company has acquired the RTM, the landlord (or other party to the lease who holds the service charge monies, or the tribunal-appointed manager) is required to transfer the accrued but uncommitted service charges to the RTM company.[901]

10.8 These are monies which have been previously paid by way of service charges and which are not required to meet pre-acquisition costs.[902] The obligation is to transfer these monies on the acquisition date or as soon thereafter as reasonably practicable.[903]

10.9 In the event of a dispute, either the paying party or the RTM company can apply to the tribunal to determine the amount payable.[904] The tribunal is limited to deciding how much of the money actually held should be transferred; it cannot order a landlord to reconstitute a fund and transfer that greater sum to the RTM company.[905] Enforcement is a matter for the court.

Post-acquisition disputes with the landlord

10.10 The forum for a post-acquisition dispute between the RTM company and landlord is determined by the nature of the dispute.

---

898 Under section 103 of the Commonhold and Leasehold Reform Act 2002.

899 *Francia Properties Ltd v Aristou* [2017] Landlord and Tenant Reports 5.

900 See para 6.54.

901 Commonhold and Leasehold Reform Act 2002, s 94.

902 Commonhold and Leasehold Reform Act 2002, s 94(2).

903 Commonhold and Leasehold Reform Act 2002, s 94(4).

904 Commonhold and Leasehold Reform Act 2002, s 94(3).

905 *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC), [2011] 1 Estates Gazette Law Reports 97.

(1) A dispute over whether a landlord should be compelled to grant consent under the terms of the lease may be dealt with by the tribunal.[906]

(2) A dispute with the landlord as to the service charges to be paid in respect of retained units may be dealt with by the tribunal or the county court.[907]

(3) A claim by a landlord alleging that an RTM company is mismanaging the building[908] is likely to be brought in the court.[909] However, it might also be used as the basis for an application to have a manager appointed under the Landlord and Tenant Act 1987, so as to bring it within the exclusive jurisdiction of the tribunal.[910]

Disputes between the RTM company and leaseholders

10.11 Once the RTM is acquired, the RTM company can enforce the leaseholders' obligations to pay service charges and other covenants under the lease.[911]

10.12 The obligation to pay service charges is only enforceable by the RTM company.[912] Other covenants (such as against nuisance behaviour or sub-letting) can be enforced by both the RTM company and by the party or parties who could enforce them before the RTM was acquired (usually the landlord/third party manager).[913]

10.13 In general terms, both the tribunal and the court can deal with such disputes. Both have jurisdiction to deal with service charge disputes[914] and cases involving allegations of breaches of lease terms.[915]

10.14 Likewise, both the tribunal and the court are likely to have jurisdiction to deal with leaseholders' complaints about the RTM company. The most common dispute is likely to concern service charges, which can be dealt with by either the tribunal or the court.[916]

---

906 Commonhold and Leasehold Reform Act 2002, s 99.

907 Commonhold and Leasehold Reform Act 2002, s 103 (obligation to make payment) and sch 7, para 4, modifying section 27A of the Landlord and Tenant Act 1985.

908 Commonhold and Leasehold Reform Act 2002, s 97(1); it may also be possible for a landlord to maintain a claim in negligence against an RTM company although we are not aware of any such claim.

909 Commonhold and Leasehold Reform Act 2002, s 107.

910 Commonhold and Leasehold Reform Act 2002, sch 7, para 8.

911 Commonhold and Leasehold Reform Act 2002, ss 96 and 97.

912 Commonhold and Leasehold Reform Act 2002, s 96.

913 Commonhold and Leasehold Reform Act 2002, s 100(2).

914 Landlord and Tenant Act 1985, s 27A.

915 Although only the court could issue an injunction, both the tribunal and court could determine whether a breach of covenant has occurred: Commonhold and Leasehold Reform Act 2002, s 168.

916 Landlord and Tenant Act 1985, s 27A.

10.15 Where a leaseholder wishes to enforce the obligations of the RTM company under the lease or the 2002 Act, this would be dealt with in the county court.[917]

Disputes between the RTM company and third parties

10.16 Although such claims appear to be less common than the previous two categories of dispute, there is some anecdotal evidence of RTM companies needing to take legal proceedings against third parties. Examples of such third parties include: mobile phone companies which have caused damage by placing masts on the roof, and neighbouring property owners undertaking works which pose a risk to the building. Such proceedings are usually in the court.[918]

FORUM FOR DISPUTE RESOLUTION: COURTS AND TRIBUNALS

Current law and problems

10.17 As we have illustrated above, the 2002 Act creates a divided jurisdiction, with responsibility split between the tribunal and the courts. The tribunal, for example, has exclusive jurisdiction to determine whether objections contained in a landlord's counter-notice are valid,[919] and what monies are to be transferred to the RTM company on acquisition of the RTM.[920]

10.18 The county court, on the other hand, has power to enforce any obligations imposed on parties by the RTM provisions in the 2002 Act.[921] For example, if the RTM company fails to discharge its obligations under the 2002 Act, a leaseholder or the landlord may apply to the county court for an order requiring the RTM company to rectify this default.[922]

10.19 The High Court retains its inherent jurisdiction in other cases.[923]

10.20 This position of fragmented jurisdiction is similar to the current position in enfranchisement. In the enfranchisement consultation paper, we criticised the current regime for creating

---

917 Commonhold and Leasehold Reform Act 2002, s 107; *Reiner v Triplark Ltd* [2018] EWCA Civ 2151.

918 We have also found one case of an RTM company challenging a tax penalty in the First-tier Tribunal (Tax Chamber): *St John's Westminster RTM Co Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 718 (TC), (18 September 2012) TC/2012/06550 First-tier Tribunal (Tax Chamber).

919 Commonhold and Leasehold Reform Act 2002, s 84(3).

920 Commonhold and Leasehold Reform Act 2002, s 94(3).

921 Commonhold and Leasehold Reform Act 2002, s 107(1).

922 Commonhold and Leasehold Reform Act 2002, s 107.

923 For example, to make a declaration that premises are, or are not, within the scope of the Commonhold and Leasehold Reform Act 2002: *Hayes Point RTM Co Ltd v Avon Freeholds Ltd* (11 July 2017) D90CF004 High Court, Cardiff District Registry (unreported).

complexity for the parties that is likely to increase costs, either as a result of parties having to take legal advice in order to navigate the process correctly, mistakes being made, or because multiple hearings are necessary.[924]

Existing Government proposals

10.21 In November 2018, the Communities Secretary launched a call for evidence seeking views on the Government's proposals for a specialist Housing Court in England.[925] The Government is exploring whether a Housing Court could bring together different disputes which are currently heard by either the tribunal or the county court, depending on their nature. This could make it "easier for all users of court and tribunal services to resolve disputes, reduce delays and secure justice in housing cases".[926]

10.22 Because of the early stage of this policy development, however, we make proposals based on the current arrangements.

Our proposals

Disputes arising from the RTM provisions

10.23 In our enfranchisement consultation paper, we concluded that the tribunal should be given exclusive jurisdiction over enfranchisement disputes.[927] Similarly, we propose in this paper that the tribunal should be given exclusive jurisdiction to determine any dispute arising out of the acquisition of the RTM and the discharge of functions under the 2002 Act.

10.24 If this approach is taken, then some examples of new jurisdictions conferred on the tribunal would include:

(1) the power to compel an RTM company to give notice to a landlord of a leaseholder's request for consent;[928]

(2) determining whether an RTM company had validly acquired the RTM even where no counter-notice had been served; [929] and

---

924 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 12.4.

925 Ministry of Housing, Communities and Local Government, *Considering the case for a Housing Court: a call for evidence* (November 2018), available at https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence.

926 Ministry of Housing, Communities and Local Government, *Considering the case for a Housing Court: a call for evidence* (November 2018), para 10, available at https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence.

927 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 12.56.

928 *Reiner v Triplark Ltd* [2018] EWCA Civ 2151. In Chapter 9 we consider whether the law should be changed so that the RTM company is not required to pass the request for consent on to the landlord. The issue of whether the RTM company had wrongly refused consent could still be dealt with by the tribunal.

929 *Hayes Point RTM Co Ltd v Avon Freeholds Ltd* (11 July 2017) D90CF004 High Court, Cardiff District Registry (unreported). See also the discussion at para 6.70.

(3) determining whether the RTM has ceased to be exercisable.[930]

Consultation Question 107.

10.25 We provisionally propose that the tribunal should have exclusive jurisdiction over disputes between the RTM company and landlord arising from the RTM provisions. Do consultees agree?

Consultation Question 108.

10.26 Do consultees consider the tribunal having exclusive jurisdiction over disputes between the RTM company and landlord over RTM provisions would save time and lower costs?

Consultation Question 109.

10.27 If consultees do not agree that the tribunal should have exclusive jurisdiction over disputes between the RTM company and the landlord arising from the RTM provisions, over which disputes should the county court retain jurisdiction?

Enforcement of obligations

10.28 The county court is currently tasked with hearing applications by landlords, leaseholders and RTM companies for orders requiring a party to make good any failure to comply with any requirement imposed by the 2002 Act.[931] The applicant party must have given the defaulting party a notice requiring them to remedy a default and wait 14 days before making any application to the county court.

10.29 This provision typically relates to procedural requirements, such as the requirement of the landlord to give the contracts and contractor notices, which we explain more fully in Chapter 7.

10.30 We have considered whether applications for orders requiring a party to make good a failure to comply with a requirement of the 2002 Act should be dealt with by the tribunal as part of our proposal above. We think they should. The tribunal is the expert body with greater familiarity with the RTM legislation (and leasehold disputes generally). We recognise that this would require new legislative provisions to confer enforcement powers on the tribunal (for example, to require documents to be

930 See Chapter 11.

931 Commonhold and Leasehold Reform Act 2002, s 107.

provided), but we do not think that this would pose any significant problems. We made a similar proposal in our enfranchisement consultation paper.[932]

Consultation Question 110.

10.31 We provisionally propose that enforcement of the requirements in the 2002 Act should be the exclusive preserve of the tribunal. Do consultees agree?

Disputes between the RTM company and other parties

10.32 We do not propose any changes concerning disputes between RTM companies and third parties where those disputes do not relate to the RTM process or the rights of the RTM company. There is unlikely to be any significant benefit to the parties in giving the tribunal exclusive jurisdiction over such disputes; indeed, it may be positively unhelpful to do so. For example, if a person who has been providing cleaning services alleges that the RTM company owes him money, that is best dealt with as a simple debt claim in the county court. The expertise of the tribunal members has no bearing on such a claim.

10.33 The position concerning disputes between RTM companies and leaseholders is more complex. We think that the majority of such disputes are likely to arise from the issues that come with communal living. Such claims will not necessarily stem from the unique status of the RTM company. Accordingly, we consider that such claims should continue to be treated as they are presently. If a leaseholder wishes to dispute a service charge demand, they should be free to do so either in the tribunal or the county court. If an RTM company wishes to obtain an injunction to prohibit a particular activity, it must bring county court proceedings. The forum for dispute resolution should continue to be governed by the remedy and subject matter, rather than the mere fact that it involves an RTM company.

Consultation Question 111.

10.34 Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a third party?

10.35 Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a leaseholder?

MEDIATION OR ARBITRATION?

10.36 We have been told by leaseholders that some RTM claims are initiated by them, not because of a genuine desire to acquire management, but as a “last resort”. This is in

[932] Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, paras 12.51 to 12.60.

order to obtain information about their building or because they feel their opinions are not being considered by the landlord.

10.37 Similarly, some stakeholders representing landlords' and managing agents' interests have told us that RTM claims often flounder once leaseholders realise the nature and scale of the management tasks and responsibilities being taken on.

10.38 We consider that greater attention should be paid at an earlier stage to ensuring that the parties have an open and frank discussion about the management of the building.

10.39 We have also considered whether an alternative form of dispute resolution should apply to help keep costs down and expedite resolution of issues arising between the parties once an RTM claim has been made. This could be via mediation or arbitration. The alternative would be for either party to apply to the tribunal.

10.40 For example, in Chapter 4, we propose a presumption that the landlord retains management of shared appurtenant property (that is, appurtenant property which is not only used by the building or buildings over which the RTM is being claimed). However, the RTM company may wish to challenge this presumption and claim management functions in respect of non-exclusive appurtenant property. We suggest in Chapter 4 that this would have to happen by agreement with the landlord or by determination by the tribunal. Any agreement or determination that the management functions for the non-exclusive appurtenant property should transfer to the RTM company would need to address the practicalities of dual management, and payment for that management. It may be that arbitration would be quicker and more cost-effective, or that mediation should be tried before going to the tribunal.

10.41 Another instance in which arbitration or mediation could be helpful is during the information notice process. One of the advantages of serving an early information notice (under Option 2 as set out in Chapter 7),[933] would be that the parties would know where they stood prior to issuing the RTM claim notice and to engaging the formal process. If there was disagreement at that stage (for example, as to the extent of information to be provided, or the category into which certain appurtenant property fell), arbitration and/or mediation may be preferable to going through the tribunals and, potentially, embarking on a long appellate journey.

10.42 We would welcome views on whether mediation or arbitration would play a helpful role with regard to any particular issue or at any particular stage in the RTM process.

Mediation

10.43 There could be a statutorily-approved form of mandatory mediation. If the parties fail to reach agreement about a particular issue (such as management of non-exclusive appurtenant property) within, say, 30 days of the outset of the mediation, either party would have the right to apply to the tribunal for a determination.

10.44 Despite the benefits of mediation in encouraging the parties to reach agreement, it has been suggested to us that mediation might prolong the process unnecessarily. It

933 See our proposals at paras 7.78 to 7.86.

does not lead to a binding decision and its success would rely entirely on the willingness of the parties to cooperate.

Arbitration

10.45 Arbitration is the default position in the context of tenant management organisations ("TMO"). There, the landlord local authority and the tenants must agree which management functions are transferred over to the TMO. At the initial stage of the process, the landlord must provide information and financial support to the TMO, so that it can create a management plan. If the local authority and the TMO cannot come to an agreement on the level of support, the TMO can refer the issue to arbitration under the Arbitration Act 1996.[934] The scheme provides for arbitration by the Chartered Institute of Arbitrators ("CIArb").[935] Under that scheme, the arbitrator is required to make a determination within 28 days of referral to arbitration.

10.46 We understand that both the CIArb and the Royal Institution of Chartered Surveyors ("RICS") provide arbitrators specialised in property and landlord and tenant disputes. The advantage of arbitration would be that it would provide a binding award, by an expert in the area, within a short time. We also understand that the property arbitrations currently available are relatively inexpensive.[936]

10.47 Under the Arbitration Act 1996, any party who wishes to appeal the award would need to obtain permission from the High Court and, if granted, the appeal would be heard in the High Court. The threshold for appeals from arbitration decisions is high, so in the vast majority of cases the arbitrator's award will be final. We envisage that arbitration could apply instead of going to the tribunal, but only in respect of certain matters. We appreciate that this would mean that different courts would be responsible for different matters, but we think the jurisdiction of the arbitrator would be limited, as indicated above, and that the cost and time efficiency might well justify the added complexity.

Consultation Question 112.

10.48 We invite consultees' views as to whether there is any stage of the RTM process or any issue (pre- or post- acquisition of the RTM) in which mediation or arbitration might play a helpful role. If so, please give details.

---

934 See paragraph 35 of the statutory guidance issued under regulation 18 of the Housing (Right to Manage) (England) Regulations 2012, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/266536/RTM_Statutory_Guidance_Part_1__4_.pdf.

935 See Department for Communities and Local Government, *Right to Manage Guidance: Modular Management Agreement for Tenant Management Organisations* (December 2013), Pt 2, para 18.9, available at https://www.gov.uk/government/publications/right-to-manage-guidance-modular-management-agreement-for-tenant-management-organisations-volume-1.

936 Under CIArb's Property Dispute Scheme, the referral fee for an arbitrator is £360 including VAT.

COSTS: THE CURRENT LAW

10.49 The process of claiming and acquiring the RTM will inevitably lead the RTM company and the landlord (and potentially third parties such as managing agents) to incur some costs. Even where the parties agree that the RTM company is entitled to acquire the RTM, both sides are likely to incur costs in sharing and analysing the necessary management information, for example.

10.50 Where there is a dispute between the parties over the claim, those costs will increase, particularly if a tribunal or court is involved. Each party may spend money bringing or opposing a claim, and/or in arguing about the details of what management functions should be or have been transferred. The amount spent by either side will be affected not only by the complexity of the disputed issues, but also by the individual choices and resources of the parties.

10.51 The costs may be those of the parties directly, or of professionals and others (such as lawyers or surveyors) who have been asked to help. Those costs can be divided into:

(1) non-litigation costs (costs incurred other than in litigation, such as the initial costs of making and processing the RTM claim, including the costs of providing information under a claim or counter-notice); and

(2) litigation costs (costs incurred by the parties in relation to any court or tribunal application and hearing).

10.52 As we discuss below, the RTM company is liable not only for its own costs, but also for the landlord's non-litigation costs, and potentially their litigation costs if a dispute arises.

RTM company's own costs of exercising the RTM

10.53 The RTM company (in reality, the leaseholders who wish to exercise the RTM) is liable for its own costs of making the RTM claim. These costs might include:

(1) the costs of establishing the RTM company (Companies House fees and the costs of any professional who assists the leaseholders in this process);

(2) the fees of any professionals instructed to assist with the RTM claim (such as a lawyer to advise as to procedure or a surveyor to advise on whether a building meets the qualification criteria); and

(3) the RTM company's own litigation costs (such as its own solicitor or other legal representative) if the RTM claim leads to an application to and/or a contested hearing before the tribunal.

10.54 As discussed in Chapter 5, RTM companies are typically undercapitalised. Therefore, when embarking on an RTM claim, members of the RTM company would be well-advised to make personal provision for such expenses as there is no mechanism for recovering them. It is not possible to recover these costs from the other leaseholders via the service charge, because they are incurred before acquisition of the RTM.

10.55 In respect of management costs (including administrative costs) incurred by the RTM company after acquisition of the RTM, we have proposed permitting RTM companies to recover these through the service charge, as if the lease made express provision for such recovery.[937]

Landlord's costs of RTM process

Costs of dealing with the claim: non-litigation costs

10.56 Currently,[938] the RTM company is liable for the "reasonable costs" incurred by a landlord "in consequence of" an RTM claim notice, which may include legal and surveyors' costs. This also extends to the reasonable costs of third parties to the lease, and court-appointed managers.[939] This is intended to compensate the landlord (or other party) for the costs incurred in investigating the claim (such as checking that the RTM company has sufficient qualifying tenants as members).[940] The landlord's costs will be regarded as "reasonable" only to the extent that it would have been reasonable for the landlord to incur those same costs if the RTM company was not liable for them.[941]

10.57 Typically, landlords recover the costs of investigating the claim, which might include checking that the RTM company has prescribed articles, that the participation notices have been served on all qualifying tenants, and that the premises qualify. The landlord might also be able to recover the reasonable costs incurred in preparing and serving the counter-notice, as well as the costs of a managing agent having to provide information to effect the handover to the RTM company.[942]

Costs of withdrawn claim

10.58 Where the RTM claim notice is withdrawn or otherwise ceases to have effect, the RTM company and each member[943] of the RTM company remain jointly and severally liable to pay the landlord's costs up to the time that the claim notice is withdrawn.[944]

---

937 See para 5.162.

938 Commonhold and Leasehold Reform Act 2002, s 88(1).

939 Appointed under section 24 of the Landlord and Tenant Act 1987.

940 *Columbia House Properties (No 3) Ltd v Imperial Hall RTM Co Ltd* [2014] UKUT 30 (LC).

941 Commonhold and Leasehold Reform Act 2002, s 88(2).

942 *Columbia House Properties (No 3) Ltd v Imperial Hall RTM Co Ltd* [2014] UKUT 30 (LC).

943 The costs liability of a leaseholder does not apply where the leaseholder has, at the time the claim notice has been withdrawn, assigned their lease and the new leaseholder has become a member of the company: Commonhold and Leasehold Reform Act 2002, ss 89(4) and (5). Note that "assignment" here includes an assent by personal representatives, and an assignment by operation of law where the assignment is to a trustee in bankruptcy or to a mortgagee under section 89(2) of the Law of Property Act 1925.

944 Commonhold and Leasehold Reform Act 2002, s 89. This means that each member is potentially liable for all of the costs. There is no requirement for a landlord who has a costs order to apportion that order between the company and its members. The landlord can simply require one member to pay all the costs. If one member ends up paying more than their share, they can recover the excess from the others in equal shares, subject to any agreement to the contrary. RTM company members may have a participation agreement to cover this, or otherwise the paying member could claim against the other members under the Civil Liability (Contribution) Act 1978.

10.59 We explain express and deemed withdrawal in more detail in Chapter 6.[945]

Costs of a dispute in respect of the RTM claim: litigation costs

10.60 If there is a dispute between the RTM company and landlord in respect of the RTM claim, the RTM company may end up being liable to pay the landlord's costs. The 2002 Act provides for "qualified one-way costs shifting" in favour of the landlord. This means that, if the landlord challenges the RTM company's right to acquire the RTM and the case proceeds to a tribunal hearing, the RTM company must pay the landlord's reasonable costs if the tribunal decides in the landlord's favour.[946]

10.61 This is "one-way" costs shifting because, by contrast, the RTM company has no statutory right to recover any costs from the landlord, even if it is the successful party in the litigation. The RTM company can only recover its costs if the tribunal uses its general procedural power to make such an award. The tribunal will only do so where the landlord has behaved unreasonably during the litigation.[947]

Tribunal determination in respect of landlord's costs

10.62 In all cases, if the quantum of costs cannot be agreed then the tribunal has power to determine the amount to be paid.[948] We understand that, in practice, RTM companies rarely ask for costs to be assessed because of the additional costs involved in doing so.

10.63 Any shortfall between "reasonable" costs and the landlord's actual costs is payable by the landlord, unless recoverable through other means.

General right for the landlord to recover costs from leaseholders

10.64 Landlords may also have an additional right to recover costs from individual leaseholders under the lease, whether they are members of the RTM company or not. This right arises where the lease puts the leaseholder under an obligation to contribute to the landlord's legal costs or costs of management, whether as a service charge or an administration charge.[949]

10.65 However, under section 20C of the Landlord and Tenant Act 1985, a tenant (including a long leaseholder) can apply to a relevant court or tribunal for an order that the landlord's costs cannot be included in the service charge. A similar order can be made in respect of administration charges.[950] These orders can prevent the landlord from re-

---

945 See para 6.41 onwards.

946 Commonhold and Leasehold Reform Act 2002, s 88(3). Or if the RTM company withdraws its claim, leading to a dismissal: *R (O Twelve Baytree Ltd) v Leasehold Valuation Tribunal* [2014] EWHC 1229 (Admin), [2015] 1 WLR 276; *Post Box Ground Rents Ltd v Post Box RTM Co Ltd* [2015] UKUT 230 (LC).

947 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169, r 13; *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC).

948 Whether under section 27A of the Landlord and Tenant Act 1985 (where charged to an individual as a service charge) or schedule 11 of the Commonhold and Leasehold Reform Act 2002 (where charged as an administration charge).

949 See, by way of analogy, *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC), [2014] 1 Estates Gazette Law Reports 111.

950 Commonhold and Leasehold Reform Act 2002, sch 11, para 5A.

directing any costs to the leaseholders under the lease, if not all costs are recovered from the RTM company. However, this relies on the leaseholders being aware of the need to make an application to the relevant tribunal, which we are told is rare.

Post-acquisition disputes with the landlord

10.66 Liability for litigation costs in respect of disputes which arise after the RTM has been acquired depends on the nature of the dispute, which determines whether the case is heard in the tribunal or the court. The parties must rely upon the powers of the court or tribunal to make an order that the other party should pay all or part of their costs in the proceedings. However, the powers of each forum are very different.

Disputes heard by the tribunal

10.67 The general rule is that the tribunal should not make an order for costs in favour of any party, so that each party bears its own costs. However, the tribunal has powers to award costs where it considers that a party's representative has wasted costs, or a party has behaved unreasonably in relation to bringing, defending or conducting proceedings.[951]

10.68 A party is not unreasonable if they have merely failed to state their case clearly, or sought an unrealistic outcome.[952] Unreasonable behaviour includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case.[953]

10.69 In reality, proceedings in the tribunal between the landlord and RTM company will almost always be on terms that each side bears its own costs.

Disputes heard by the court

10.70 A court has broad discretion to make orders in respect of costs,[954] and starts from the general rule that the unsuccessful party should pay the successful party's costs. Whether the RTM company can recover any or all of its legal costs depends on the application of the Civil Procedure Rules and the exercise of judicial discretion. Generally, if the case is a small claim then costs are likely to be irrecoverable unless the landlord has engaged in unreasonable behaviour.[955] If the claim has been allocated to the fast track then some fixed or capped costs are likely to be recoverable.[956] If the claim is a multi-track claim then there are no such restrictions.[957]

---

951 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169, r 13(1). The tribunal may also order a party to reimburse any fees paid.

952 *Willow Court Management v Ratna Alexander* [2016] UKUT 290.

953 *Willow Court Management v Ratna Alexander* [2016] UKUT 290 at [24].

954 Senior Courts Act 1981, s 51; Civil Procedure Rules, Pts 44 to 47.

955 Rule 27.14 of the Civil Procedure Rules provides that the sums that one party to a small claim can be ordered to pay to another party to that claim will be limited to specified categories of cost (such as court fees and witness expenses) unless that party has behaved unreasonably.

956 Civil Procedure Rules, r 45.

957 Civil Procedure Rules, r 44.

NON-LITIGATION COSTS: CRITICISMS OF THE CURRENT LAW AND PROPOSALS FOR REFORM

10.71 In the enfranchisement consultation paper, we asked the following questions in respect of non-litigation costs for enfranchisement claims.

(1) Is there any justification for requiring the leaseholders to pay any part of their landlord's non-litigation costs?

(2) If so, should the leaseholders pay all, or only part of, those costs?

(3) If part only, how should that contribution be determined?

10.72 We consider the same questions below, in the RTM context. The options for reform that we consider in this chapter are also based closely on the options set out in the enfranchisement consultation paper. We consider that, as far as possible, the liability of the RTM company for the landlord's costs should be the same as for leaseholders involved in an enfranchisement claim.

Should the RTM company pay any part of the landlord's non-litigation costs?

10.73 The RTM company's liability for the non-litigation costs of the landlord (or other third party) has attracted substantial criticism from stakeholders, for the following reasons.

(1) It was said that it encourages landlords to conduct a forensic analysis of the claim with a view to identifying minor and inconsequential defects, safe in the knowledge that the costs of that process will be recoverable.

(2) As mentioned above, RTM companies are usually undercapitalised and have no assets. At the stage of serving a claim notice, they are not entitled to collect service charge monies. Therefore, the burden of paying all reasonable costs represents a large financial commitment, often from a collection of individual leaseholders.

(3) Different premises will incur significantly different amounts of costs, depending on their size and complexity. Members of an RTM company may not be able to anticipate at the outset what constitutes reasonable costs for exercising the RTM in respect of their particular premises. In not knowing what they could be charged, they are vulnerable to unforeseen costs.

(4) Particularly for large or complex premises, "reasonable costs" may amount to large sums that can act as a deterrent to the exercise of the RTM.

(5) If an RTM company does not consider that the claimed costs are "reasonable" within the meaning of section 88 of the 2002 Act, it will be forced to take the question to the tribunal,[958] which is time consuming and increases the costs payable.

---

[958] Commonhold and Leasehold Reform Act 2002, s 88(4).

10.74 However, other stakeholders argued strongly that the RTM company should cover the landlord's non-litigation costs, or make at least a substantial contribution. We have identified the following arguments.

(1) The RTM is a "no-fault" right which leaseholders can exercise without the need to prove a complaint against the landlord. Landlords do not initiate an RTM process and have no say in whether the leaseholders decide to embark upon it, but will usually require some professional advice to assist them in determining whether the claim is valid, and if so, to assist with meeting their obligations following receipt of a claim.

(2) Landlords may have to go to some length in providing the correct information to qualifying tenants and contractors as a consequence of an RTM claim being initiated.

(3) If the landlord incurs costs because the RTM company has acted on inadequate advice or has made mistakes, it is difficult to argue that the landlord should have to bear those costs.

10.75 We have set out above the arguments for and against the RTM company being liable for the landlord's non-litigation costs. We think that these arguments are finely balanced. As such, we do not intend to make a provisional proposal as to whether the RTM company should pay any part of the landlord's non-litigation costs. Instead, we invite the views of consultees as to whether any such contribution should be made.

Consultation Question 113.

10.76 We invite consultees' views as to whether the RTM company should be required to make any contribution to the landlord's non-litigation costs.

How should any contribution be calculated?

10.77 If the RTM company is to continue to make a contribution towards the landlord's non-litigation costs, we have identified a number of ways in which that contribution might be quantified.

Fixed costs

10.78 We have considered the adoption of fixed costs that would be payable by the RTM company in respect of the landlord's non-litigation costs.

10.79 Any such scheme would ensure that leaseholders have certainty, before making an RTM claim, as to the amount of the landlord's non-litigation costs that they would be liable to pay. It would remove the imbalance of power that can exist between the parties as a result of the RTM company's current liability to pay an uncertain and unpredictable sum towards the landlord's costs. And it would remove the difficulties that can arise from the need to have the landlord's claim, in respect of non-litigation costs, assessed by a court or tribunal if an agreement is not reached.

10.80 As our enfranchisement consultation paper recognised, such schemes necessarily carry the risk that landlords will be under-compensated in some cases, but over-compensated in others. However, the scope for such divergence should be substantially less in RTM cases because issues such as premiums and leasebacks which arise in enfranchisement do not arise in RTM. Such a scheme in the RTM regime could be stepped, to try to reflect the different types and complexity of claims and the likely costs associated with each of them. However, it should also seek to retain the benefits of simplicity and predictability for RTM companies and landlords alike.

10.81 It may also be necessary to consider how such a scheme could be applied where an RTM company begins the RTM process but does not ultimately acquire the RTM (which we consider below). Additionally, it may be necessary to consider how such a scheme could provide incentives for landlords only to dispute those claims where they genuinely consider the premises do not qualify.

Capped costs

10.82 We have also considered whether landlords' recoverable costs could be capped rather than fixed.

10.83 Capping costs would allow the RTM company to know the maximum extent of their liability towards the landlord's non-litigation costs. While this approach would better prevent landlords from being over-compensated (as might sometimes be the case if costs were fixed), any reduction in the imbalance of power between the parties would depend upon the level at which any cap were set. If set too high, the cap may have little benefit to the RTM company.

Fixed costs subject to a cap

10.84 We have also considered whether fixed and capped costs might be combined.

10.85 A fixed costs regime can take different forms. In the most basic of fixed costs regimes, there would be no need for a cap, as there would be one sum payable by the RTM company in respect of the landlord's non-litigation costs. However, more nuanced fixed costs regimes – where the amount of fixed costs payable by the RTM company would vary depending on a range of possible factors – might benefit from the introduction of an overall cap on costs.

10.86 Such a cap would allow for a degree of variation in the fixed cost regime. It would reflect the level of costs that landlords are likely to incur in giving effect to claim notices on differing blocks or estates, while ensuring that the amount paid by the RTM company would not exceed a particular sum.

Linking non-litigation costs to the landlord's responses to the claim

10.87 We have also considered whether it might be possible to create a regime for the payment of landlords' non-litigation costs that reflects the landlords' approach to the RTM company's claim.

10.88 The amount that a landlord is likely to spend in relation to any claim notice might reflect his or her approach to the RTM company's claim. For example, a landlord hoping to identify a small error in the procedure may incur costs investigating each

leaseholders' title or looking for proof that a notice inviting participation was served on every leaseholder. At the other end of the spectrum, a landlord who assists the RTM company and provides comprehensive management information is likely to incur greater costs than those who do not go to such lengths.

10.89 It might be possible to allow a landlord to recover their non-litigation costs only if they either accept the RTM company's entitlement to acquire the RTM, or are successful (whether wholly or partly) in defeating the claim on the challenges raised in the counter-notice.

10.90 Such an approach has the potential to encourage landlords to settle claims early unless they are confident that the points they raise have sufficient merit. However, it may prove difficult to calibrate the appropriate level of incentive, and to avoid encouraging satellite disputes that might in themselves cause further costs to be incurred. In addition, such an approach may risk penalising landlords who raise reasonable enquiries of RTM companies, even if the RTM company's claim ultimately succeeds.

A potential approach: fixed non-litigation costs

10.91 From these options we have considered further how a fixed costs regime might operate in determining the amount of an RTM company's contribution to the landlord's non-litigation costs in connection with an RTM claim.

10.92 The non-litigation costs that landlords might reasonably incur will vary according to the complexity of the premises over which the RTM is being claimed. Landlords' costs are likely to be less where the RTM is being claimed over a small block compared to a large estate, or where the block contains only flats let to qualifying tenants as opposed to blocks with a commercial element or with retained flats.

10.93 The likely non-litigation costs incurred by landlords are unlikely to be simply a multiple of the number of residential units over which the RTM is being claimed. The costs to a landlord may not increase significantly as the total number of residential units increases. For example, a landlord's costs of dealing with an RTM claim in respect of a block of 12 flats may not be significantly greater than dealing with a claim in respect of a block of eight flats.

10.94 It will be necessary to balance the need to reflect the differing complexities of claims against the objective of simplifying the process and creating greater certainty at the outset for both parties. A balance may also need to be struck between facilitating certainty at the outset and allowing for flexibility to reflect unexpected complexities which have the effect of increasing a landlord's non-litigation costs.

Multiple or intermediate landlords and third parties

10.95 We have also considered whether it is appropriate to allow more than one landlord to recover costs from the RTM company. This might occur in practice where there is a split freehold or intermediate landlord. In this case we think it is unlikely to be fair that leaseholders should pay for multiple landlords to consider the claim and face a higher bill purely because of the complexity of the landlords' titles, which should not be relevant for management purposes. The qualifying tenants are unlikely to have played any role, or had any say, in the creation of the intermediate interest or to have derived

any benefit from it. As such, we provisionally think that where there is a split freeholder or there are intermediate landlords, the RTM company should not face a higher bill than it would if there was a single landlord.

10.96 The new regime would need to detail which party, where there are a number of landlords, would be entitled to the costs and how the landlords might then share the amount of costs between them.

10.97 However, where a third party manager incurs costs as well as the landlord, we think that it might be reasonable for the RTM company to pay a further sum where the third party has in fact incurred costs as a result of the claim.

What might a fixed costs regime look like?

10.98 In light of the above, we set out the following broad outline for a possible fixed costs regime.

(1) A single fixed sum that would be payable by the RTM company to its landlord in respect of a claim notice where the claim is to exercise the RTM over a single residential unit.

(2) A fixed base sum that would be payable in respect of claims for blocks containing more than one residential unit. As the number of residential units increased, the sum per unit would decrease (but the total sum owed would increase). The following is an illustration of how such a scheme might operate (but note that the figures are purely illustrative):

(a) A fixed sum per unit payable for each of the first 10 residential units included in a claim of, say, £50.

(b) A further fixed sum per unit payable (in addition to the amount payable under (a) above) for each of the next 10 residential units of, say £30.

(c) A further fixed sum per unit payable (in addition to the amount payable under (a) and (b) above) for each of any further residential units of, say, £20.

(3) The fixed base costs recoverable by a landlord in respect of a claim notice would also be subject to an overall cap. As a result, in some cases, the increasing number of units would not lead to any increase in the landlord's recoverable costs.

10.99 We anticipate that the scale and figures would be set out in secondary legislation following consultation with relevant parties. We gave a similar example in the enfranchisement consultation paper, with (higher) illustrative figures.[959] We expect that the costs of an enfranchisement claim would generally be higher (because of questions of valuation, for example) than an RTM claim. It may therefore be

[959] Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 13.88.

appropriate for any recoverable costs of the landlord on a fixed or capped costs basis to be proportionately higher.

10.100 Ultimately, in laying out the cost regime above, we recognise that the landlord will incur legitimate costs associated with the transfer of management. This is particularly the case given our proposals for earlier provision of information to the RTM company by the landlord, set out in Chapter 7. Therefore, we invite consultees' views on the matter, particularly on the cost structure and whether it would increase accessibility of RTM whilst distributing costs fairly.

Consultation Question 114.

10.101 We invite consultees' views as to how any contribution that is to be made by the RTM company to the landlord's non-litigation costs should be calculated. Should the contribution be based on:

(1) fixed costs;

(2) capped costs;

(3) fixed costs subject to a cap on the total costs payable; or

(4) the landlord's response (the counter-notice) to the claim notice, and/or whether the landlord succeeds in relation to any points raised in his or her counter-notice?

Consultation Question 115.

10.102 We also invite consultees' views as to whether, if a fixed costs regime were to be adopted:

(1) such a regime should apply to claim notices; and

(2) if a fixed costs regime were to apply to claim notices:

(a) what additional features might justify the recovery of additional sums; and

(b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

Consultation Question 116.

10.103 We provisionally propose that:

(1) no additional costs should be recoverable where there are intermediate landlords or split freehold titles; and

(2) the RTM company pays an additional fee owed to third party managers if they incur expense due to the RTM company's claim.

Do consultees agree?

Costs on withdrawal

10.104 We have considered whether the RTM company should be liable only for a proportion of the non-litigation costs incurred by landlords in respect of a claim which is withdrawn or otherwise does not proceed. This is consistent with our approach in the enfranchisement consultation paper, but is different from the current position under the 2002 Act.[960]

10.105 In particular, we have considered whether RTM companies should be liable to pay landlords a specified percentage of the fixed sum that would be recoverable upon completion in the event that the claim fails, is withdrawn, or where the claim notice is struck out.

10.106 Different percentages might apply to claims that had reached certain stages. For example, where:

(1) a claim notice has been served (whether or not the notice is valid); and

(2) a counter-notice accepting the RTM company's right to acquire has been served.

Consultation Question 117.

10.107 We provisionally propose that where a claim notice fails, is withdrawn, or is struck out, the RTM company should be liable to pay a percentage of the non-litigation costs that would have been payable had the claim been completed.

Do consultees agree?

960 See discussion above at para 10.58.

Consultation Question 118.

10.108 We provisionally propose that the percentage of the fixed non-litigation costs that should be payable where a claim notice fails, is withdrawn, or is struck out should vary depending on the stage that the claim has reached.

Do consultees agree? If so, what percentages should apply at particular stages of the claim?

LITIGATION COSTS: PROBLEMS WITH THE CURRENT LAW AND PROPOSALS FOR REFORM

10.109 The area of costs most criticised by stakeholders was the qualified one-way costs shifting provisions applicable after an unsuccessful RTM claim. Stakeholders have pointed out that such a provision is unusual in civil litigation. Even more unusual is that the shift is in favour of the party which is generally more powerful and better resourced.

10.110 We have been told by stakeholders that the rule encourages landlords to resist RTM claims on the basis of small, technical issues and to appeal any adverse tribunal decision.[961] Leaseholders may even be persuaded by their landlord to give up an RTM claim because of the threat of litigation and having to bear the landlord's costs.

Who should bear which costs?

10.111 We agree that this provision is unusual. We do not believe that a proper balance is struck by the existing one-way costs shifting rules.

10.112 We have consequently considered whether costs should generally be borne by the unsuccessful party to the litigation, in accordance with the general rule on costs. The power to order one party to pay another party's costs has the potential to benefit the RTM company. However, the imbalance of resources that often exists between the RTM company and landlord will usually mean that the prospect of costs-shifting against the losing party would have a greater impact on the RTM company than landlords.

10.113 In fact, stakeholders were more supportive of parties bearing their own litigation costs arising from an RTM claim regardless of the outcome (unless there has been unreasonable behaviour or wasted costs). This would give parties, and particularly the RTM company, the power to determine how much they are willing to spend on the RTM claim and any dispute arising from it. It would also mitigate the effect on the RTM company of the landlord choosing expensive lawyers and pursuing technical objections.

---

961 A successful appeal to the Upper Tribunal (Lands Chamber) results in the landlord recovering its costs of both the First-tier and Upper Tribunal: *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC).

10.114 We are therefore persuaded that the parties should bear their own costs of attempting to prove their case or asserting their statutory rights.

10.115 We think that there should be some exceptions to this rule in line with the proposals in our enfranchisement consultation paper.[962] We think that the tribunal should be able to order the landlord to pay the RTM company's costs:

(1) where a landlord is missing and the RTM company has obtained an order from the tribunal that allows a claim to proceed;[963] and

(2) where a landlord has failed to serve a counter-notice but has subsequently been permitted to participate in any application made by the RTM company for a determination that it was entitled to acquire the RTM.[964]

Section 20C and Schedule 11 orders

10.116 We discuss above a leaseholder's right to apply for an order that the landlord's litigation costs must not be passed onto leaseholders as a service charge or administration charge.[965] We suggest that the legislation should include a presumption that such orders have been made in favour of the leaseholders at the end of any tribunal proceedings. This would prevent the landlord from recovering the litigation costs through another means. Such presumptive rules are common in civil litigation. For example, a claimant who discontinues their claim is liable for the defendant's costs up to the date the notice of discontinuance is served, unless they can show a good reason for disapplying the presumption.[966]

Consultation Question 119.

10.117 We provisionally propose that the litigation process in respect of an RTM claim should not confer a right to costs on either party. Instead, each party should bear their own costs, except where there has been unreasonable behaviour or wasted costs, or where one of the exceptions we refer to above applies. Do consultees agree?

962 Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, para 13.109.

963 See discussion at para 6.141.

964 Under our provisional proposal in paragraph 6.74.

965 See para 10.65 above.

966 Civil Procedure Rules, r 38.6.

Consultation Question 120.

10.118 Do consultees think that each party having to bear their own costs of litigation would lead to fewer tribunal cases?

Consultation Question 121.

10.119 We provisionally propose there be a presumption in favour of an order under section 20C of the Landlord and Tenant Act 1985 and/or paragraph 5A of schedule 11 to the 2002 Act to prevent landlords recovering litigation costs from leaseholders through service charges or administration charges. Do consultees agree?

Chapter 11: Termination of the RTM

INTRODUCTION

11.1 As time moves on, it may become impossible or undesirable for leaseholders to continue to manage their building themselves through an RTM company. Properties will invariably change hands, and thus the identity of the directors and members of an RTM company will change too. It is not uncommon in small blocks for there to be no subscriber directors and members left (all having been replaced by their successors in title) within a relatively short space of time. The directors and members of the RTM company from time to time may have differing views on how best to manage their building, differing skill sets, or differing levels of desire to commit time to managing on a day-to-day basis.

11.2 It is in no one's interests for a building to be managed by a group of people who no longer want to manage it, or for a building to be managed badly or not at all. Poor or no management may negatively affect the value of both the freehold and leasehold interests in the building.

11.3 This chapter examines the ways that the RTM can be ended, and the consequences of termination. We also set out criticisms of the existing law relating to termination, along with our proposals for reform.

11.4 We refer in this chapter to the RTM "ceasing", "ending" or "terminating". What we mean by this is that the management functions in respect of the building cease to be exercisable by the RTM company. That does not always mean that the RTM has failed, or that the RTM company itself does not exist at the point when the RTM ends.

CIRCUMSTANCES IN WHICH THE RTM CEASES

11.5 The exercise of the RTM is not currently subject to any time limit. Once acquired, the RTM continues until and unless it is terminated by some particular event or act. Presently, the RTM ceases in the following circumstances:

(1) by agreement between the RTM company and every relevant landlord;[967]

(2) through insolvency or voluntary winding up of the RTM company;[968]

(3) by appointment of a receiver or manager by a debenture holder;[969]

(4) if the RTM company is struck off the register of companies;[970]

---

967 Commonhold and Leasehold Reform Act 2002, s105(2).

968 Commonhold and Leasehold Reform Act 2002, ss 105(3)(a) and (c).

969 Commonhold and Leasehold Reform Act 2002, s 105(3)(b).

970 Commonhold and Leasehold Reform Act 2002, s 105(3)(d).

(5) by appointment of a manager pursuant to Part 2 of the Landlord and Tenant Act 1987 ("the 1987 Act");[971] or

(6) when the RTM company ceases to be an RTM company in respect of the premises.[972]

11.6 Each of these circumstances is examined in more detail below.

By agreement

11.7 The RTM company and the landlord can agree to terminate the RTM.[973] "Landlord" in this context means every person who is a landlord under a lease of the whole or any part of the premises,[974] and therefore includes intermediate landlords.

11.8 This agreement should make provision as to whom the management obligations will then pass. They will often pass to the person responsible for management as set out in the leases, which may be the freeholder, an intermediate landlord, a trustee, a manager, or a management company (which may be owned and controlled by the leaseholders).[975] If the responsible party no longer exists, the obligations are likely to default to the landlord, provided that the landlord is able to recover the cost of managing by way of service charges. If the obligations do not default to the landlord, no party is responsible for managing. The landlord or leaseholders may make an application to the tribunal to vary the leases to provide for the landlord to manage and collect service charges, or the leaseholders may apply to have a manager appointed.

11.9 Leaseholders who are not members of the RTM company will have no say in the decision to relinquish the RTM. The decision can be taken either by the board of directors[976] or by special resolution, in line with company law rules. If it is taken by special resolution, this will require at least 75% of the total number of votes within the RTM company.[977] The agreement does not have to be approved by the court or tribunal.

11.10 The RTM may be brought to an end by agreement for many reasons, including the following examples.

(1) The RTM company may simply not want to manage the building any longer and the landlord is content to resume management. Leaseholders who have acquired their flats after the original RTM claim may not have made the claim

---

971 Commonhold and Leasehold Reform Act 2002, s 105(4).

972 Commonhold and Leasehold Reform Act 2002, s 105(5).

973 Commonhold and Leasehold Reform Act 2002, s 105(2).

974 Commonhold and Leasehold Reform Act 2002, s 105(2)(b).

975 In this chapter we refer to "the landlord" where we mean the freeholder or intermediate landlord. We use the term "third party manager" to refer to a manager or management company or maintenance trustee who is not a landlord with a reversionary interest but who is nonetheless responsible for managing the building under the terms of the leases.

976 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, arts 5(m) and 8; RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, paras 5(m) and 8.

977 Companies Act 2006, s 283.

had they been owners at the time. Leaseholders who made the claim may not have appreciated how time-consuming management was going to be.

(2) The parties may agree that the landlord is after all better placed to manage the building. Perhaps the landlord can obtain better deals with contractors or insurers, because the landlord may appear a better prospect to creditors, or because contractors or insurers are interested in working across the landlord's portfolio of properties.

(3) The RTM company may have found itself in financial difficulties, perhaps due to a failure or inability to collect service charges, and the RTM company may face expensive litigation to recover unpaid monies, or to vary leases to require full recovery of service charges.

(4) The landlord may consider the premises are not being managed properly, and have grounds to apply to the tribunal to have a manager appointed. Handing back management in these circumstances would save the time and cost of going to the tribunal.

Insolvency or winding up of the RTM company

11.11 Insolvency is an inherent threat to an RTM company because it is usually undercapitalised and has no property over which it can grant security for a loan. An RTM company has no source of income other than service charge monies which can only be used for certain items of expenditure and, if the leases permit, administration charges for dealing with applications for lease consents.[978]

11.12 Where an RTM company's financial situation has deteriorated to bring it to the brink of insolvency, it is undesirable and sometimes impossible or unlawful to allow that company to continue to manage a building, and control the service charge funds belonging to the leaseholders.

11.13 The RTM therefore ceases where:

(1) a winding up order is made;[979]

(2) a resolution for the voluntary winding up of the RTM company is passed;[980]

(3) the RTM company enters administration;[981] or

(4) a company voluntary arrangement ("CVA") proposed for the purposes of Part 1 of the Insolvency Act 1986 is approved.[982]

---

978 Such administration charges tend to be relatively modest given the requirement for reasonableness in paragraph 2 of schedule 11 to the Commonhold and Leasehold Reform Act 2002.

979 Commonhold and Leasehold Reform Act 2002, s 105(3)(a).

980 Commonhold and Leasehold Reform Act 2002, s 105(3)(a).

981 Commonhold and Leasehold Reform Act 2002, s 105(3)(a).

982 Commonhold and Leasehold Reform Act 2002, s 105(3)(c).

11.14 A winding up order is a court order, typically following a petition by a creditor, that forces an insolvent company into compulsory liquidation. This might happen to an RTM company where, for example, it incurs expenditure with a contractor which it is then unable to recover from the leaseholders through the service charge, and therefore cannot pay the contractor.

11.15 A resolution for the voluntary winding up of a company can take the form of a members' voluntary liquidation or a creditors' voluntary liquidation. The former can only take place where the company is solvent, such as where the members decide they no longer wish to continue with the RTM for reasons which do not relate to lack of funds. A creditors' voluntary liquidation occurs where the directors of the company propose liquidation because the company cannot pay its debts as they fall due and that proposal is supported by the company's creditors.

11.16 Companies in financial difficulties which cannot pay their debts as they fall due can opt for administration. The company has eight weeks within which the administrator will seek to save the company and during which the company is protected from being wound up. Because the RTM ceases on administration, the administrator is not obliged or empowered to manage the premises.

11.17 A CVA is a formal process which enables a company and its creditors to enter into an agreement which provides for the payment of a proportion of debts either over a period of time or once the company's assets are sold.

Appointment of a receiver or manager by a debenture holder

11.18 The RTM will also cease to be exercisable where:

(1) a receiver or a manager of the RTM company's undertaking is appointed; or

(2) the holders of any debentures secured by a floating charge take possession of any property of the RTM company subject to the charge.[983]

11.19 A debenture is an instrument that either creates or acknowledges a debt. Debentures can be secured by a floating charge over the assets of a company. A floating charge is a security interest over a pool of changing assets. In certain circumstances, usually where the company has defaulted on a payment due to the creditor, the floating charge crystallises and a debenture holder can then take possession of and sell the business assets of the company.

11.20 In principle, RTM companies are permitted to borrow funds and offer a floating charge as security.[984] We have been told by stakeholders that this does not occur in practice because lenders are not willing to lend to RTM companies as an RTM company generally has few or no assets of its own and so is seen as a risky prospect.

---

983 Commonhold and Leasehold Reform Act 2002, s 105(3)(b).

984 RTM Companies (Model Articles) (England) Regulations 2009/2767, sch 1, para 1, art 5(v); RTM Companies (Model Articles) (Wales) Regulations 2011/2680, sch 1, para 5(v).

11.21 A receiver or manager of the company's undertaking may be appointed by a creditor where the loan or security agreement allows the creditor to appoint such a person. The court also has jurisdiction to appoint a receiver or manager of the undertaking where it considers it is just and equitable to do so.[985] This is separate from, and in addition to, the jurisdiction of the tribunal to appoint a manager in respect of the management functions.

RTM company struck off

11.22 The RTM ceases when an RTM company is struck off the Register of Companies.[986]

11.23 The registrar has the power to strike a company from the register where there is reasonable cause to believe that a company is not carrying on business or is not in operation.[987] The registrar has a duty to strike a company from the register where:

(1) the registrar has cause to believe that either:

(a) no liquidator is acting; or

(b) that the affairs of the company are fully wound up; and

(2) the returns required to be made by the liquidator have not been made for a period of six consecutive months.[988]

11.24 The company may itself apply to the registrar to be struck off, by application made on behalf of the company by its directors and containing the prescribed information.[989]

11.25 Where the company is struck off the register, it is dissolved[990] and no longer exists as a legal person. The RTM must therefore cease. Given the grounds upon which a strike off application can be made, the RTM company may not have been actively managing the relevant property for a period of time before the strike off.

11.26 However, the liability of the directors and members continues as if the company had not been dissolved.[991] In *AB&R RTM Company Limited v Rovergrange Limited* ("*AB&R*"),[992] the RTM company had been struck off the register because of "administration errors", but was subsequently restored to the register. The RTM company sought a determination that it was entitled to recommence management.

---

985 See section 37 of the Senior Courts Act 1981 (High Court), section 38 of the County Courts Act 1984 (County Court), and section 107 of the County Courts Act 1984 (receivers by way of equitable execution).

986 Companies Act 2006, ss 1000 to 1001, and 1003.

987 Companies Act 2006, s 1000.

988 Companies Act 2006, s 1001(1).

989 Companies Act 2006, s 1003(2).

990 Dissolution under sections 1000, 1001 and 1003 occurs on the publication of the notice in the Gazette (Companies Act 2006, ss 1000(6), 1001(4) and 1003(5) respectively).

991 Companies Act 2006, ss 1000(7)(a), 1001(5)(a) and 1003(6)(a).

992 (12th April 2017) LON/00AM/LRM/2017/0005 First-tier Tribunal Property Chamber (Residential Property) (unreported).

The relevant statutory provision stipulated that "[on being restored to the register] the company is deemed to have continued in existence as if it had not been dissolved or struck off the register".[993]

11.27 The tribunal agreed that the restoration of an RTM company to the register gives rise to the right to take back management. The tribunal commented that the 2002 Act refers to the fact that the RTM "ceases to be exercisable" if any of the occurrences in section 105 occur. In the tribunal's view that did not necessarily mean that it is not capable of being resurrected. However, we think there is doubt as to whether the tribunal had jurisdiction to make this order.

Appointment of a manager pursuant to Part 2 of the 1987 Act

11.28 The landlord or leaseholders can make an application to the tribunal under Part 2 of the 1987 Act to appoint a manager in respect of a building. For it to succeed, the person currently managing the building, here the RTM company, must be at fault.

11.29 An order may be made by the tribunal where it is satisfied that at least one of the following grounds are proven and it is just and convenient to make the order in all the circumstances of the case:

(1) the RTM company is in breach of any obligation owed by it to a tenant under their tenancy and relating to the management of the premises in question or any part of them;[994]

(2) unreasonable service charges or variable administration charges have been made, or are proposed or likely to be made;[995]

(3) the RTM company has failed to comply with any relevant provision of a code of conduct approved by the Secretary of State as a "code of management practice";[996] or

(4) other circumstances exist which make it just and convenient for an order appointing a manager to be made.[997] Such circumstances include any in which the RTM company no longer wishes the RTM to be exercisable by it.[998]

---

993 Companies Act 2006, s 1028. This might equally apply where an RTM company is restored to the register by the court where, by virtue of section 1032 of the Companies Act 2006, the effect of restoration is the same.

994 Landlord and Tenant Act 1987, s 24(2)(a) and as applied with changes imposed by the Commonhold and Leasehold Reform Act 2002, sch 7, para 8(5).

995 Landlord and Tenant Act 1987, ss 24(2)(ab) and (aba).

996 Landlord and Tenant Act 1987, s 24(2)(ac) and by reference to section 87 of the Leasehold Reform Housing and Urban Development Act 1993.

997 Landlord and Tenant Act 1987, s 24(2)(b).

998 Commonhold and Leasehold Reform Act 2002, sch 7, para 8(6). This provision is interesting given that an RTM company cannot itself make an application to appoint a manager under the Landlord and Tenant Act 1987. Presumably it would just cease to undertake any management and hope that the landlord or a leaseholder would make an application to the tribunal – although this would raise questions about the

11.30 The tribunal may:

(1) appoint a manager to carry out such functions in connection with the management (which include repair, maintenance, improvement or insurance)[999] of the premises, or such functions of a receiver, or both as the tribunal thinks fit;[1000] and/or

(2) order that the RTM over the premises is to cease to be exercisable by the RTM company.[1001]

11.31 The effect of the 2002 Act is that either a leaseholder or a landlord[1002] can make an application for the appointment of a manager where an RTM company is responsible for managing a building.[1003] It is also arguable that an application by a landlord for an order described in limb (2) above, without an application for an order described in (1), would be, in effect, an application for management to be restored to the landlord. We are not aware of an application of this nature ever having been made.

11.32 Few applications for orders appointing a manager in place of an RTM company appear to have been made to the tribunal, and certainly very few applications have been made by landlords. This might suggest that the RTM is working well in practice or that, in cases where the RTM does not work out, agreements are made with the landlord to take back management instead of applying to the tribunal to have a manager appointed.

11.33 The following are examples of applications to appoint a manager.

(1) A manager was appointed where the RTM company had allowed multiple buildings to fall into significant disrepair, and was due to be struck off the register.[1004]

(2) A manager was appointed on the application of a leaseholder who was not a member of the RTM company, where the RTM company was controlled by a person who owned most of the flats in the building as well as the landlord company.[1005]

---

directors' liability and fiduciary duties. It does appear that an RTM company may be able to make an application for variation or discharge of an order appointing a manager (Landlord and Tenant Act 1987, s 24(9) – use of "any person interested").

999 Landlord and Tenant Act 1987, s 24(11).

1000 Landlord and Tenant Act 1987, s 24(1).

1001 Commonhold and Leasehold Reform Act 2002, sch 7, para 8(7).

1002 Commonhold and Leasehold Reform Act 2002, sch 7, para 8(3).

1003 Commonhold and Leasehold Reform Act 2002, sch 7, para 8(2).

1004 *Lindsay Court Securities Ltd v Lindsay Court RTM Co Ltd* (13 March 2014) MAN/30UF/LAM/2014/0001 First-tier Tribunal Property Chamber (Residential Property) (unreported).

1005 *Mr K Hayes v Marina Heights St Leonards Ltd* (21 August 2017) CHI/21UD/LAM/2016/0009 First-tier Tribunal Property Chamber (Residential Property) (unreported).

(3) The tribunal refused to make an order appointing a manager on an application by a leaseholder who was also a director of the freehold company, and despite the tribunal finding that the RTM company had been in breach of their obligations.[1006]

(4) The landlord's application to appoint a manager was dismissed as groundless. The tribunal noted that the only person seemingly unhappy with the management of the RTM company was the landlord.[1007]

The RTM company ceases to be an RTM company in respect of the premises

11.34 The RTM ceases to be exercisable where the RTM company ceases to be an RTM company in respect of the premises.[1008] This may occur in a number of circumstances.

11.35 Under the 2002 Act, it occurs where the freehold of the premises is transferred to the RTM company, whether as a nominee purchaser under the provisions of the Leasehold Reform Housing and Urban Development Act 1993[1009] or otherwise.[1010] An RTM company also ceases to be an RTM company if it is converted to a commonhold association.[1011] An RTM company might also cease to be an RTM company where it changes its constitution. As we set out in Chapter 5, the 2002 Act and subsequent regulations[1012] set out the requirements for the articles of an RTM company. The current legislation renders ineffective any provision of the articles that is inconsistent with the prescribed articles.[1013] If an amendment is ineffective, the articles arguably have not been changed at all.

11.36 However, the articles could be changed to amend the premises to which the RTM applies. It is arguable that this amendment would be effective because it would not be inconsistent with the prescribed articles, but it would probably fall foul of the requirement to have as one its objectives the exercise of the RTM of the "premises".

1006 *Geoffrey Waterman v Motcombe Court RTM Co Ltd* (26 January 2015) CHI/21UG/LAM/2014/0014 First-tier Tribunal Property Chamber (Residential Property) (unreported).

1007 *Addestone Group Ltd v Carr Mills RTM Co Ltd* (26 September 2014) MAN/00DA/LAM/2014/0007 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [16].

1008 Commonhold and Leasehold Reform Act 2002, s 105(5).

1009 An RTM company would usually only be chosen as a nominee purchaser for the purposes of section 15 of the Leasehold Reform Housing and Urban Development Act 1993 if all members of the RTM company were contributing towards the purchase price for the freehold on some fair reversionary basis.

1010 Commonhold and Leasehold Reform Act 2002, s 73(5). This is the example given in the explanatory notes to the Commonhold and Leasehold Reform Act 2002. See: Commonhold and Leasehold Reform Act 2002, Explanatory Notes, Commentary on the Sections: Pt 1, s 105. There is an oddity in the legislation in that it would permit an RTM company to acquire a head-lease of the whole building (with all the management functions of the landlord) but remain an RTM company.

1011 Commonhold and Leasehold Reform Act 2002, s 73(3). Although this provision stipulates that an RTM company is not an RTM company if it is a commonhold association (in effect, that a commonhold association cannot be used to acquire the RTM), a company would cease to be an RTM company if it were converted to a commonhold association subsequently.

1012 RTM Companies (Model Articles) (England) Regulations 2009/2767; RTM Companies (Model Articles) (Wales) Regulations 2011/2680.

1013 Commonhold and Leasehold Reform Act 2002, s 74(5).

This may therefore mean that it is no longer an RTM company in respect of the premises, so that the RTM ceases. The same might be the case if the RTM company changes its name and excludes "RTM Company Limited"[1014] or if it amends its objects clause so that it fails to include as one of its objectives the acquisition and exercise of the RTM of the premises.[1015]

11.37 If a change to the RTM company's articles is effective, it is unclear whether this can be remedied by re-amending the articles given that the RTM ceases at the point the RTM company ceases to be an RTM company in respect of the premises. However, the tribunal has been willing to make an order that an RTM company is entitled to recommence management where it is dissolved and subsequently restored to the register,[1016] and so perhaps a similar outcome might be achieved if the circumstances above ever occurred.

11.38 The 2002 Act does not deal specifically with what happens if, at any point after acquisition, the RTM company has less than 50% of the leaseholders of the total number of flats in the building as members.[1017] It also does not provide for what happens if the premises have changed to an extent that they would no longer qualify under the 2002 Act.[1018] The 2002 Act only refers to the qualification and participation tests in the context of the point in time at which the claim is made. It appears that lower participation after the RTM has been acquired does not end the RTM.[1019]

WHY DOES THE RTM FAIL?

11.39 As discussed elsewhere in this consultation paper, much of the publicity and criticism about the RTM relates to the process for acquiring the right in the first place. Few stakeholders appear to have focussed on the current provisions dealing with termination of the RTM. One stakeholder asked us why, since the RTM does and should continue indefinitely, we are even considering the termination of the RTM.

11.40 We have also been told by leaseholder stakeholders that they do their very best to avoid situations which could result in their RTM company failing. They considered it unlikely that many RTM companies will fail. We have not been able to obtain statistics

---

1014 But see *Fairhold Mercury Ltd v HQ (Block 1) Action Management Co Ltd* [2013] UKUT 487 (LC) [2014] Landlord and Tenant Reports 5 where the Upper Tribunal held that a failure of a company to incorporate the words "RTM Company Limited" in its name did not mean the company was not an RTM company in accordance with the Commonhold and Leasehold Reform Act 2002.

1015 Which is required by section 73(2)(b) of the Commonhold and Leasehold Reform Act 2002.

1016 See para 11.27 above.

1017 This might occur where: flats are sold and purchasers have no desire to be RTM company members; or where existing members fall out and a sufficient number resign their membership; or where one or more leaseholders cease to be qualifying tenants for some other reason.

1018 This might occur if some flats are converted into commercial units, meaning the building fails the 25% commercial test (described in Chapter 2), or where the landlord develops the building so it is no longer either a self-contained building or part of a building.

1019 *111, St Anne's Road East RTM Co Ltd v Angela Coombs* (09 January 2018) MAN/30UF/LRM/2017/0004 First-tier Tribunal Property Chamber (Residential Property) (unreported). See also Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-32.

in respect of the number of RTM companies which have in fact failed and the reasons for failure.

11.41 This lack of focus on the termination provisions of the 2002 Act means there is very little commentary or criticism of them. We are keen to hear from stakeholders who have direct experience of failing or failed RTM companies. We would like to understand the reasons why the RTM ceased and what happened once the management functions ceased to be exercisable by the RTM company.

Consultation Question 122.

11.42 Do consultees have experience of the RTM ceasing to be exercisable by an RTM company? What caused the termination, and what happened afterwards?

WHAT HAPPENS POST-TERMINATION?

11.43 Where one of the events described above occurs, the RTM ceases automatically. The RTM company is then no longer responsible for the management functions which were transferred to it on acquisition.

11.44 Following the termination of the RTM, obvious questions arise such as:

(1) who becomes responsible for the management functions;

(2) what happens to the service charge funds held by the RTM company, and to claims for arrears of service charges owed by leaseholders (or the landlord); and

(3) what happens to contracts entered into by the RTM company with third parties and any monies due under those contracts.

11.45 We consider these questions below.

Who does the management revert to once the RTM has ended?

RTM terminated by agreement

11.46 Where the RTM has ended by agreement, that agreement should set out by whom the management functions will thereafter be performed. This is likely to be the person who, but for the RTM, would be responsible under the leases. There are problems where that person no longer exists. For example, a management company may have been dissolved after the acquisition date as it may have had no further function. The landlord might be willing or obliged to manage but this is only likely if they have the power to recover service charges under the leases.

11.47 If a person other than the responsible party under the lease takes responsibility for the management functions, it would be important to ensure that the covenants in the lease could be enforced between that person and the leaseholders.

RTM terminated by the tribunal

11.48 Where the RTM ends because the tribunal appointed a manager, the tribunal's order will identify the manager by whom functions are to be performed and will set out the management functions which the new manager will undertake, along with other incidental matters.

Other circumstances

11.49 Where the RTM has ended by virtue of one of the other grounds referred to above, the position is less clear. It is generally assumed that the management obligations will simply revert to the party or parties responsible under the lease.[1020]

11.50 The party responsible under the lease may no longer exist when the RTM ceases. Some leases contain provisions requiring the landlord to step in and manage where a third party fails to do so. Where there is no such provision, or where it is a power but not a duty, there will be no one obliged to manage. The obligation to manage appears to depend on a leaseholder making an application to the tribunal for a manager to be appointed, or a majority of leaseholders exercising the RTM again with an order from the tribunal disapplying the four-year ban against further RTM claims.[1021]

Uncommitted service charges

11.51 Service charge monies are held in trust. The trust arises automatically by virtue of section 42 of the 1987 Act.[1022] The RTM company becomes the trustee in place of the landlord on acquisition of the RTM. Uncommitted service charges are service charge funds collected from leaseholders (and the landlord where they contribute)[1023] which have not yet been spent. A more detailed explanation is contained in Chapter 8.

11.52 Where the RTM ceases by an agreement between the RTM company and the landlord, the terms of that agreement should deal with the payment over to the landlord (or other person managing) of those funds (or payment back to the leaseholders).

11.53 Where the RTM ceases by an order of the tribunal appointing a manager, the order will usually specify what is to happen to any uncommitted funds. Usually the funds are to be paid over to the appointed manager.

11.54 Going into administration or liquidation does not automatically disqualify a company from being a trustee.[1024] It is only so disqualified once dissolved. Accordingly, where the RTM ceases because of insolvency or administration, the RTM company continues to be the trustee of the service charge monies it had received so long as the company exists. In administration, the trusteeship will be exercised by the

---

1020 See, for example, Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-33.

1021 We discuss this below from para 11.75.

1022 Landlord and Tenant Act 1987 ss 42 to 42B. For the application to the RTM company, see: Commonhold and Leasehold Reform Act 2002, sch 7, para 11.

1023 In respect of retained units under section 103 of the Commonhold and Leasehold Reform Act 2002.

1024 L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts* (19th ed 2018) para 22-016.

administrator and not the directors.[1025] In liquidation, it will be exercised by the liquidator.[1026] Trust monies are not part of the funds to be used in the administration or distributed in liquidation.[1027]

11.55 Given that the RTM company no longer has the RTM, the administrator or liquidator cannot apply the funds towards works or management. Under trusts law, the liquidator or administrator has the power to transfer the service charge monies to the person to whom management reverts.[1028] The leaseholders, as beneficiaries, could also apply to the court (county court or High Court if the amount is over £30,000) for the appointment of a new trustee of the service charge fund.[1029] This is likely to be the landlord or, if different, the person to whom management reverted.

11.56 If a claim made against an RTM company in the insolvency involved some contractual claim, relating perhaps to repair works, then the liquidator would arguably have recourse to the trust funds.[1030] If the claim against the RTM company involved a "catastrophic" tort claim, then it would appear that the trust funds would be entirely protected. But, overall, whether the service charge fund would be available to meet judgments and costs might well depend on the specific service charge provisions included in the lease and how broadly they were interpreted.

11.57 If the service charge monies have become mixed with the RTM company's or directors' own money and dissipated, the leaseholders as beneficiaries would have remedies for breach of trust against the RTM company. They may be able to trace the trust funds in the possession of third parties under general principles of trust law.

Monies owed by and to the RTM company (including service charge arrears) and contracts with third parties

11.58 In Chapter 7 we discuss the fact that the 2002 Act does not make express provision for what is to happen to existing management contracts when the RTM is acquired. The same uncertainty arises in respect of such contracts if the RTM ceases.

11.59 Where the RTM company owes money to third parties, the fact that the RTM ceases does not change the existing liability of the RTM company to the creditor. The creditors may, however, face difficulties in enforcing the debt where the RTM company has no funds of its own.

1025 *Polly Peck International plc v Henry* [1999] 1 Butterworths Company Law Cases 407.

1026 L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts* (19th ed 2018) para 22-018.

1027 L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts* (19th ed 2018) para 22-027.

1028 L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts* (19th ed 2018) paras 22-019 to 22-020. See also *Chirkinian v Larcom Trustees Ltd* [2006] EWHC 1917 (Ch), [2006] BPIR 1363 at [18] (liquidator can make appointment if in pursuit of statutory functions but must act in interests of beneficiaries).

1029 Trustee Act 1925, s 41. See generally L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts* (19th ed 2018), ch 15 and para 22-03.

1030 On the basis that a claim relating to a judgment for damages and costs arising out of a building contract would be likely to be "costs incurred in connection with the matters for which the relevant service charge was payable" (Landlord and Tenant Act 1987, s 42(3)(a)).

11.60 In the ordinary course of events, a leaseholder (or landlord who contributes towards the service charge) may have a claim for set off, for example for damages for disrepair against their service charge contributions. Where an RTM company has ceased to manage, it is unlikely that the leaseholder will be able to exercise any right to set off against the person who resumes management.[1031]

11.61 If the RTM company is owed money by third parties, the RTM company (or insolvency practitioner, if the company is insolvent) may still pursue recovery in the usual way.

GENERAL CRITICISMS OF THE CURRENT LAW

11.62 Some stakeholders representing landlords' or managing agents' interests have suggested that the RTM should not continue indefinitely unless and until terminated by one of the specified events. Many of those stakeholders argued that the RTM should cease where membership of the RTM company falls below 50% of the leaseholders who qualify to join.

11.63 Others told us that there are not enough rights for a landlord to step in to remove an RTM company where it is failing. As we discuss above, landlords can apply to the tribunal for a manager to be appointed but have no standalone right to apply to take management back themselves. Their main option is to apply to have a manager appointed by the tribunal even where this might not be the best outcome.

11.64 RTM companies cannot apply to the tribunal to give up management. If the RTM company cannot agree with the landlord that the landlord will take back management, it only has limited options. It can be voluntarily wound up, become insolvent, or take some act to ensure that the company is struck off, or is no longer an RTM company in respect of the premises. None of these options promote the effective transfer of management back to the landlord or other party.

11.65 Where the RTM ends and management functions automatically revert to the landlord or other third party, the landlord may have to deal with a building that has fallen into disrepair by demanding service charges from leaseholders who may be unable to finance repairs. The landlord might not, understandably, want to manage in these circumstances.

11.66 We describe the other general problems in more detail above. These include the inability of the tribunal to restore management functions to the RTM company and the uncertainty and problems around who takes over the management from the RTM company.

PROPOSALS FOR REFORM

11.67 We think that the statutory regime which creates the RTM should also make provision for what happens where the RTM fails or where those entitled to exercise the RTM decide they no longer wish to continue with it. Questions to consider include:

[1031] *Edlington Properties Ltd v JH Fenner & Co Ltd* [2006] EWCA Civ 403, [2006] 1 WLR 1583; *Maunder Taylor v Blaquiere* [2002] EWCA Civ 1633, [2003] 1 WLR 379.

(1) the circumstances in which the RTM ends;

(2) who takes on the management functions after the RTM company ceases to manage;

(3) what, if any, liability the person taking on the management functions has for matters which pre-date their assumption of the relevant obligations; and

(4) what happens to any monies held by or owing to the RTM company for the benefit of the building.

Should the RTM continue if it does not have majority membership?

11.68 As we explain in Chapter 2, an RTM claim can only be made when leaseholder membership of the RTM company is equal to at least 50% of the total number of flats in the premises.[1032] We have carefully considered whether this should be a continuous requirement, and whether the leaseholders should have to periodically prove, at the request of the landlord, that the RTM company continues to have a sufficient number of members.

11.69 Landlords and managers have argued that the RTM is a right for a majority of leaseholders to acquire and exercise management functions. Where the RTM company is no longer supported by a majority of leaseholders, some stakeholders have argued that it is unfair that the right should continue at all, let alone indefinitely. We have been told by stakeholders of cases where, over time, RTM company membership is reduced to just one or even no leaseholder members at all. This might be because flats have been sold and new leaseholders have, for whatever reason, not elected to join the RTM company, or because a majority of leaseholders no longer support the RTM company and have resigned membership.

11.70 However, there are various arguments against such a continuous membership requirement.

(1) Leaseholders have told us that any requirement to re-apply for the RTM or prove any sort of qualification criteria after acquisition will lead to unnecessary costs and uncertainty.

(2) Introducing such a requirement may give landlords another opportunity to challenge the process. We have been told by some leaseholders that it has taken years and tens of thousands of pounds to acquire the RTM and it would be unfair to allow the landlord a second bite of the cherry later on.

(3) There are likely to be frequent, but short, periods of time when an RTM company does not have at least 50% of leaseholders as members, but this does not mean that the RTM is not supported by the majority. For example, as flats are sold there is typically a delay between the automatic termination of membership of an outgoing leaseholder and the new membership of the incoming leaseholder.

[1032] Commonhold and Leasehold Reform Act 2002, s 79(5).

11.71 On balance, we do not consider that majority membership should be introduced as a continuing requirement. We think this would make the exercise of the RTM more difficult and costly for leaseholders, which is contrary to our Terms of Reference.

11.72 However, we do provisionally propose that the membership of the RTM company should be a relevant consideration if the landlord or any leaseholder makes an application to the tribunal to appoint a manager[1033] or for the transfer of management back to the landlord.[1034] If such an application is made, we think the tribunal should take into account whether or not the RTM company remains supported by a majority of leaseholders as members. The tribunal must determine whether it is just and convenient to make an appointment. It may be more just and convenient for an appointment to be made if the RTM company only has one member than it would be if the RTM company continues to have the support of a majority of leaseholders.

11.73 The tribunal should also be required to consider, if known, why the RTM company might not have a majority of leaseholders as members. This should prevent a decision to appoint a manager being made on a day where membership might be low temporarily, because, for example, a number of flats have been sold and the buyers have not yet had the chance to decide whether to become members.

Consultation Question 123.

11.74 We provisionally propose that when evaluating an application to appoint a manager under Part 2 of the Landlord and Tenant Act 1987, or for management to revert to the landlord, the tribunal should consider whether the RTM company's membership satisfies the RTM participation requirements. Do consultees agree?

RESTRICTION ON SUCCESSIVE AND FURTHER RTM CLAIMS

11.75 Where the RTM has ceased to be exercisable by the RTM company, there can be no further RTM claim over those premises for a period of four years.[1035] We refer to this as the "four-year ban".

11.76 The period of four years was chosen:

> to reflect the typical amount of time taken for a substantial turnover in leaseholders in a particular block.[1036]

11.77 It appears that the Government considered, when drafting the 2002 Act, that where an RTM had failed, the same leaseholders should not generally be permitted to exercise

---

1033 Under Part 2 of the Landlord and Tenant Act 1987 as discussed above.

1034 We discuss our proposal for this below, from para 11.110 onwards.

1035 Commonhold and Leasehold Reform Act 2002, sch 6, para 5(1)(b).

1036 Commonhold and Leasehold Reform: Draft Bill and Consultation Paper (2000) Cm 4843, Part II, Section 3, ch 1, para 101.

a further right straight away. After four years, it was thought that the leaseholders would be a sufficiently new group to be permitted to exercise the RTM again.

11.78 The four-year ban does not apply where the RTM ended because the freehold of the whole or part of the premises is transferred to the RTM company.[1037] In this case, a majority of qualifying tenants can immediately make a further RTM claim against the new freeholder (which will have ceased to be an RTM company).[1038]

11.79 The tribunal has jurisdiction to determine that the four-year ban does not apply where it considers it would be unreasonable.[1039] The leaseholders can either apply to the tribunal in the name of the existing RTM company, or incorporate anew and apply in the name of the new RTM company. In Chapter 5 we discuss whether, if an RTM company is no longer managing but still exists in law, section 73(4) of the 2002 Act would or should operate to exclude any second RTM company from being an RTM company for the purposes of the 2002 Act.[1040]

11.80 We have been told by some leaseholder stakeholders that four years is too long. They argued that, just because one RTM has failed, it does not mean that a further RTM will fail, particularly where a different group of leaseholders propose to become directors and take responsibility for the day-to-day running of the company. While the tribunal could disapply the four-year ban in some circumstances, leaseholders saw it as unnecessarily expensive and burdensome.

Who should take over management?

11.81 In any case of termination, we believe that there should be express provision as to who becomes responsible for management post-termination. It should be clear in all cases who is responsible for managing the building to facilitate as smooth a handover, and as little gap in continuity, as possible.

11.82 We think that, unless the issue is determined by agreement between the parties or by the tribunal, the default position should be that management reverts to the party who is responsible for management functions in the ordinary course of events under the lease. If that person no longer exists, the management functions should revert to the landlord[1041] unless an order or determination is made in accordance with our proposals above.

1037 Commonhold and Leasehold Reform Act 2002, sch 6, para 5(2), and by reference to s 73(5).

1038 Commonhold and Leasehold Reform Act 2002, s 73(5).

1039 Commonhold and Leasehold Reform Act 2002, sch 6, para 5(3).

1040 See from para 5.31.

1041 ie the leaseholders' immediate landlord; unless that is the leaseholders themselves in which case the landlord above them. If the leaseholders have different landlords, the management will be split according to the lease arrangements.

Consultation Question 124.

11.83 We provisionally propose that, on termination of the RTM, the functions of the RTM company should, by default, revert to:

(1) the party who is responsible for management functions in the ordinary course of events under the leases; or

(2) if that person no longer exists, the landlord.

Do consultees agree?

Consultation Question 125.

11.84 We provisionally propose that the default position should not however apply where:

(1) the tribunal has made an alternative determination or order; or

(2) the issue has been otherwise agreed between the RTM company and every landlord.

Do consultees agree?

The existing grounds for termination

11.85 We consider that the existing grounds for termination of the RTM are necessary and sensible and thus should, in principle, be retained. However, we provisionally propose amendments to the detail of some grounds, and set these out below. We also set out a number of new proposals which might apply in certain situations, and which we believe will address some of the more general criticisms of the current legislation.

Agreements between the RTM company and every landlord

11.86 Where the RTM company and every landlord agree that the RTM should cease then we think most parties, save for perhaps a minority of leaseholders, will be content with the arrangements made for ongoing management.

11.87 We are reluctant to propose any measures that interfere with the parties' freedom to agree in this regard. However, there is the potential for prejudice to a minority of leaseholders. Those leaseholders might be members of the company that have voted against the agreement, or they might be non-member leaseholders who had no say at all in respect of the agreement.

11.88 Where the agreement provides for a third party to manage instead of the person responsible under the lease, individual leaseholders may have no right to enforce performance of the management functions by that third party. We accept that the third party is unlikely to be able to enforce payment of service charges against leaseholders

and thus is unlikely to accept the appointment to manage under the agreement. However, we consider this is an unsatisfactory situation for any party to find themselves in.

11.89 We therefore provisionally propose that, where an agreement between the RTM company and the landlord to terminate the RTM does not have the support of all qualifying tenants, that agreement will have to be approved by the tribunal. The application for approval could be made by either the landlord or the RTM company and should be made before the agreement is entered into.

11.90 We think the tribunal should be asked to consider only whether the proposed agreement ensures that each qualifying tenant can enforce performance of the management functions under their leases. In most cases, particularly where there is no active objection to the agreement, the tribunal should be able to deal with the application by paper determination, saving the expense and delay of a hearing. Where the tribunal is not satisfied that there is, for example, an enforceable covenant to repair by the party proposed to be responsible for management, they would be able to refuse to approve the agreement.

11.91 Where approval of the tribunal is not obtained, the management functions will continue to be exercisable by the RTM company, and the agreement will have no effect.

Consultation Question 126.

11.92 We provisionally propose that, where an agreement between the RTM company and the landlord to terminate the RTM does not have the support of all qualifying tenants, that agreement should have to be approved by the tribunal. The tribunal should approve the agreement if it is satisfied that the leaseholders will be able to enforce performance of the management functions in the leases against the party proposed to be responsible for management. Do consultees agree?

Company struck off the register

11.93 Where an RTM company has been struck off the register, it no longer exists as a legal person and the RTM must necessarily cease. We recognise there are situations such as that which occurred in *AB&R*[1042] where strike off has occurred but the company is restored to the register.

11.94 Where such restoration happens relatively quickly, we believe that the RTM should be allowed to continue once the company has been restored. However, we do not think it would be desirable, for example, for an RTM company to apply for restoration three years after it was struck off, and to have the RTM restored to it without having to make a further claim afresh. We therefore provisionally propose that the application to

[1042] *AB&R RTM Co Ltd v Rovergrange Ltd* (12th April 2017) LON/00AM/LRM/2017/0005 First-tier Tribunal Property Chamber (Residential Property) (unreported), discussed at paras 11.26 and 11.27 above.

restore the company to the register should have to be made within 30 days of the strike off taking effect.[1043]

11.95 We are concerned that, despite the decision in *AB&R*, the tribunal does not have jurisdiction to make an order that management functions are restored to an RTM company once they have ceased. This is because the 2002 Act states that the RTM has ceased. In such a case or, for example, where the landlord agrees to treat a restored company as still having the RTM, the RTM might not in fact be valid. This could mean that the leaseholders are not obliged to pay their service charge to the RTM company and satellite litigation on that point might arise.

11.96 We provisionally propose that, where the application for restoration is made within 30 days, the RTM company once restored should be entitled to apply to the tribunal to have the management functions restored to it. We do not propose to place a time limit on the RTM company making the application to the tribunal. The application should be made as soon as reasonably practical if the RTM company does not want to run the risk of satellite litigation about whether or not the RTM is being validly exercised.

11.97 We think that management, in the period between strike off and the order for restoration, should revert to the landlord or other responsible party under the lease, unless the leaseholders apply to the tribunal for a manager to be appointed on an interim basis.

Consultation Question 127.

11.98 We provisionally propose that, where an RTM company which has been struck off is restored to the Register of Companies relatively quickly, the tribunal should have the ability to declare that the RTM is restored to the RTM company. Do consultees agree?

Consultation Question 128.

11.99 Do consultees consider that an application to restore the company to the register should have to be made within 30 days of the strike off taking effect? If not, how long?

[1043] The strike off takes effect upon its publication by the Registrar in the relevant Gazette.

Consultation Question 129.

11.100 We provisionally propose that interim management should revert to the landlord or other responsible party under the lease, unless the leaseholders apply to the tribunal for a manager to be appointed on an interim basis. Do consultees agree?

The RTM company ceases to be an RTM company

11.101 We consider that any of the statutory provisions which would otherwise have the effect of ending the RTM should be capable of being waived by the tribunal, so that in fact the RTM does not end. We consider that the tribunal should only exercise its discretion in circumstances where the actions of the company or its directors could be properly described as a clerical or administrative error and where no loss or prejudice is caused to any party. We therefore provisionally propose that the tribunal should have a power to excuse such errors.

Consultation Question 130.

11.102 We provisionally propose that the tribunal should have the power to reinstate the RTM even if the RTM has been terminated, if termination has occurred as a result of a clerical or administrative error which does not cause loss or prejudice to any party. Do consultees agree?

11.103 We also consider that there should be a non-exhaustive list of circumstances in which an RTM company ceases to be an RTM company in respect of the premises. This should include the following circumstances already provided for under the 2002 Act:

(1) where the freehold of any premises over which RTM is exercised is transferred to the RTM company;

(2) where the articles of the RTM company are changed so that they no longer provide that the purpose of the company is to manage the premises in question. However, we think it should be possible for an RTM company to cease to be an RTM company in relation to some but not necessarily all of the premises it is responsible for, or to add to the premises for which it is responsible;[1044] and

(3) where the RTM company is a commonhold association.

[1044] In Chapter 4 we provisionally propose that an RTM company should be able to acquire management functions for more than one building, and that individual buildings might later join or break away. The ability of individual buildings to join would be subject to the RTM company's agreement, and the ability to break away would be subject to our proposed rule on successive RTM claims (see para 11.139 below). If either situation arose, members of an RTM company may need to amend the company's articles to add or remove premises, without the company ceasing to be an RTM company for the premises.

11.104 We anticipate the Secretary of State should be empowered to update the list as and when appropriate.

Consultation Question 131.

11.105 We provisionally propose that regulations should set out a non-exhaustive list of the circumstances in which an RTM company ceases to be an RTM company in respect of the premises. Do consultees agree?

Consultation Question 132.

11.106 We provisionally propose that those grounds on which an RTM company ceases to be an RTM company in respect of the premises should include:

(1) where the freehold of any premises over which RTM is exercised is transferred to the RTM company;

(2) where the articles of the company are changed so that they no longer provide that the purpose of the company is to manage the premises in question (subject to the RTM company being able to add/remove premises); and

(3) where the RTM company is a commonhold association.

Do consultees agree? Do consultees consider that any other circumstances should be included?

Extension of the RTM

11.107 In Chapter 2 we make proposals which would extend the RTM regime to properties which are currently excluded, including houses and single unit buildings. The regime regarding the appointment of a manager does not currently apply to leasehold houses or single unit buildings. We think that, under our proposed RTM regime, those leaseholders should have an equal right to apply to have an RTM company replaced by a manager as is held by leaseholders of flats.

Consultation Question 133.

11.108 We provisionally propose that the appointment of a manager provisions in Part 2 of the Landlord and Tenant Act 1987 should be extended to apply to any premises which are being managed by an RTM company. Do consultees agree?

New rights to bring the RTM to an end?

A right for the RTM company to apply to give up the RTM

11.109 An RTM company has no simple means for giving up the RTM.

11.110 An RTM company cannot force the landlord to enter into an agreement to take back management and cannot make an application for the appointment of a manager. An RTM company can only resolve to enter into a members' voluntary liquidation where it is solvent.

11.111 We do not believe it is satisfactory that an insolvent RTM company must wait until a creditor takes action before it can terminate the RTM. This places the landlord and leaseholders at risk of having no proper management of the property in the meantime. The only recourse open to leaseholders in this situation is to incur the costs of an application to the tribunal for a manager to be appointed on the fault-based grounds. That is not satisfactory either.

11.112 We provisionally propose that an RTM company, whether solvent or not, should be able to apply to the tribunal:

(1) to give up the RTM; and

(2) for either:

(a) the management functions to be transferred back to the default party (the party under the lease, failing which, the landlord); or

(b) the appointment of a manager.

11.113 We have considered whether the tribunal's power to appoint a manager, rather than transfer the management functions to the landlord, should only apply where the fault-based requirements for appointment of a manager are demonstrated. The RTM company may know that the landlord does not wish to manage the building, or have evidence to suggest that the landlord will not in fact manage the building. We do not think leaseholders in such a situation should have to allow management to revert back to the landlord or third party and wait until the grounds for an appointment of a manager are made out.

11.114 We do not believe that the tribunal will make such orders lightly, and anticipate these orders being made only where the landlord or third party no longer exists, has managed poorly or has clearly expressed a resolve not to manage the building once the RTM ceases. We would expect the RTM company to have approached the landlord prior to making any application to ascertain whether an agreement can be reached.

11.115 We do not believe that the landlord should be entitled to object to having management functions revert to them other than in very exceptional cases. Nor do we believe the landlord should be in a position to object to an RTM company's application to have a manager appointed in place of the RTM company other than in exceptional cases.

Consultation Question 134.

11.116 We provisionally propose that an RTM company should be able to apply to the tribunal at any time, whether it is solvent or not, to give up the RTM, and for an order that a manager is appointed, or that the management functions revert to the landlord or other person who has management functions under the lease. Do consultees agree?

Consultation Question 135.

11.117 Do consultees think there will be a time and/or financial saving if RTM companies can apply to the tribunal at any time to give up the RTM? How often do consultees think this option would be used?

Consultation Question 136.

11.118 We provisionally propose that the landlord should be able to object to an RTM company's application to give up the RTM only in exceptional cases. Do consultees agree? What should these be?

A right for a landlord to apply for the appointment of a manager or for management to be restored to them

11.119 Whilst landlords can currently apply to have a manager appointed before the RTM has ceased, they currently cannot apply subsequently. In addition, a landlord has no express power to apply to take back the management themselves.[1045]

Before the RTM has ceased

11.120 We consider that the landlord should, while the RTM is continuing, have the right to apply to the tribunal either:

(1) for the management functions to be transferred back to the default party (the party under the lease, failing which, the landlord); or

(2) if the default party is not best placed to perform management functions, for the appointment of a manager.

11.121 In either case, the landlord would have to make out the fault-based grounds for the appointment of a manager[1046] and demonstrate that the party they are saying should

[1045] Although this point is somewhat unclear – we refer to this possibility in paragraph 11.31. We think it is better to make specific provision for the circumstances in which a landlord can reclaim management.

[1046] We set these out at para 11.29 above.

manage is best placed to manage the premises. These tests should act as a high threshold to prevent landlords making such applications where the RTM company is managing successfully and the landlord wants management back simply as a matter of principle. The landlord may also make such an application in response to any application to the tribunal made by the RTM company or a leaseholder for the appointment of a manager.

After the RTM has ceased

11.122 When the RTM ceases, we have proposed that management should automatically revert to the relevant party under the lease or, failing that, the landlord. We think that the landlord should be able to apply to have a manager appointed instead if the landlord wants to show that a manager is better placed to manage the building than the default party. In this situation landlords should not have to make out a fault-based ground for the appointment of a manager (because the RTM has already ended).

11.123 Leaseholders can exercise a right of set-off against the landlord but not against a tribunal-appointed manager. The tribunal order can also override the leases and provide, for example, that the manager is entitled to demand ad hoc service charges for emergency works even if this is not permitted by the lease.

11.124 We propose that the new right to apply for the appointment of a manager should be available to a landlord for a limited period after the RTM ceases. We propose that the ability for the landlord to apply should be restricted to 30 days from the date the management functions ceased to be exercisable by the RTM company.

Consultation Question 137.

11.125 We provisionally propose that, while the RTM is continuing, the landlord should have the right to apply to the tribunal either:

(1) for the management functions to be transferred back to the party under the lease, failing which, the landlord; or

(2) if the default party is not best placed to manage the premises, for the appointment of a manager;

on the basis that the fault-based grounds for appointment of a manager under the Landlord and Tenant Act 1987 are made out. Do consultees agree?

Consultation Question 138.

11.126 We provisionally propose that, after the RTM has ceased, the landlord should be able to apply to the tribunal to appoint a manager instead of management reverting to the landlord or other party under the lease. Do consultees agree?

Consultation Question 139.

11.127 We provisionally propose that the application to appoint a manager instead of management reverting to the landlord or other party under the lease should have to be made within 30 days of the RTM ending. Do consultees agree?

Post-termination of the RTM

Treatment of uncommitted service charges

11.128 As mentioned above, there are no provisions in the 2002 Act as to what should happen to service charges collected and held by an RTM company when the RTM terminates. We have explained above what happens in insolvency and administration.

11.129 When the RTM is acquired, the 2002 Act provides for the landlord, or another relevant party, to transfer to the RTM company the uncommitted service charges.[1047] We think therefore that there should be a reciprocal obligation when the RTM ceases in circumstances where the RTM company still exists and is not subject to any insolvency regime. It should of course be borne in mind that service charge funds are held in trust with the RTM company as trustee.

11.130 We provisionally propose that, in this case, there should be an express provision that the RTM company is required to account for and pay over the uncommitted service charge funds to the person who takes over the management functions. The RTM company is still a trustee of the funds under the current law even after the RTM ceases. Accordingly, it would have the duty to safeguard the fund and transfer it to the new manager, but we think setting out clearly whom it should transfer them to would assist. The funds will continue to remain subject to the usual statutory trust in whoever's hands they have passed to.

11.131 Where the RTM ceases and the RTM company is either insolvent or has been struck off the register, we do not propose to make any proposals which change the current position set out above.[1048]

Consultation Question 140.

11.132 We provisionally propose to clarify that the uncommitted service charges held by a solvent RTM company when the RTM ceases should be transferred to the party who takes over management. Do consultees agree?

[1047] Commonhold and Leasehold Reform Act 2002, s 94.

[1048] See paras 11.54 and 11.93 above.

Monies owed by and to the RTM company

11.133 In circumstances where an RTM company owes money to, or is owed money by, third parties other than in respect of service charge contributions, we do not propose to make any specific provision. The existing law would apply.

11.134 However, there may be service charge contributions owed by leaseholders or the landlord to the RTM company, which are to be used for the management, insurance, maintenance, repair or improvement of the building. We do not think that leaseholders should be able to avoid paying their service charges to the RTM company if they suspect that the RTM will soon cease.

11.135 In this case, we provisionally propose that there should be a statutory assignment of the right to pursue these debts to the party who takes over management. The funds must have been properly due to the RTM company before ceasing to exercise the RTM.

11.136 We believe this proposal will ensure a smoother handover of management functions and will avoid the need for the new manager to re-demand service charges from leaseholders or the landlord.

Consultation Question 141.

11.137 We provisionally propose that there should be a statutory assignment from the RTM company to the new manager of the right to collect service charge debts when the RTM ceases. Do consultees agree?

Where an RTM company has previously exercised the RTM – successive RTMs

11.138 We think there is good reason to retain a time restriction on leaseholders' ability to make a new RTM claim immediately after an RTM has failed. It prevents leaseholders from using an RTM company to overspend or obtain credit which it cannot pay with the result that it becomes insolvent,[1049] and then re-applying for the RTM again straight away. It also takes account of the inconvenience and expense a landlord might incur when taking back the management functions, or applying to the tribunal to have a manager appointed.

11.139 However, we are not convinced that the current four-year restriction is warranted. We have been told by stakeholders that the period of any restriction should be reduced so as to avoid the costs and delays of having to make an application to the tribunal to disapply the four-year ban. Some consultees suggested that the restriction be reduced to 12 months. We seek consultees' views as to what length of time is appropriate.

[1049] Note that in this situation the directors may have liabilities for wrongful or fraudulent trading, or may be disqualified.

11.140 In any event, we propose to retain the tribunal's ability to disapply any restriction where it considers it is unreasonable for it to apply in all the circumstances of the case.

11.141 We think that any restriction should also operate in circumstances where a further RTM claim was being made by one building wishing to break away from an existing multi-building RTM, as proposed in Chapter 4.

Consultation Question 142.

11.142 We provisionally propose that the existing four-year restriction on successive RTM companies should be reduced. Do consultees agree?

Consultation Question 143.

11.143 What period of time do consultees think is appropriate for a restriction on successive RTM companies and why?

Consultation Question 144.

11.144 Do consultees have experience of cases where the tribunal has disapplied the four-year ban? If so, has there been any negative impact on any of the parties?

Chapter 12: Consultation Questions

Consultation Question 1.

12.1 We provisionally propose that the RTM should be exercisable in respect of leasehold houses as well as flats. Do consultees agree?

Paragraph 2.10

Consultation Question 2.

12.2 Do consultees think leasehold houses qualifying for the RTM would increase the number of RTMs? Do consultees think this would be used by leaseholders of houses to acquire single-building RTMs, or only to join multi-building RTMs on estates?

Paragraph 2.11

Consultation Question 3.

12.3 We provisionally propose that leaseholders of houses should follow the same process as leaseholders of flats in order to acquire the RTM. Do consultees agree?

Paragraph 2.17

Consultation Question 4.

12.4 We provisionally propose to adopt the same approach as in our proposals relating to enfranchisement, so that the RTM will be exercisable over “residential units”. Do consultees agree it should be a consistent approach? If not, how can we justify different terminology and what should it be?

Paragraph 2.37

Consultation Question 5.

12.5 Our provisional view is that the different underlying considerations for enfranchisement and for the RTM justify a divergent approach to the qualifying criteria for premises. Do consultees agree?

Paragraph 2.95

Consultation Question 6.

12.6 We provisionally propose that there should be a broader definition of "building" for the purposes of the RTM qualifying criteria for premises. Do consultees agree?

Paragraph 2.96

Consultation Question 7.

12.7 Instead of introducing a broader definition of "building", would consultees prefer to retain the existing requirements for a self-contained building or part of a building, with an additional judicial discretion to allow the RTM to be acquired where the qualifying criteria are not met?

Paragraph 2.97

Consultation Question 8.

12.8 Do consultees have experience of failing to acquire the RTM because of the current definition of "building"?

Paragraph 2.98

Consultation Question 9.

12.9 We provisionally propose that one qualifying tenant should be able to claim the RTM over:

(1) buildings which contain no other residential premises; and

(2) buildings in which there are no other qualifying tenants.

Do consultees agree?

Paragraph 2.108

Consultation Question 10.

12.10 We provisionally propose that the requirement for at least two-thirds of the flats in the premises to be held by qualifying tenants should be reduced to 50%. Do consultees agree?

Paragraph 2.115

Consultation Question 11.

12.11 We provisionally propose that the current rule requiring the participation of both qualifying tenants in a two-unit building should be retained, because of the particular risk of dispute and deadlock in the RTM context. Do consultees agree?

Paragraph 2.125

Consultation Question 12.

12.12 We provisionally propose that the exemption for buildings containing more than 25% non-residential premises should be removed, so that the RTM could be acquired in respect of such buildings. Do consultees agree?

Paragraph 2.148

Consultation Question 13.

12.13 We provisionally propose that the RTM company should be required to instruct professional managing agents, satisfying applicable regulatory standards, for any buildings containing commercial premises which represent more than 25% of the total internal floor area. Do consultees agree?

Paragraph 2.149

Consultation Question 14.

12.14 Do consultees have experience of being unable to acquire the RTM because of the exemption for buildings containing more than 25% non-residential premises?

Paragraph 2.150

Consultation Question 15.

12.15 We provisionally propose that shared ownership leaseholders with long leases should be qualifying tenants for the purposes of RTM, regardless of whether they have staircased to 100%. Do consultees agree?

Paragraph 3.25

Consultation Question 16.

12.16 We provisionally propose that the law should be changed to allow leaseholders to qualify for the RTM in premises with a resident freeholder. Do consultees agree?

Paragraph 3.53

Consultation Question 17.

12.17 Do consultees have experience of leaseholders being prevented from exercising the RTM by the resident landlord exemption?

Paragraph 3.54

Consultation Question 18.

12.18 Do consultees consider that our provisional proposal to allow leaseholders to qualify for the RTM on premises with a resident freeholder is likely to deter home owners from converting part of their property into a leasehold flat or flats?

Paragraph 3.55

Consultation Question 19.

12.19 Do consultees consider that an RTM company should be able to acquire the RTM over the whole building where the freehold of the building is in split ownership?

Paragraph 3.61

Consultation Question 20.

12.20 If the law was changed to allow the RTM over a building in split freehold ownership, do consultees agree that the tribunal should have the power to reconcile any conflicting covenants in the leases with the different freeholders?

Paragraph 3.62

Consultation Question 21.

12.21 Do consultees have experience of the RTM in relation to a building owned by different freeholders?

Paragraph 3.63

Consultation Question 22.

12.22 We provisionally propose that National Trust properties should be excluded from the RTM. Do consultees agree?

Paragraph 3.73

Consultation Question 23.

12.23 We provisionally propose that the existing exclusion for leases which allow any non-residential use should be replaced with an exclusion for leases which prohibit residential use. Do consultees agree? If not, is there any justification for having a different position in the RTM than in enfranchisement?

Paragraph 3.83

Consultation Question 24.

12.24 Do consultees have experience of leaseholders being prevented from exercising the RTM by the exclusion for leases which allow any non-residential use?

Paragraph 3.84

Consultation Question 25.

12.25 We provisionally propose that qualifying tenants of a single building on an estate should retain the existing right to claim the RTM over that single building. Do consultees agree?

Paragraph 4.13

Consultation Question 26.

12.26 We provisionally propose that the law should allow for a single RTM company to acquire the RTM over two or more buildings situated on the same estate in a single RTM claim. Do consultees agree?

Paragraph 4.49

Consultation Question 27.

12.27 Do consultees think it would be cheaper for leaseholders on an estate to carry out a multi-building RTM rather than multiple single-building RTMs (both in terms of acquisition costs and ongoing costs)?

Paragraph 4.50

Consultation Question 28.

12.28 We provisionally propose that the RTM should be capable of being exercised over multiple buildings by a single RTM company in a single RTM claim if either:

(1) the buildings to be managed by the single RTM company share some appurtenant property; or

(2) the qualifying tenants in each building contribute to a common service charge (whether or not other, separate service charges are payable).

Do consultees agree?

Paragraph 4.57

Consultation Question 29.

12.29 We provisionally propose that the qualifying criteria and participation requirement should have to be satisfied by each individual building included in the claim for a multi-building RTM, rather than as a whole across all of the buildings included in the claim. Do consultees agree?

Paragraph 4.70

Consultation Question 30.

12.30 We do not consider that there should be an automatic right for qualifying tenants of premises not originally included in an RTM claim to later join an existing multi-building RTM arrangement. Do consultees agree?

Paragraph 4.77

Consultation Question 31.

12.31 We provisionally propose that qualifying tenants of buildings should be able to "break away" from existing multi-building RTM arrangements and exercise the RTM in their own right. Do consultees agree?

Paragraph 4.87

Consultation Question 32.

12.32 We provisionally propose that the restriction on successive claims should apply to break-away claims, so that the qualifying tenants of the building(s) wishing to break away have to wait for a minimum period following the multi-building RTM acquisition before making the break-away claim. Do consultees agree?

Paragraph 4.88

Consultation Question 33.

12.33 We do not consider that members of a multi-building RTM company should have different voting rights to members of a single-building RTM company, because of the likely associated complexity and cost. Do consultees agree?

Paragraph 4.94

Consultation Question 34.

12.34 We provisionally propose that there be a presumption that the management functions relating to appurtenant property which does not belong exclusively to, or is not usually enjoyed exclusively with, the building(s) over which the RTM is being acquired should not transfer to the RTM company. Do consultees agree?

Paragraph 4.116

Consultation Question 35.

12.35 We provisionally propose that RTM companies should continue to be companies limited by guarantee. Do consultees agree?

Paragraph 5.16

Consultation Question 36.

12.36 We provisionally propose that, if our proposals on prescribed articles for nominee purchasers are adopted, it should not be permitted to use RTM companies as nominee purchasers in collective freehold acquisitions, as it is easier to set up a new company for this purpose. Do consultees agree?

Paragraph 5.24

Consultation Question 37.

12.37 We provisionally propose that the limit on the number of RTM companies that can exist in relation to a set of premises should be removed and replaced by a rule that once one RTM company serves a claim notice in relation to a set of premises, no other RTM company can do so until:

(1) the RTM claim is withdrawn or rejected by the tribunal; or

(2) the RTM, having been acquired, ceases.

Do consultees agree?

Paragraph 5.39

Consultation Question 38.

12.38 Do consultees have experience of landlords setting up RTM companies in an attempt to prevent leaseholders from acquiring the RTM?

Paragraph 5.40

Consultation Question 39.

12.39 Do consultees have experience of third parties such as managing agents setting up RTM companies in an attempt to gain some benefit?

Paragraph 5.41

Consultation Question 40.

12.40 We invite consultees' views on whether any requirements of company law should be relaxed for RTM companies.

Paragraph 5.85

Consultation Question 41.

12.41 We provisionally propose that the prescribed articles of association should be amended to require RTM company directors to hold a general meeting once a year. Do consultees agree?

Paragraph 5.111

Consultation Question 42.

12.42 We provisionally propose that training for RTM company directors should be encouraged and well-publicised, but not mandatory. Do consultees agree?

Paragraph 5.126

Consultation Question 43.

12.43 We provisionally propose that the Government should ensure that training resources for prospective RTM directors are provided free of charge. Do consultees agree?

Paragraph 5.130

Consultation Question 44.

12.44 In your experience, do most RTM companies appoint managing agents?

Paragraph 5.151

Consultation Question 45.

12.45 Should it ever be mandatory for RTM companies to use a managing agent which meets the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government?

Paragraph 5.152

Consultation Question 46.

12.46 If consultees think it should be mandatory for RTM companies to use a managing agent meeting the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government, are any (or all) of the following the appropriate circumstances in which it should be mandatory:

(1) Where more than 25% of the internal floorspace of the premises is commercial property?

(2) Where the premises have more than a certain number of units?

(3) Where the premises have special characteristics such as:

(a) being a listed building; or

(b) having a specialised use, such as retirement property?

Paragraph 5.153

Consultation Question 47.

12.47 If consultees think that use of a managing agent should be mandatory in premises with more than a certain number of units, would 10 units be an appropriate threshold? If not, what would be an appropriate threshold?

Paragraph 5.154

Consultation Question 48.

12.48 Are there any other circumstances in which consultees think it should be mandatory to use a managing agent which meets the regulatory standards set by the Ministry of Housing, Communities and Local Government?

Paragraph 5.155

Consultation Question 49.

12.49 We provisionally propose that RTM companies should be able to recover their management costs (including administration costs) from leaseholders as if the lease made express provision for them to be recovered as part of the service charge. Do consultees agree?

Paragraph 5.165

Consultation Question 50.

12.50 Do consultees think that there would be a reduction in litigation if RTM companies were permitted to recover their management costs (including administration costs) through the service charge? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

Paragraph 5.166

Consultation Question 51.

12.51 We provisionally propose that the requirement to serve notices inviting participation should be abolished. Do consultees agree?

Paragraph 6.26

Consultation Question 52.

12.52 Do consultees think the acquisition process would be shorter and/or cheaper if notices inviting participation were abolished? If possible, please estimate how much time and/or money the average RTM company might save.

Paragraph 6.27

Consultation Question 53.

12.53 We provisionally propose that the prescribed notes accompanying the claim notice should include a statement that qualifying tenants are entitled to join the RTM company at any time. Do consultees agree?

Paragraph 6.28

Consultation Question 54.

12.54 In our enfranchisement consultation paper we provisionally proposed to replace the current deemed withdrawal provisions for a claim notice. If this proposal applied in the RTM context, landlords who have served a counter-notice and leaseholders would have a new right to apply to the tribunal for an order striking out the claim where the RTM company has not initiated the next step in the process.

We provisionally propose that the same right should be introduced in the RTM context. Do consultees agree? This would replace the rule that the RTM company is deemed to have withdrawn its claim if it does not apply to the tribunal after receiving a negative counter-notice. If consultees think the position should be different from that in enfranchisement, please give reasons.

Paragraph 6.49

Consultation Question 55.

12.55 We provisionally propose that landlords should be required to state all possible objections in the counter-notice and should not generally be permitted to raise new arguments at a later stage. Do consultees agree?

Paragraph 6.61

Consultation Question 56.

12.56 We provisionally propose that, where a counter-notice has not been served, the RTM company should be able to apply to the tribunal to determine:

(1) that the RTM company was on the relevant date entitled to acquire the RTM;

(2) the acquisition date on which the RTM was or will be acquired; and/or

(3) the transfer of management functions in respect of non-exclusive appurtenant property.

Do consultees agree?

Paragraph 6.77

Consultation Question 57.

12.57 We provisionally propose that, where no counter-notice is served and an RTM company applies to the tribunal for a determination as to its acquisition of the RTM and/or the transfer of management functions in respect of non-exclusive appurtenant property, then:

(1) the landlord should have to apply to the tribunal for permission to participate in the proceedings; and

(2) the tribunal should be able to make the permission conditional on such terms as it thinks fit.

Do consultees agree?

Paragraph 6.78

Consultation Question 58.

12.58 Do consultees think that giving RTM companies the right to apply to the tribunal to determine their entitlement to acquire the RTM when no counter-notice has been served is likely to prevent future litigation over the validity of the RTM? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

Paragraph 6.79

Consultation Question 59.

12.59 We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the claim notice and make any other directions it considers appropriate. Do consultees agree?

Paragraph 6.96

Consultation Question 60.

12.60 We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the counter-notice and make any other directions it considers appropriate, provided that amendments are not permitted unless the landlord has made a genuine mistake or other exceptional criteria are met. Do consultees agree?

Paragraph 6.97

Consultation Question 61.

12.61 Do consultees think that giving the tribunal the power to waive defects or allow amendments in notices would reduce litigation and therefore reduce costs? If possible, please estimate how much money an RTM company might save.

Paragraph 6.98

Consultation Question 62.

12.62 Do consultees consider that there should continue to be a requirement for the claim notice to be signed by or on behalf of the RTM company?

Paragraph 6.104

Consultation Question 63.

12.63 If the requirement for a claim notice to be signed by or on behalf of the RTM company is to be retained, do consultees consider that the claim notice should be signed by either:

(1) a single officer of the RTM company; or

(2) a person authorised by an officer of the RTM company to sign the claim notice on behalf of the RTM company?

Paragraph 6.105

Consultation Question 64.

12.64 We provisionally propose that an RTM company should be able to serve the RTM claim notice on the landlord at the following email addresses:

(1) an address they have specified for the service of RTM notices;

(2) an address they have specified for the purposes of serving notices (including notices in proceedings); or

(3) an address included on or at HM Land Registry as one at which the registered proprietor can be served with notices.

Do consultees agree?

Paragraph 6.116

Consultation Question 65.

12.65 We provisionally propose that the law should be clarified to confirm that an RTM company is entitled to serve a copy of the claim notice on a qualifying tenant at an email address they have confirmed to the RTM company as an email address for the service of notices under the RTM provisions. Do consultees agree?

Paragraph 6.118

Consultation Question 66.

12.66 We provisionally propose that a claim notice should be deemed to have been served on the landlord if it is delivered by hand, or sent by post or email (where permitted) to one of the specified addresses in Group A or Group B.

Group A addresses for service include:

(1) any address (including an email address) that has been provided by the landlord to the leaseholders or RTM company as an address at which an RTM notice may be served; and

(2) the landlord's current address.

Group B addresses for service include:

(3) the landlord's last known address;

(4) the latest address given by the landlord for the purposes of section 47 of the Landlord and Tenant Act 1987;

(5) the latest address given by the landlord for the purposes of section 48 of the Landlord and Tenant Act 1987; and

(6) the latest email address given by the landlord for the purposes of serving notices (including notices in proceedings).

Do consultees agree?

Paragraph 6.125

Consultation Question 67.

12.67 We provisionally propose that before serving a claim notice, the RTM company should be required to check the landlord's address on or at HM Land Registry. Do consultees agree?

12.68 Before service of a claim notice at a Group B address, we provisionally propose that the RTM company should be required to:

(a) search the Probate Register;

(b) search the Insolvency Register; and

(c) (in the case of a company landlord) check its status at Companies House.

12.69 We also provisionally propose the following:

(1) if an individual landlord is dead, the designated address for service should be the address of any personal representatives given in any grant of probate (or, if none, the office of the Public Trustee);

(2) if an individual landlord is insolvent, the designated address for service should be the address for their trustee in bankruptcy as shown on the Insolvency Service website;

(3) if a company landlord is insolvent, the designated address for service should be the address for its administrator, liquidator or receiver as listed at Companies House. If no such person has been appointed, the Official Receiver should be served.

Do consultees agree?

Paragraph 6.136

Consultation Question 68.

12.70 Do consultees consider that a claim notice should include a statement of truth confirming that specified checks (if required) have been carried out?

Paragraph 6.139

Consultation Question 69.

12.71 We provisionally propose that if the identity of the landlord is known, but the RTM company does not have an address for them falling within Group A or B, they should carry out the Group B checks above. If this fails to provide an address, an advertisement should be placed in the London Gazette. Do consultees agree?

Paragraph 6.140

Consultation Question 70.

12.72 We provisionally propose, in line with our proposals in the enfranchisement consultation paper, that an RTM company applying to acquire the RTM under the missing landlord procedure should be required to:

(1) conduct the pre-service checks for using a Group B address for service;

(2) place an advertisement in the London Gazette inviting the owner of the identified property to contact the RTM company within 28 days; and

(3) include confirmation that these preliminary checks have been undertaken in the application to the tribunal for a determination that the RTM company is entitled to acquire the RTM.

Do consultees agree that the procedure where there is a missing landlord should be the same for RTM as for enfranchisement claims?

Paragraph 6.147

Consultation Question 71.

12.73 We provisionally propose that an RTM company should be able to specify in the claim notice an alternative address (other than the company's registered office) at which a landlord should serve a counter-notice. This could be:

(1) an address in England or Wales for service by post or hand delivery; or

(2) an email address.

Do consultees agree?

Paragraph 6.151

Consultation Question 72.

12.74 We provisionally propose that, in the absence of agreement between the landlord and the RTM company, the minimum period between:

(1) either

(a) the withdrawal of a counter-notice opposing the RTM claim; or

(b) the tribunal's final determination that the RTM company is entitled to acquire the RTM; and

(2) the acquisition date of the RTM,

should be three months. Do consultees agree?

Paragraph 7.19

Consultation Question 73.

12.75 We provisionally propose that, where the claim notice does not specify a date for acquisition, this should be determined by the tribunal, following an application by the RTM company or landlord. Do consultees agree?

Paragraph 7.20

Consultation Question 74.

12.76 We provisionally propose that the tribunal should be able to change the acquisition date on an application from an RTM company. Do consultees agree?

Paragraph 7.21

Consultation Question 75.

12.77 Do consultees consider that we should prescribe a form for the information notice? The form would contain information which should always be provided, as well as information which, depending on the circumstances, it may be reasonable to request/provide.

Paragraph 7.58

Consultation Question 76.

12.78 Do consultees think that landlords should be exempted from providing information which they cannot reasonably provide without incurring disproportionate expense (whether these costs are to be met by the RTM company or the landlord)?

Paragraph 7.59

Consultation Question 77.

12.79 Do consultees think that the provision of information before the RTM company finds out whether it is actually entitled to exercise the RTM is a good idea? If so, which of the two options relating to the timing of the provision of information would you prefer and why? Please also provide any further comments on your preferred option which may improve it.

12.80 If possible, when setting out your preferred option for the timing of the provision of information, please set out how you consider the costs should be allocated, and estimate the cost/impact of the different options.

Paragraph 7.87

Consultation Question 78.

12.81 Do consultees think that the landlord should have:

(1) 28 days, with a possible extension in exceptional circumstances; or

(2) a fixed period of 60 days,

in order to provide the information needed by the RTM company in connection with the RTM?

Paragraph 7.95

Consultation Question 79.

12.82 We provisionally propose that the landlord should be under a duty to notify the RTM company of any material changes to the information previously provided and confirm, on the date of acquisition, that there are no material changes that have not been notified. Do consultees agree?

Paragraph 7.106

Consultation Question 80.

12.83 Do consultees think that RTM companies need a copy of every lease to understand their management obligations? Is a copy of each lease provided to or obtained by RTM companies at the moment?

Paragraph 7.118

Consultation Question 81.

12.84 Do consultees consider that the benefits of the RTM company accessing a copy of each lease would outweigh the additional time and cost incurred in preparing these?

Paragraph 7.119

Consultation Question 82.

12.85 We provisionally propose to require the landlord, RTM company and contractor parties to communicate within prescribed periods to clarify how existing contracts will be dealt with prior to the RTM acquisition date. Our proposals would require:

(1) the landlord to provide copies or details of the management contracts, (including the contract terms, cost and notice period) in response to the information notice or with the counter-notice, depending on the preferred option for provision of information;

(2) the RTM company to notify the landlord of the contractor parties which it does not wish to, or cannot agree terms with on which to maintain a contractual relationship within one month of the determination date; and

(3) the landlord to notify the RTM company's preference to the contractor parties within 14 days. The landlord should also confirm that it considers the contract terminated as a matter of law as it will no longer be managing the premises post acquisition.

Do consultees consider that these additional requirements will provide sufficient clarity and certainty for all parties involved in the management of the premises?

Paragraph 7.162

Consultation Question 83.

12.86 We invite consultees to share their experiences of TUPE where the RTM has been acquired. Did the landlord's employees, who were involved in management of the premises, transfer over to the RTM company? If so, in what circumstances? If not, what happened to them once the RTM transferred?

Paragraph 7.180

Consultation Question 84.

12.87 Do consultees have experience in relation to a caretaker or landlord's employee's rights to occupy a flat in the premises? What happened once the RTM was transferred?

Paragraph 7.181

Consultation Question 85.

12.88 Do consultees consider that any amendments could be made to the definition of "management functions", or more information provided by way of guidance, to improve clarity and certainty?

Paragraph 8.32

Consultation Question 86.

12.89 Are consultees aware of cases where the RTM company and landlord have arranged for certain management functions to remain with, or transfer back to, the landlord? If so:

(1) What functions, and why?

(2) Did any disputes arise from the agreement to transfer them back?

Paragraph 8.33

Consultation Question 87.

12.90 Do consultees think that regulated activities, such as the provision of personal care, should be excluded from the definition of "management functions", so that they do not transfer to the RTM company?

Paragraph 8.46

Consultation Question 88.

12.91 If consultees do not think that regulated activities should be excluded from the definition of "management functions", do they consider that any changes are needed to the current law, under which the RTM company acquires the obligation to carry out any regulated activities specified in the lease?

Paragraph 8.47

Consultation Question 89.

12.92 Are there any regulated activities other than the provision of care which consultees think RTM companies should not, or might not want to, acquire?

Paragraph 8.48

Consultation Question 90.

12.93 We provisionally propose that a copy of the current insurance policy, the insurance claims history and a copy of the last reinstatement valuation should be part of the documentation provided by the landlord to the RTM company before acquisition of the RTM. Do consultees agree?

Paragraph 8.73

Consultation Question 91.

12.94 Do consultees think that landlords providing a copy of the current insurance policy, claims history and a copy of the last reinstatement valuation would lower the cost of securing insurance for RTM companies? If possible, please provide an estimate of how much could be saved.

Paragraph 8.74

Consultation Question 92.

12.95 Do consultees think that it should it be made explicit in legislation that the RTM company has an insurable interest?

Paragraph 8.86

Consultation Question 93.

12.96 We provisionally propose that the RTM company should acquire the duty to reinstate the building, provided that the lease places this duty on the landlord. Do consultees agree?

12.97 If not, should there be a solution based on separate insurances obtained by the RTM company and the landlord respectively ("split insurance")?

Paragraph 8.87

Consultation Question 94.

12.98 We provisionally propose that the RTM company should provide the landlord with a copy of any contract of insurance entered into by the RTM company in respect of the premises, within 21 days of a request from the landlord. Do consultees agree?

Paragraph 8.91

Consultation Question 95.

12.99 Do consultees have experience of landlords purchasing additional insurance for a premises subject to the RTM because an RTM company failed to secure comprehensive insurance? If so, what was the cost of this additional insurance?

Paragraph 8.96

Consultation Question 96.

12.100 We provisionally propose that the landlord should be able to apply to the tribunal for a determination that the RTM company has under-insured. Do consultees agree?

Paragraph 8.97

Consultation Question 97.

12.101 We provisionally propose that, if the tribunal finds that the RTM company has under-insured, the tribunal should be able to:

(1) direct that legitimate costs of "top up" insurance are recoverable; and/or

(2) make a direction for the future insurance of the building to be procured by the RTM company.

Do consultees agree?

Paragraph 8.98

Consultation Question 98.

12.102 Do consultees consider that RTM companies should be required to obtain reinstatement valuations periodically?

Paragraph 8.99

Consultation Question 99.

12.103 In consultees' experience, how much does it cost to obtain a reinstatement valuation?

Paragraph 8.100

Consultation Question 100.

12.104 In consultees' experience, how common is it for RTM companies to recover accrued service charge arrears from the landlord? What are the consequences for the financial security of the RTM company if arrears are not recovered?

Paragraph 8.113

Consultation Question 101.

12.105 We provisionally propose that the landlord should be required to pay to the RTM company 50% of the estimated uncommitted service charges at the latest on the acquisition date, with the remainder payable within six months of the acquisition date. Do consultees agree?

Paragraph 8.114

Consultation Question 102.

12.106 We provisionally propose that the landlord should be required to use reasonable endeavours to pursue service charge arrears accrued prior to the acquisition date, and to pay any recovered funds to the RTM company. Do consultees agree?

Paragraph 8.122

Consultation Question 103.

12.107 We invite consultees' views on the following points.

(1) Do consultees consider that there is a practical solution to avoid some of the existing delays and duplication of costs associated with lease consents under the RTM regime?

(2) If so, do consultees consider:

(a) that the RTM company and landlord should be required to appoint joint advisors (chosen by the RTM company), in order to keep down the costs to be met by the leaseholder ("option 3");

(b) that the existing process should be sped up, by requiring the leaseholder to seek consent from the RTM company and landlord concurrently, or requiring the RTM company to pass the request to the landlord within a set period of time ("option 4"); or

(c) that there is another model which would work better (in which case, please give details)?

(3) In relation to option 4, do consultees agree that the RTM company and/or landlord should have a limited period within which to respond? How long would be appropriate? We suggest 30 days as an initial position. How could costs be kept down?

Paragraph 9.41

Consultation Question 104.

12.108 What experiences of delays and/or duplication of costs have consultees experienced in relation to lease consents under the RTM regime? If possible, please give an indication of the costs incurred.

Paragraph 9.42

Consultation Question 105.

12.109 Do consultees consider that the law should be clarified to make clear that the RTM company is not entitled to grant retrospective consents or consents in respect of absolute covenants?

Paragraph 9.47

Consultation Question 106.

12.110 We provisionally propose that the law should require the RTM company to include its own name and address for service on service charge demands, but not those of the landlord. Do consultees agree?

Paragraph 9.69

Consultation Question 107.

12.111 We provisionally propose that the tribunal should have exclusive jurisdiction over disputes between the RTM company and landlord arising from the RTM provisions. Do consultees agree?

Paragraph 10.25

Consultation Question 108.

12.112 Do consultees consider the tribunal having exclusive jurisdiction over disputes between the RTM company and landlord over RTM provisions would save time and lower costs?

Paragraph 10.26

Consultation Question 109.

12.113 If consultees do not agree that the tribunal should have exclusive jurisdiction over disputes between the RTM company and the landlord arising from the RTM provisions, over which disputes should the county court retain jurisdiction?

Paragraph 10.27

Consultation Question 110.

12.114 We provisionally propose that enforcement of the requirements in the 2002 Act should be the exclusive preserve of the tribunal. Do consultees agree?

Paragraph 10.31

Consultation Question 111.

12.115 Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a third party?

12.116 Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a leaseholder?

Paragraph 10.34

Consultation Question 112.

12.117 We invite consultees' views as to whether there is any stage of the RTM process or any issue (pre- or post- acquisition of the RTM) in which mediation or arbitration might play a helpful role. If so, please give details.

Paragraph 10.48

Consultation Question 113.

12.118 We invite consultees' views as to whether the RTM company should be required to make any contribution to the landlord's non-litigation costs.

Paragraph 10.76

Consultation Question 114.

12.119 We invite consultees' views as to how any contribution that is to be made by the RTM company to the landlord's non-litigation costs should be calculated. Should the contribution be based on:

(1) fixed costs;

(2) capped costs;

(3) fixed costs subject to a cap on the total costs payable; or

(4) the landlord's response (the counter-notice) to the claim notice, and/or whether the landlord succeeds in relation to any points raised in his or her counter-notice?

Paragraph 10.101

Consultation Question 115.

12.120 We also invite consultees' views as to whether, if a fixed costs regime were to be adopted:

(1) such a regime should apply to claim notices; and

(2) if a fixed costs regime were to apply to claim notices:

(a) what additional features might justify the recovery of additional sums; and

(b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment), or only further fixed sums.

Paragraph 10.102

Consultation Question 116.

12.121 We provisionally propose that:

(1) no additional costs should be recoverable where there are intermediate landlords or split freehold titles; and

(2) the RTM company pays an additional fee owed to third party managers if they incur expense due to the RTM company's claim.

Do consultees agree?

Paragraph 10.103

Consultation Question 117.

12.122 We provisionally propose that where a claim notice fails, is withdrawn, or is struck out, the RTM company should be liable to pay a percentage of the non-litigation costs that would have been payable had the claim been completed.

Do consultees agree?

Paragraph 10.107

Consultation Question 118.

12.123 We provisionally propose that the percentage of the fixed non-litigation costs that should be payable where a claim notice fails, is withdrawn, or is struck out should vary depending on the stage that the claim has reached.

Do consultees agree? If so, what percentages should apply at particular stages of the claim?

Paragraph 10.108

Consultation Question 119.

12.124 We provisionally propose that the litigation process in respect of an RTM claim should not confer a right to costs on either party. Instead, each party should bear their own costs, except where there has been unreasonable behaviour or wasted costs, or where one of the exceptions we refer to above applies. Do consultees agree?

Paragraph 10.117

Consultation Question 120.

12.125 Do consultees think that each party having to bear their own costs of litigation would lead to fewer tribunal cases?

Paragraph 10.118

Consultation Question 121.

12.126 We provisionally propose there be a presumption in favour of an order under section 20C of the Landlord and Tenant Act 1985 and/or paragraph 5A of schedule 11 to the 2002 Act to prevent landlords recovering litigation costs from leaseholders through service charges or administration charges. Do consultees agree?

Paragraph 10.119

Consultation Question 122.

12.127 Do consultees have experience of the RTM ceasing to be exercisable by an RTM company? What caused the termination, and what happened afterwards?

Paragraph 11.42

Consultation Question 123.

12.128 We provisionally propose that when evaluating an application to appoint a manager under Part 2 of the Landlord and Tenant Act 1987, or for management to revert to the landlord, the tribunal should consider whether the RTM company's membership satisfies the RTM participation requirements. Do consultees agree?

Paragraph 11.74

Consultation Question 124.

12.129 We provisionally propose that, on termination of the RTM, the functions of the RTM company should, by default, revert to:

(1) the party who is responsible for management functions in the ordinary course of events under the leases; or

(2) if that person no longer exists, the landlord.

Do consultees agree?

Paragraph 11.83

Consultation Question 125.

12.130 We provisionally propose that the default position should not however apply where:

(1) the tribunal has made an alternative determination or order; or

(2) the issue has been otherwise agreed between the RTM company and every landlord.

Do consultees agree?

Paragraph 11.84

Consultation Question 126.

12.131 We provisionally propose that, where an agreement between the RTM company and the landlord to terminate the RTM does not have the support of all qualifying tenants, that agreement should have to be approved by the tribunal. The tribunal should approve the agreement if it is satisfied that the leaseholders will be able to enforce performance of the management functions in the leases against the party proposed to be responsible for management. Do consultees agree?

Paragraph 11.92

Consultation Question 127.

12.132 We provisionally propose that, where an RTM company which has been struck off is restored to the Register of Companies relatively quickly, the tribunal should have the ability to declare that the RTM is restored to the RTM company. Do consultees agree?

Paragraph 11.98

Consultation Question 128.

12.133 Do consultees consider that an application to restore the company to the register should have to be made within 30 days of the strike off taking effect? If not, how long?

Paragraph 11.99

Consultation Question 129.

12.134 We provisionally propose that interim management should revert to the landlord or other responsible party under the lease, unless the leaseholders apply to the tribunal for a manager to be appointed on an interim basis. Do consultees agree?

Paragraph 11.100

Consultation Question 130.

12.135 We provisionally propose that the tribunal should have the power to reinstate the RTM even if the RTM has been terminated, if termination has occurred as a result of a clerical or administrative error which does not cause loss or prejudice to any party. Do consultees agree?

Paragraph 11.102

Consultation Question 131.

12.136 We provisionally propose that regulations should set out a non-exhaustive list of the circumstances in which an RTM company ceases to be an RTM company in respect of the premises. Do consultees agree?

Paragraph 11.105

Consultation Question 132.

12.137 We provisionally propose that those grounds on which an RTM company ceases to be an RTM company in respect of the premises should include:

(1) where the freehold of any premises over which RTM is exercised is transferred to the RTM company;

(2) where the articles of the company are changed so that they no longer provide that the purpose of the company is to manage the premises in question (subject to the RTM company being able to add/remove premises); and

(3) where the RTM company is a commonhold association.

Do consultees agree? Do consultees consider that any other circumstances should be included?

Paragraph 11.106

Consultation Question 133.

12.138 We provisionally propose that the appointment of a manager provisions in Part 2 of the Landlord and Tenant Act 1987 should be extended to apply to any premises which are being managed by an RTM company. Do consultees agree?

Paragraph 11.108

Consultation Question 134.

12.139 We provisionally propose that an RTM company should be able to apply to the tribunal at any time, whether it is solvent or not, to give up the RTM, and for an order that a manager is appointed, or that the management functions revert to the landlord or other person who has management functions under the lease. Do consultees agree?

Paragraph 11.116

Consultation Question 135.

12.140 Do consultees think there will be a time and/or financial saving if RTM companies can apply to the tribunal at any time to give up the RTM? How often do consultees think this option would be used?

Paragraph 11.117

Consultation Question 136.

12.141 We provisionally propose that the landlord should be able to object to an RTM company's application to give up the RTM only in exceptional cases. Do consultees agree? What should these be?

Paragraph 11.118

Consultation Question 137.

12.142 We provisionally propose that, while the RTM is continuing, the landlord should have the right to apply to the tribunal either:

(1) for the management functions to be transferred back to the party under the lease, failing which, the landlord; or

(2) if the default party is not best placed to manage the premises, for the appointment of a manager;

on the basis that the fault-based grounds for appointment of a manager under the Landlord and Tenant Act 1987 are made out. Do consultees agree?

Paragraph 11.125

Consultation Question 138.

12.143 We provisionally propose that, after the RTM has ceased, the landlord should be able to apply to the tribunal to appoint a manager instead of management reverting to the landlord or other party under the lease. Do consultees agree?

Paragraph 11.126

Consultation Question 139.

12.144 We provisionally propose that the application to appoint a manager instead of management reverting to the landlord or other party under the lease should have to be made within 30 days of the RTM ending. Do consultees agree?

Paragraph 11.127

Consultation Question 140.

12.145 We provisionally propose to clarify that the uncommitted service charges held by a solvent RTM company when the RTM ceases should be transferred to the party who takes over management. Do consultees agree?

Paragraph 11.132

Consultation Question 141.

12.146 We provisionally propose that there should be a statutory assignment from the RTM company to the new manager of the right to collect service charge debts when the RTM ceases. Do consultees agree?

Paragraph 11.137

Consultation Question 142.

12.147 We provisionally propose that the existing four-year restriction on successive RTM companies should be reduced. Do consultees agree?

Paragraph 11.142

Consultation Question 143.

12.148 What period of time do consultees think is appropriate for a restriction on successive RTM companies and why?

Paragraph 11.143

Consultation Question 144.

12.149 Do consultees have experience of cases where the tribunal has disapplied the four- year ban? If so, has there been any negative impact on any of the parties?

Paragraph 11.144

Appendix 1: List of stakeholders

1.1 Below we list the parties we have met or corresponded with, grouped into broad categories.

1.2 Certain of our meetings were also attended by representatives from MHCLG.

ADVISORY GROUP

1.3 Bridget Stark-Wills, Capsticks Solicitors LLP

1.4 Craig Stevens, Warwick Estates

1.5 Damian Greenish, Pemberton Greenish

1.6 David Evans, former legal chair of the Residential Property Tribunal for Wales

1.7 Jeremy Donegan, Bate & Albon Limited

1.8 Lorraine Scott, Scott Cohen Solicitors

1.9 Martin Boyd, Leasehold Knowledge Partnership ("LKP")

1.10 Nick Mills, Riversong Group

1.11 Philip Rainey QC, Tanfield Chambers

1.12 Roger Hardwick, Brethertons LLP

1.13 Shula Rich, RTM practitioner

1.14 Siobhan McGrath, President of the First-tier Tribunal (Property Chamber)

GROUPS REPRESENTING LEASEHOLDER/RTM COMPANY INTERESTS[1050]

1.15 Association of Leasehold Enfranchisement Practitioners ("ALEP")

1.16 BLR Property Management

1.17 Canonbury Management

1.18 Coole Bevis LLP

1.19 Leasehold Solutions

[1050] Note that we have not listed individual leaseholders, RTM company directors, RTM companies or tenants' associations.

1.20 LKP

1.21 Mayfield Law Limited

1.22 Professor James Driscoll

1.23 Steve Wylie

1.24 The Federation of Private Residents' Association ("FPRA")

1.25 The Leasehold Advisory Service ("LEASE")

1.26 The Right to Manage Federation ("RTMF")

LANDLORD INTERESTS

1.27 A2Dominion

1.28 Association of Leasehold Enfranchisement Practitioners ("ALEP")

1.29 Aviva Investors

1.30 Charities' Property Association

1.31 Consensus Business Group

1.32 Eagerstates Ltd

1.33 Freehold Managers PLC

1.34 Gateway Group Ltd

1.35 Homeground

1.36 Howard de Walden Management Limited

1.37 Long Harbour Ltd

1.38 Mainstay Group Limited

1.39 National Trust

1.40 Pinsent Masons LLP

1.41 Principle Estate Management

1.42 Residential Management Group Ltd

1.43 Simarc Property Management Limited

1.44 Sue Petri Consulting Limited

MANAGING AGENTS

1.45 Amax Estates and Property Services Ltd

1.46 Association of Residential Managing Agents (“ARMA”)

1.47 Bourne Estates Ltd

1.48 CBRE

1.49 Estates & Management Ltd

1.50 FirstPort

1.51 Jane Forsyth

1.52 Maunder Taylor

1.53 Rendall and Rittner

1.54 Riversong Group

1.55 SPL Property Management LLP

1.56 Stanley Chelsea

1.57 Urang Property Management Limited

RETIREMENT SECTOR

1.58 Associated Retirement Community Operators (“ARCO”)

1.59 Association of Retirement Housing Managers (“ARHM”)

1.60 Audley Villages

1.61 McCarthy and Stone

1.62 Millstream Management

1.63 Retirement Housing Group

1.64 Stanley Chelsea

SOCIAL HOUSING STAKEHOLDERS

1.65 National Leasehold Group (“NLG”)

1.66 Regulator of Social Housing

1.67 National Housing Federation (“NHF”)

INSURANCE INDUSTRY STAKEHOLDERS

1.68 Association of British Insurers (“ABI”)

1.69 Dr Özlem Gürses, Associate Professor in Insurance Law, Kings College London

1.70 iinsure365

1.71 M2 Recovery Ltd

1.72 Royal & Sun Alliance Insurance plc (“RSA”)