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Right to Manage 2012 Feature

Your essential guide to right to manage

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Right to Manage »

Exercising the right-to-manage can be a relatively inexpensive and quick, no-fault solution for resolving existing management issues/disputes within a building. This pull out and keep guide to right-to-manage introduces the key concepts and is written by independent industry practitioners.

RIGHT TO MANAGE

WHAT YOU NEED TO KNOW ABOUT RIGHT TO MANAGE COMPANIES?

Selchouk Sami explains in outline

> **"The formal Right to Manage (RTM) procedure provides leaseholders with the power to collectively decide who they would like to manage their block"**

THIS PIECE aims to shed some light on the leaseholder's statutory right which enables them to take charge of the management of their building by removing existing managing agents.

The formal Right to Manage (RTM) procedure provides leaseholders with the power to collectively decide who they would like to manage their block. This can be exercised even if the existing managing agent is technically "not at fault". So long as the right procedure is adopted the landlord has little say in objecting to the request.

There are only two grounds on which a Claim Notice can be disputed. These are that the building does not qualify, or there are insufficient participating leaseholders. In most cases the RTM company will become responsible to all leaseholders for: Services, Repairs, Maintenance, Insurance, Management of the whole or part of the building.

WHAT AN RTM COMPANY CAN DO

So long as thirty days prior notice has been given by the RTM company to the landlord, it can grant approval to any qualifying leaseholder's request for the following: Assignments, Underletting, Charging, Parting with possession, the making of structural alterations, improvements, alterations of use. In all other cases the RTM company cannot grant approvals without having given the landlord fourteen days notice. The landlord cannot unreasonably withhold such consent.

OBLIGATIONS UNDER THE LEASE

The RTM company has the legal right to take action to enforce any obligation entered in to by any leaseholder of the building under a lease. This can include where a leaseholder is in breach by causing another leaseholder a nuisance.

MEMBERSHIP OF THE RTM COMPANY

There must be at least 50% of the number of flats in the block to qualify.

THE RTM PROCESS

It may be prudent to get your landlord to comply with their obligations under the lease for example repairs to the structure of the building before taking over with an RTM company. Equally it may be more appropriate to purchase the freehold of the building even though this option is likely to be significantly more expensive.

WHY YOU SHOULD CONSIDER PURCHASING THE FREEHOLD INSTEAD?

- Allows the leaseholders who join in the freehold purchase to collectively agree on the management of the block and also take on the obligations on the part of the landlord set out in the lease.
- Those that participate in the purchase can extend their leases to 999 years and reduce the rent to a peppercorn.
- Receive future rental payments from those leaseholders that choose not to participate in the purchase of the freehold and also the premium a non participating leaseholder may pay, if they decide to extend their lease.

Selchouk Sami is a Solicitor at Stennett & Stennett

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RIGHT TO MANAGE

THE PROBLEMS WITH RIGHT TO MANAGE

Roger Hardwick discusses some uncertain legal issues

ONE PARTICULAR RIGHT TO MANAGE PROBLEM is that the Commonhold & Leasehold Reform Act 2002 fails to make satisfactory provision for developments comprising more than one block; managed under one service charge scheme.

Section 72(1) provides that the right to manage applies to premises "which are a self-contained building or part of a building, with or without appurtenant property".

The first question is whether "building" can be interpreted to mean "buildings". Section 6 of the Interpretations Act 1978, provides that "unless the contrary intention appears ... words in the singular include the plural".

It is arguable the contrary intention appears. Under the qualifying requirements for collective enfranchisement (which are materially identical), it is accepted the right can only be exercised in relation to single buildings (the County Court decision Garden Court NW8 Property Court Ltd. v Becker Properties is considered correct).

By contrast, the appointment of a manager, can include multiple buildings. It has also been decided the phrase "building" can mean more than one building where there was an acquisition pursuant to the tenants' right of first refusal (the Court of Appeal decision: Long Acre Securities v Karet has been criticised by some).

Secondly, and equally perplexing, is the question of whether a single RTM company can serve more than one claim notice, in relation to multiple blocks. The argument against is that a RTM company is only a valid in relation to premises if "its memorandum of association states its object...is the acquisition and exercise of the right to manage the premises", while "premises" can only mean one building or part of a building.

This argument is considered to be correct by several leading authorities, but the LVT disagreed in Dawlin RTM Ltd. v Oakhill Park Estates and, more recently, in Kingsmere RTM Company v Anstone Properties (although the claim was dismissed because the claim notices were not served simultaneously and so the RTM company had acted ultra vires).

In Belmont Hall Court and Elm Court RTM Company v The Halliard Property Company, by contrast, the LVT decided that a RTM company can only be for a single set of premises, but, depending on the facts, these may comprise more than one building (it did not, in that case).

Finally, the Court of Appeal will soon consider the meaning of "appurtenant property" in Gala Unity v Ariadne Road RTM Company. Previously, the Upper Tribunal ruled "appurtenant property" should include property over which tenants have rights (eg access roads and gardens). The appellant will argue the phrase should be more restrictive, to mean only property included within the demise of individual leases.

> **"(the) Act 2002 fails to make satisfactory provision for developments comprising more than one block"**

Until these issues are resolved, leaseholders face a quagmire of uncertainty, along with the possibility of an expensive LVT hearing to determine whether they qualify. This cannot have been the legislative intent and hopefully some judicial guidance will follow.

Roger Hardwick is Head of Enfranchisement at Brethertons Solicitors

RIGHT TO MANAGE

GATHERING SUPPORT FOR RTM

Nicolas Shulman explains how to get your fellow flat owners on board

In order for the Right to Manage Company (RTM Co) to be effective in its purpose, at least 50% of the qualifying leaseholders in the building must become members. This will require a concerted and determined effort on behalf of one or more qualifying tenants in order to create a groundswell of support for the RTM Co. By law, all qualifying flat-owners must be invited to become members of the RTM Co (see Section 78 of CLARA 2002). There is a prescribed form of notice inviting participation which must be served on all qualifying flat-owners containing:

- a statement that the RTM Co intends to acquire the right-to-manage;
- the names of the members of the RTM Co;
- the purpose of the RTM Co;
- an invitation to qualifying flat-owners to become members of the RTM Co, and the implications of joining;
- the names of the directors and company secretary of the RTM Co;
- the names of the landlord and any other person who is party to the lease other than the lessees;
- the registered number of the RTM Co;
- the address of the registered office of the RTM Co;
- a copy of the Memorandum and Articles of Association or a statement explaining where these documents can be located.

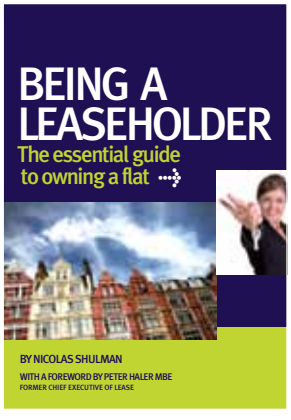
The purpose of the RTM Co will be to acquire the ability to determine the management functions of the building from the landlord (except for any flats owned by the landlord or any commercial space). As a consequence, the RTM Co can then decide:

- to keep the current managing agent;
- to replace the current managing agent with another professional managing agent;
- to self-manage the building (in which case, management experience of the members of the company should be explained);

In addition, although it is not compulsory, it is useful to provide a draft plan/budget to show prospective members how the RTM Co intends to manage the building after the right has been exercised.

Because each member of the company will be liable for the landlord's costs from the time the initial notice is served until the right is exercised, it is important that participation in the company is carefully considered and, where appropriate, the flat-owner receives independent legal advice (see Section 88–89 of the 2002 Act). Once a flat-owner has decided to become a member, they should respond to the notice inviting participation, whereupon they will be inscribed in the company's records and be issued with appropriate corporate certification.

Unless the notice inviting participation is carefully drafted to include the above information and served properly, it may be considered to be invalid. Therefore, it is prudent for the company itself to obtain its own legal advice at the earliest opportunity, since this will avoid any later potential challenge by the landlord.



This is an edited extract from the book, Being a Leaseholder - the essential guide to owning a flat by Nicolas Shulman. The book is available on Amazon in print or Kindle edition or directly from News On The Block - email support@newsontheblock.com to purchase your copy.

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LEGAL

THE RTM CLAIM HAS LANDED: WHAT NEXT?

Yashmin Mistry gives some advice to landlords on responding to a claim notice

WHEN A LANDLORD IS NOTIFIED of an intention to exercise the right to manage ('RTM') certain factors need to be considered, namely:

- whether the right should be admitted at all;
- existing contracts;
- contractor notices;
- duty to provide information; and
- transfer of funds

CONDITIONS FOR OBJECTING: Landlords should be aware they cannot resist the RTM if all relevant conditions are met. Landlords may challenge the claim notice and issue a counternotice if there is evidence that:

- There are not enough "qualifying tenants"
- There is already an RTM company in existence
- The RTM does not represent at least 50% of qualifying tenants

The requirements for a counter-notice are contained in Section 84 and the 2003 Regulations with a prescribed form annexed at Schedule 3 to the 2003 Regulations.

The scope for dispute is limited and hopefully landlords react in a professional manner. If there is no basis for challenging eligibility, obstruction is only likely to delay matters by a few months and incur irrecoverable costs.

OTHER CONSIDERATIONS:
Existing Contracts: It is the landlord's obligation to ensure all parties are aware of the relevant contracts through service of "the contractor notice".

When RTM is exercised, the landlord is likely to have a number of contracts in place relating to the block. Under the 2002 Act all responsibility for management under the terms of the leases transfer to the RTM Company. The landlord will therefore no longer be in a position to fulfil any contractual duties and the RTM will need to decide whether to renew the contracts or look elsewhere for the provision of those services.

Contractor Notice: The contractor notice must be served by the landlord on all contractors appointed by the landlord and must include the following information:

- Identity of the relevant contract
- Statement that the RTM is to be acquired by an RTM company;
- The name and address of the RTM Company
- The Acquisition Date
- Statement advising a contractor who wishes to continue to provide services to the building to contact the RTM company

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

Duty to Provide Information: The RTM Company will not be able to manage the building without detailed information and the company can request whatever it "reasonably requires in connection with the exercise of the RTM" by issuing the landlord with a duty to provide information notice. The landlord must supply the information requested within 28 days.

Duty to transfer funds: Where a landlord has collected service charges in advance but not yet spent them, he is under a statutory obligation to hand the money to the RTM without notice on or as soon after the Acquisition date as reasonably practicable.

CONCLUSION:
Regardless of potential technical objections, Landlords should consider whether to object and the extent to incur costs which may be irrecoverable. It may be more pragmatic to accept the claim. After all, a landlord will surely be concerned only with maintaining proper management of his freehold interest?

Yashmin Mistry is Partner at Jaffe Porter Crossick LLP

LEGAL

The Commonhold and Leasehold Reform Act 2002 - the difference a decade makes

Nicholas Kissen provides a brief reminder of some of the changes introduced by this Act.

ON 1ST MAY 2002 the Commonhold and Leasehold Reform Act 2002 received Royal Assent and with a few exceptions most of its provisions have since come into force.

Flat owners made particular gains. The abolition of the residence requirement undoubtedly enabled more people to extend their leases or buy the freehold of the building in which their flat is located.

Right to Manage was introduced for the first time in the 2002 Act giving leaseholders of flats the chance to take over the running of the building without having to prove there is anything wrong with the way it is being managed.

It is not a cure-all. It may not be suitable for every building or in some cases the right solution to management problems. Disputes can still arise over the commissioning of major works nor can it be a guarantor of good behaviour by flat-owners. But it is a useful weapon in the armoury of those wishing to improve the management of their building.

Section 21B ensured that with each demand for service charges a leaseholder would receive a summary of rights and obligations. The right to withhold payment is a powerful sanction against a manager who has not supplied the summary in the required form and with the prescribed content. A way of bringing home to leaseholders what legal rights they have in respect of service charges.

One of those rights lies in an enhanced consultation process to be followed before major works are embarked upon or long term agreements entered into for the supply of services or carrying out of works. Also, with it an ability to apply to the Leasehold Valuation Tribunal rather than the county court for an order to dispense with some or all of the procedure.

The remit of the LVT was enhanced to take in all manner of service charge disputes. Not just how much should be paid but does the lease provide for payment.

Charges for sub-letting and alterations as well as interest on arrears are classified as administration charges. As such they must be a reasonable amount, an issue which can be decided by the LVT. And with each demand for administration charges a summary of rights and obligations should be given otherwise payment is suspended.

> **“It is not a cure-all. It may not be suitable for every building”**

But as one can see from the title there are two aspects to the 2002 Act and Commonhold came into force in September 2004. Eight years have passed and there has been little take-up so far.

Who knows what the next ten years will bring?

Nicholas Kissen is a Senior Legal Advisor with The Leasehold Advisory Service

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