

**MENNEER SHUTTLEWORTH THE RIGHT TO MANAGE FLATS
(SECTION 71 COMMONHOLD & LEASEHOLD REFORM ACT 2002)**

The above provision enables qualifying leaseholders to acquire and exercise the management of a block or blocks of flats by using a special form of company known as a Right to Manage (RTM) company.

To exercise this right it is not necessary to prove that the Landlord has been at fault in any way.

It will only be possible for a Landlord to dispute the application for the Right to Manage on technical grounds.

On acquiring the Right to Manage all the obligations and duties on the Landlord, as set out in the flat leases, pass to the RTM company. However, the right of re-entry and forfeiture (in other words the right of any Landlord to take back the lease for the breach of covenant i.e. non-payment of rent) remains with the Landlord.

To make the application not less than half of the leaseholders must participate, but there is no requirement that those participating are resident in their flats.

Qualifications for RTM

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

- The building must be self-contained (or if part of another building, be capable of being redeveloped independently);
- It must include at least two flats;
- At least two-thirds of the flats must be let to 'qualifying tenants'*;
- It can be part commercial but the non-residential part must not exceed 25% of the total floor area.

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

It is possible for leaseholders that are themselves companies to exercise the right.

Suitable RTM companies can be acquired (off the shelf) from company formation agents.

The company must be formed before the RTM can be transferred from the Landlord

Useful information on the requirements for forming and running a company can be found at the website of Companies House www.companies-house.gov.uk

Once the company has been formed, a Notice is served on non-participating leaseholders (if any) inviting them to participate by becoming a member of the company.

Notice is then served on the Landlord and any other interested parties, such as a managing agent.

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

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

The Notice of Claim

The claim may only be served where:

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

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

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

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

A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises.

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

- specify the premises and include a statement of the grounds on which the premises comply with the qualifications for RTM;

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

The regulations require the inclusion of three further points:

- a statement informing the Landlord that he may alert the company to any inaccuracies in the notice.
- a reminder in the notice for a Landlord who has no objection to the claim to serve what are known as the 'contract' and 'contractor' notices.
- a statement to remind the Landlord of his statutory right to membership of the RTM company

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

The Landlord's Counter-Notice

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

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

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

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

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

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

The Counter-Notice must specify the reason for the alleged non-qualification by reference to the specific requirements of the Act and must state that:

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

The RTM company must make the application to the LVT within two months of the date of the Landlord's Counter-Notice. If the application is not made within this time, the claim is deemed to be withdrawn.

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

If the RTM is established, the company takes over the management of the premises and no compensation or premium is payable to the freeholder.

The RTM company must, however, pay the freeholders costs of dealing with the notice but is not responsible for costs if the matter has to be determined by the Tribunal.

RTM companies

These companies are limited by guarantee and therefore there will be no share certificates.

Upon a leaseholder selling their lease, the incoming purchaser will take over the outgoing leaseholders membership of the RTM company.

Acquisition by the RTM

The Acquisition Date is the date set out in the Claim Notice unless a Counter Notice is served. In this event, assuming the application is successful, the RTM company will take over one month after the Tribunal determination.

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

As the Right to Manage is not default-based, there is no reason why the Landlord, who retains an interest in the building, should not have some input to the practicalities of its management. It is different where the Manager has been appointed by a Tribunal to replace an incompetent Landlord

The right is not limited to the immediate Landlord, but includes any intermediate Landlords under the lease. For example, the Landlords may comprise the freeholder plus the Head Lessee, or the freehold may be split in its ownership and the two or more owners of the split freehold may be entitled both to membership of the company and to a vote.

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

The situation is a little more complicated where the the Landlord's retained units are non-qualifying, that is, where they are commercial or otherwise non-residential units. Their overall management of the building will then have some impact on the general operation of the commercial parts. Therefore the Landlord will also be able to exercise votes in respect of these units.

The votes allocated in respect of the non-residential parts will be proportional to the relative internal floor areas of the residential and non-residential parts of the building, excluding the common parts. This is calculated by taking the total number of votes allocated to the residential parts and multiplying that number by the formula A/B , where A is the total floor area of the non-residential parts, and B is the total area of the residential parts (the areas are to be measured in square metres).

Management Contracts

It will often be the case that the freeholder has entered into contracts for the management of the premises. On the RTM company taking over these management, these contracts will be frustrated and the freeholder and the contractor will have to conclude matters as best they can.

It will be open to the RTM company to negotiate with contractors concerned with a view to the contract being transferred over.

Uncommitted Service Charges

If at the time of acquisition the freeholder holds uncommitted service charge contributions paid by the leaseholders, then these must be paid over to the RTM company on the acquisition date.

Managing under the Right to Manage

The following points should be borne in mind in relation to the future responsibilities of the RTM company:

- Landlords' functions under the lease are taken on by the RTM company;
- the Landlord will have an action against the RTM company if it fails to manage the premises in accordance with the terms of the leases;
- individual leaseholders can take action against the RTM company if they consider there has been a breach of the company's obligations under the lease;
- after the Acquisition Date leaseholders will pay service charges to the RTM company. Ground Rent will still be payable to the Landlord. (NB- the Landlord can retain the right to insure but at his own expense).
- specifically after the acquisition date the RTM company is responsible for repair, maintenance and insurance (save as above) and the collection of service charges;
- application for permissions to sub-let will be dealt with by the RTM company (although they must give the freeholder requisite notice, usually 30 days, before granting permission);
- the RTM company must take action to enforce non-compliance with leaseholders covenants;
- where the flats are sub-let, the RTM company will be responsible to sub-tenants for the basis structure of the building and for heating, sanitation and supply of water, gas and electricity;
- all the legislative requirements in relation to service charges will apply to the RTM company;
- RTM companies must report to the Landlord if leaseholders are in breach of covenant.

Ending the Right to Manage

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

There are three circumstances where the right may be terminated:-

- by agreement with the Landlord- the RTM company may simply agree to return the management to the Landlord.
- through the collapse of the RTM company- if the company is wound up, is taken onto receivership, goes into voluntary insolvency or is struck off the Register of Companies, then the Right to Manage ceases to be exercisable and the management responsibility is restored to the Landlord;

- through the appointment of a manager- Part 2 of the Landlord and Tenant Act 1987 provides that a LTV may appoint a manager to take over and run the building. Such an order may be a response to an application by the leaseholders, or by the Landlord. Alternatively the Tribunal may simply make an order that the right ceases to be exercisable by the RTM company.

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

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

Where the Right to Manage is terminated, for any reason, no further application for the right may be made for another four years, other than with the consent of the LVT.

General Points

- Leaseholders will need to decide amongst themselves who will take responsibility for the different roles i.e. Directors Company Secretary (although it is no longer a statutory requirement to have one), Treasurer, Foreman of Works etc.
- If leaseholders do not have the time to carry out the functions mentioned, it may be appropriate to appoint their own managing agents to take over the day to day running of the premises. Clearly the extent to which this is necessary will depend on the size and nature of the building in which the flats are located.

Procedures and statutory time limits

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| <ul style="list-style-type: none"> • Leaseholders form RTM company and register at Companies House. • RTM company serves S82 Right to Information Notice (discretionary). • Landlord must respond within 28 days. • RTM company must serve a S78 Notice Inviting Participation on all qualifying leaseholders who are not members of the RTM company. • RTM company may not serve S79 Notice of Claim until at least 14 days after service of the Notice Inviting Participation. • RTM company serves S79 Notice of Claim, which: <ul style="list-style-type: none"> ○ must allow at least one month from date of service for landlord to serve a counter-notice (the determination date); ○ must propose a date of acquisition at least three months after the date proposed for the landlord's counter-notice (the acquisition date). |
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- RTM company, or the landlord, serves the S83 Right of Access Notice, requiring access for inspection (discretionary).
- Parties must respond within 10 days.
- Landlord may serve a S84 counter-notice, which either:
 - accepts the claim; or
 - disputes the claim on grounds specified in the counter-notice.
- Where landlord disputes the claim, RTM company must apply to the Leasehold Valuation Tribunal within two months of the date of the counter-notice.
- Landlord must serve S92 Contractor Notices and Contract Notices on the determination date, or 'as soon as is reasonably practical' after that.
- RTM company serves S93 Duty to Provide Information Notice.
- Landlord must respond within 28 days of the notice, subject to the proviso that he is not obliged to do so until after the acquisition date.

The acquisition date will be:

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

- Landlord may take up membership of the RTM company.
- RTM company to allocate votes to landlord according to his holding in the building.
- Landlord must transfer all uncommitted service charges on the acquisition date or 'as soon after that date as is reasonably practicable'.
- RTM company must give landlord notice of an intention to grant an approval under the lease for:
 - assignment, sub-letting, placing a charge, parting with possession, structural alterations or change of use - 30 days;
 - all other approvals - 14 days.

For further guidance and advice please contact either David Collins or Nikki Coward.

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