

RIGHT TO MANAGE

Commonhold And Leasehold Reform Act 2002

The Commonhold and Leasehold Reform Act received Royal Assent on 1st May 2002. The provisions of the Act will be phased in from July.

The Act's main headings can be summarised as follows:

Part I - Commonhold

Part 2

Chapter I - Right to manage
Chapter II - Collective enfranchisement
Chapter III - Flat claims
Chapter IV - House claims
Chapter V - Service charges etc.
Chapter VI - Leasehold valuation tribunals
Chapter VII - General

Pemberton Greenish are producing a number of briefing papers on the Act. In this briefing paper we look at Chapter I in Part 2.

THE RIGHT TO MANAGE

Introduction

The provisions relating to the right to manage are contained in Chapter 1 of Part 2 of the Act. They introduce a new right for tenants, who fulfil certain qualifying conditions, to take over the management of their building, without first having to show fault on the part of the landlord and without having to pay any compensation when the right is exercised. This will be in addition to the existing right to apply to a leasehold valuation tribunal for the appointment of a manager under Section 24 of the Landlord and Tenant Act 1987 where the tenants have to show to the satisfaction of the tribunal that a landlord is in breach of his obligations.

Qualifying conditions

The premises to which the right to manage will apply are blocks of flats, defined in much the same way as in Part 1 of Chapter 1 of the Leasehold Reform, Housing and Urban Development Act 1993 in that

- they must consist of a self-contained building or part of a building, with or without appurtenant property¹
- they must contain two or more flats held by qualifying tenants², and
- the total number of flats held by such tenants must be not less than two thirds of the total number of flats contained in the premises

A building is a self-contained building if it is structurally detached.

A part of a building is a self-contained part if it constitutes a vertical division of the building, and the structure of the building is such that it could be redeveloped independently of the rest of the building and the relevant services either are provided independently for occupiers of the rest of the building or could be so provided without carrying out works likely to result in a significant interruption in the provision of such services. The relevant services are those provided by means of pipes, cables or other fixed installations.

Certain premises which fulfil those conditions are nevertheless excluded from the right to manage and these are set out in Schedule 6. In brief, they are

- Those where the internal floor area of any non-residential part or the sum of non-residential parts exceeds 25% of the whole. This mirrors the exclusion from the right to collectively enfranchise

¹ Defined as “.....any garage outhouse garden yard or appurtenances belonging to, or usually enjoyed with, the building.....”

² Principally a person who holds a long lease of a flat (a lease for an original term exceeding 21 years) but excluding a business tenancy

- Those which contain separate self-contained parts where the freehold of those parts is owned by different persons
- Non-purpose built blocks of flats where the building contains not more than four units and the landlord or an adult member of his family lives in one of those units as his only or principal home and has done so for the previous twelve months
- Premises where the landlord of any of the qualifying tenants is a local housing authority
- Premises where the right to manage has already been acquired and continues to be exercisable. Where a RTM company ceases to be responsible for the management of premises (other than where the RTM company acquires the freehold) then a party cannot acquire the right to manage within a period of four years from that event except with the consent of the leasehold valuation tribunal.

Setting up a right to manage company

In order to exercise the right to manage, tenants must become members of a private company limited by guarantee, whose memorandum of association must include as one of its objects, the acquisition and exercise of the right to manage the premises. The only people entitled to become members of the right to manage company are

- qualifying tenants and
- the landlord under leases of the whole or any part of the premises (although landlords cannot be members before the right to manage is acquired).

A qualifying tenant is a tenant of a flat holding a long lease³ – in general terms a lease originally granted for a term of more than 21 years. The definition of qualifying tenant broadly follows the definition in the 1993 Act⁴; in particular, a business tenant cannot be a qualifying tenant.

A company cannot be a right to manage company if there is already an RTM company in existence for the purpose of the right to manage or if it is a commonhold association or if the freehold of the premises is conveyed to the RTM company.

The form of the memorandum and articles of association of the RTM company will be the subject of regulations to be made by the appropriate national authority⁵.

³ the definition of “long lease” follows the definition in the 1993 Act

⁴ but there is no limit on the number of flats that can be owned by one person

⁵ the “appropriate national authority” means the Secretary of State (in respect of England) and the National Assembly for Wales (in respect of Wales)

Before making a claim to acquire the right to manage, a RTM company must give notice to each qualifying tenant in the building who is not already a member of the company. This notice must

- state that the RTM company intends to acquire the right to manage
- state the names of the members of the RTM company
- invite such tenant to become a member and
- contain such other information as may be prescribed by regulation.

The notice is likely to be in prescribed form and must either be accompanied by a copy of the memorandum of association and articles of association of the RTM company or include a statement about inspection and copying of the memorandum and articles and specify where they may be inspected and at what times.

Initial Procedure

Once the RTM company has been set up and the invitation notices served on all qualifying tenants in the premises who are not already members, the RTM company, if it is willing and able to proceed, must serve a claim notice on

- the landlord
- any party to a lease who is neither the landlord nor the tenant
- any manager appointed under Part 2 of the Landlord and Tenant Act 1987 and the leasehold valuation tribunal or Court by which the manager was appointed.

A claim notice does not need to be given to any person who cannot be found or identified, but if this means that nobody at all would be served, then the RTM company will need to make an application to the leasehold valuation tribunal for an order that it can acquire the right to manage.

In addition, a copy of the notice must be given to every person who, at the relevant date⁶, is a qualifying tenant of a flat in the premises, whether or not they are also members of the RTM company.

The claim notice must be served not less than fourteen days after the notice inviting participation.

The notice (which may be in a prescribed form) must state

⁶ defined as being the date on which the claim notice is given – if there is more than one person to be given the notice, it will be the date on which the last person who needs to be served is served

- the name of each qualifying tenant who is also a member of the RTM company together with details of his address and particulars of his lease
- the name and registered office of the RTM company
- a date, which must be at least one month after it is given, inviting the recipient to respond to it by giving a counter-notice
- a further date, being at least three months after the date giving the counter-notice, on which the RTM company intends to acquire the right to manage the premises, and
- such other particulars as may be prescribed by regulations.

If there are only two flats in the building, then the tenants of both must be members of the RTM company at the date that the notice is given. However, in any other case, membership of the RTM company must include a number of qualifying tenants which is not less than one half of the total number of flats in the building.

An RTM company is given a right to obtain copy documents and information from any person relating to the premises which is reasonably required by the RTM company for the purpose of ascertaining the particulars needed to be included in the claim notice. Such a notice must be complied with within 28 days.

Once the claim notice has been served on the landlord, the RTM company or any of the persons served with the claim notice (i.e. the landlord, the third parties and any 1987 Act manager) and any authorised representative of any of those persons, is entitled to a right of access to any part of the premises in connection with anything arising out of the claim to exercise the right to manage. The right is exercisable on not less than ten days notice.

As long as the qualifying conditions are satisfied there is no defence to a right to manage claim; a claim can only be resisted if it can be established that the claimants are not entitled to exercise the right to manage through a failure to meet the eligibility criteria set out in the Act; for example, because more than 25% of the internal floor area of the building is used for commercial purposes.

The procedure is that any of the persons who are given a claim notice may give a counter-notice (which may well be in a prescribed form and/or contain prescribed particulars) within the period specified in the claim notice and that counter-notice must either

- admit the right, or
- not admit the right by reference to a specific provision of the Chapter.

If an RTM company receives one or more counter-notices which dispute its right, then it can apply to the leasehold valuation tribunal for a determination that it is entitled to the right. There is a strict time limit for making that

application⁷. In such circumstances, it will not acquire the right to manage unless either the tribunal finds in its favour or the objectors concede.

A claim notice can be withdrawn at any time before the RTM company acquires the right to manage⁸; there are also a number of circumstances where a notice is deemed withdrawn⁹.

Generally, the recipients of a claim notice are entitled to recover their costs of dealing with it, including costs before a leasehold valuation tribunal, if the RTM company is found not to be eligible to acquire the right to manage. Members of the RTM can be personally liable for costs if a claim ceases to have effect.

Acquisition of right

If none of the recipients of a claim notice serve a counter-notice disputing the entitlement of the RTM company to acquire the right to manage, it is acquired on the date specified in the claim notice for that purpose.

If an application is made to the leasehold valuation tribunal and it is determined that the RTM company was entitled to acquire the right to manage or the objectors concede that the RTM company had the right, then the right is acquired on a date three months after the final determination of the matter by the tribunal or three months after the date of concession (as applicable).

If the RTM company obtains an order from the tribunal because there is no person ascertainable or identifiable on whom the claim notice can be served, then the right to manage will be acquired on such date as the tribunal specifies in that order.

It is provided that, once the eligibility of the RTM company to acquire the right to manage has been determined and prior to the handing over of the management to the RTM company, the parties responsible for and employed in the management of the premises should be enabled to make arrangements to prepare for the RTM company taking over the management. This is achieved through the mechanism of serving notices, called firstly a "contractor notice" and secondly a "contract notice".

The manager of the premises (in most cases likely to be the landlord but might be a third party management company or a manager under Part 2 of the 1987 Act) must give to each of the contractors employed by him to carry out management functions in relation to the premises a notice which will

- identify the contract
- state that the right to manage is to be acquired by the RTM company
- state the name and registered office of the RTM company

⁷ two months from the date of the counter-notice

⁸ a notice of withdrawal needs to be given

⁹ principally if the RTM company fails to make its application to the LVT within the specified time limit but also if the RTM company is wound up etc.

- specify the date on which the RTM company will be taking over, and
- contain such other particulars as may be prescribed by regulations.

This is called a “contractor notice”. There are corresponding provisions for a person who receives a contractor notice to give a similar notice to any sub-contractors.

The manager of the premises is also required to give a notice¹⁰ to the RTM company

- giving particulars of the contracts and of the contractors already employed by the manager to carry out the management of the premises
- such further particulars as may be prescribed by regulation.

This is called the “contract notice”. Again, there are corresponding provisions to deal with sub-contracts.

There is also a further opportunity for the RTM company to obtain copy documents and any information relevant to the management of the premises from the manager by service of notice. Copy documents and information must be supplied within twenty-eight days of the request. However, a person who is required by a notice to do anything, cannot be required to do it before the acquisition date or, if the acquisition date falls within four months following the date that the claim notice was given, then before the end of that four month period.

The manager of the premises is obliged to pay to the RTM company all sums held as service charges on behalf of tenants in respect of the premises, save for any amount which is required to meet costs incurred before the right is acquired. The RTM company is entitled to be paid these sums on the date that it acquires the right to manage¹¹ unless that date is less than four months after the date on which the claim notice was given in which case payment should be made at the end of that four month period. The RTM company or the manager may apply to the leasehold valuation tribunal for a determination of the amount to be paid over.

Exercising Right

The management functions which the RTM company acquires in respect of the premises are those relating to “services, repairs, maintenance, improvement, insurance and management”¹². Where either a landlord or a third party to a lease is required under the terms of that lease to carry out management functions, then as from the acquisition date those management functions become the

¹⁰ which may be in a prescribed form

¹¹ or “.....as soon after that date as is reasonably practicable”.

¹² the definition of “management functions” can be altered by order of the appropriate national authority

responsibility of the RTM company but not in so far as such management functions

- are functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit which is not held on a lease by a qualifying tenant (e.g. a commercial unit or rented flat), or
- are functions relating to rights to re-enter or forfeit¹³.

Accordingly, once the management functions have become the responsibility of the RTM company, they are no longer the functions of the landlord and/or the third party and

- any provision of a lease governing the relationship of the landlord and/or the third party in relation to such function no longer has effect, and
- the landlord and/or the third party is no longer entitled to perform those functions unless otherwise agreed by the RTM company.

Once the right to manage has been acquired by the RTM company, its obligations in respect of the management functions will be owed not only to the tenants but also to the landlord. Similarly, the obligations of the tenant to the landlord become obligations to the RTM company¹⁴.

There are special provisions concerning granting approvals¹⁵. As with “management functions” it is stated that such provisions do not apply in relation to an approval concerning only a part of the premises consisting of a flat or other unit not held under a lease held by a qualifying tenant (i.e. a commercial unit or rented flat). Subject to that saving, where approvals are required under the terms of the tenant’s long lease (for example consents to assign or underlet or to carry out alterations to the premises) the RTM company will now deal with these in place of the landlord. However, where a tenant seeks approval for assignment, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use, the RTM company must give thirty days written notice to the landlord. For all other approvals, fourteen days notice must be given¹⁶.

If the landlord objects to the grant of any approval within the time limit (and he can only object on a ground that he could sustain if he had remained responsible for granting the consent), the RTM company may not grant the approval without the subsequent written agreement of the landlord or in accordance with a determination of the leasehold valuation tribunal. An application to the tribunal

¹³ these exclusions can be altered by order of the appropriate national authority

¹⁴ in particular, this provision will allow the RTM company to recover the service charge from the tenant

¹⁵ the expression “approval” includes consent or licence

¹⁶ this 14 day period can be increased (but not apparently decreased) by regulations made by the appropriate national authority

may be made by the RTM company, the tenant seeking approval or by the landlord¹⁷.

An RTM company is also empowered to enforce (other than by re-entry or forfeiture) what the Act calls "untransferred tenant covenants". A tenant covenant means simply a covenant to be complied with by the tenant under the lease and it will be untransferred if it would not be enforceable by the RTM company but for this Section of the Act. In addition to the person who can enforce such covenants under the terms of the lease, an RTM company will also be able to enforce any untransferred tenant covenants in the same manner as they would be enforceable by that person¹⁸.

The RTM company also has an obligation to monitor compliance by tenants with lease terms generally and to report breaches to the landlord.

There are also provisions for the landlord to meet the short-fall in any service charges in so far as it relates to flats or units which are not subject to a lease held by a qualifying tenant.

Other provisions

An RTM company will cease to be entitled to exercise the right to manage if

- it is so agreed between the RTM company and the landlord
- the RTM company is wound up, a receiver or manager is appointed, it is struck off, or it enters into a voluntary arrangement
- a manager is appointed to replace it under the Landlord and Tenant Act 1987; a landlord will be able to make an application under the 1987 Act in relation to an RTM company
- it ceases to be an RTM company in relation to the premises.

There is a section relating to contracting out¹⁹; generally the county court has jurisdiction to require compliance with obligations under the Act²⁰ (save to the extent that the leasehold valuation tribunal is given specific jurisdiction) and the Chapter will apply to the Crown.

Schedule 7 seeks to impose on an RTM company similar statutory restraints as are currently imposed on landlords. They are listed at some length in that Schedule but for example a RTM company will find itself subject to

¹⁷ it would appear therefore that in relation to determination of the question of whether the landlord can object to the RTM company giving an approval, it is the LVT which has jurisdiction to determine that issue, whereas presumably the court will retain jurisdiction to determine whether the RTM company is unreasonably withholding consent.

¹⁸ it should be noted that this section applies to any lease and not just a long lease

¹⁹ contracting out is not permitted

²⁰ a 14 day notice of default must be given before proceedings are issued

- Section 19 of the Landlord and Tenant Act 1927²¹
- The duty of care imposed by section 4 of the Defective Premises Act 1972
- Section 11 of the Landlord and Tenant Act 1985 (with modification)
- The service charge etc. protection given under the Landlord and Tenant Acts 1985 and 1987
- The appointment of a manager under the Landlord and Tenant Act 1987²²
- The Landlord and Tenant Act 1988.

Damian Greenish
Pemberton Greenish
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For further details please contact:
 Damian Greenish on 020 7591 3350 or E-mail d.greenish@pglaw.co.uk

²¹ it seems that it could not be unreasonable for the RTM company to withhold consent where it has received notice of objection because it cannot grant consent until that objection has been dealt with. If the objection is not sustained, does the tenant have any right of action against the person who objected? Presumably not as it is no longer his function to give consent.

²² the application can be made by the tenant of any flat or by any landlord. It will be possible to make an order appointing a new manager against an RTM company where it fails to fulfil any of its obligations in respect of granting approvals or monitoring covenants, or where the company wishes itself to be replaced as manager. Furthermore, this power will include a power to order that the right to manage is no longer exercisable by the RTM company. The right of compulsory acquisition under Part 3 of the 1987 Act will however not apply