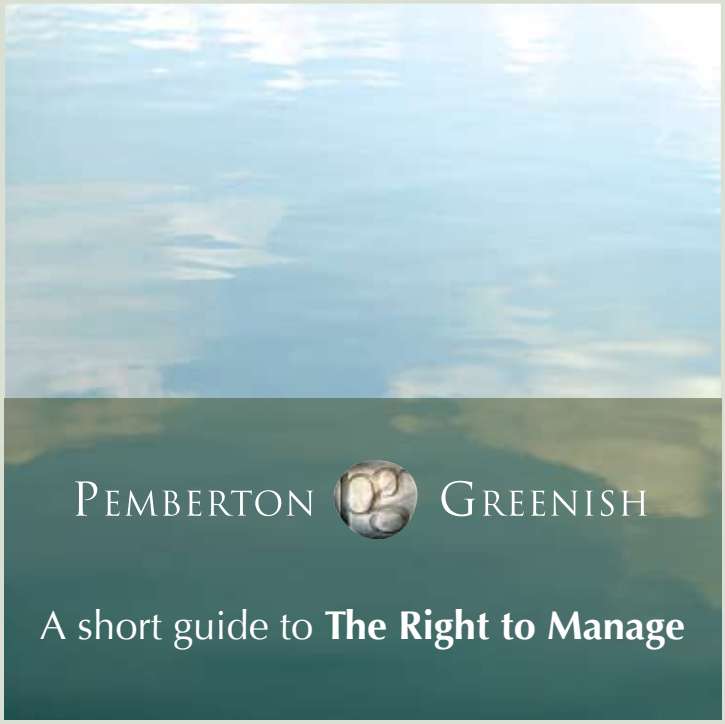
PEMBERTON GREENISH
A short guide to **The Right to Manage**

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By Section 37 of the Supreme Court Act 1981 the High Court was given the power to appoint a receiver or manager of a property where a landlord was in default. A similar power was given to the County Court by Section 34 of the County Courts Act 1984. However, once appointed the receiver or manager had to obtain the approval of the Court for the various steps he needed to take in order to manage the premises. As a result the procedures were both unwieldy and expensive and tended to be used as a last resort in cases where, for example, the landlord had disappeared or where major works of repair were urgently needed.

During the early 1980s complaints from tenants regarding the management of their premises increased and led to the publication of a Code of Practice for the management of residential blocks by the RICS. The issue was considered by a Committee of Inquiry set up by the Government under the chairmanship of Edward Nugee QC which produced a report in November 1985. The report lead to the Landlord & Tenant Act 1987, Part II of which sets out a statutory procedure for tenants of flats seeking to appoint their own manager where it can be shown that the landlord is in default.

The provisions were amended by the Housing Act 1996 as a result of which jurisdiction for the appointment of a manager was passed to the Leasehold Valuation Tribunal and tenants were no longer able to apply to the Court to make the appointment under its inherent jurisdiction.

A new right to manage was introduced by Chapter 1 of Part II of the Commonhold and Leasehold Reform Act 2002 which came into effect on 30 September 2003. These provisions give tenants who fulfil certain qualifying conditions the right 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 regime is available alongside the existing right to apply to the Leasehold Valuation Tribunal for an appointment under the 1987 Act.

The exercise of the right to manage under the 2003 Act is quicker and less expensive than under the 1987 Act. However, if a right to manage (RTM) company set up under the 2002 Act fails to carry out its management obligations it is still possible for a tenant or the landlord to apply to the Leasehold Valuation Tribunal for the appointment of a manager under the 1987 Act.

Kerry Glanville
Head of Property Litigation
Pemberton Greenish
January 2009

COMMONHOLD & LEASEHOLD REFORM ACT 2002

QUALIFYING CONDITIONS

Tenants of flats acting through a right to manage (RTM) company can apply to take over the landlord's management functions regardless of whether his management has been good or poor. The covenants in the leases do not change as a consequence of the exercise of the right. Accordingly the RTM company will have the same obligations that the landlord would otherwise have had. The RTM company will be required, like any other landlord, to act in accordance with a government approved code of management practice such as that produced by the Royal Institution of Chartered Surveyors. In addition to the obligation to repair, maintain and provide the services for the building the RTM company will acquire the power to grant approvals and to enforce the covenants in the leases. The right to manage can extend to "appurtenant property" such as gardens, garages etc that are let with or usually enjoyed with the premises.

Certain qualifying conditions must be met.

The building occupied by the tenants must:

- be a self-contained building or be a part of a building which part is capable of independent development;
- contain two or more flats that are held by qualifying tenants (a qualifying tenant is, principally, a tenant whose lease was granted for an original term of more than 21 years); and
- the number of flats held by such qualifying tenants must be not less than two thirds of the total number of all the flats 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 the part could be redeveloped independently of the remainder of the building and the services are either provided independently to 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. Services means those provided by pipes, cables or other fixed installations.

Some premises which fulfil those conditions are nevertheless excluded from the right to manage. In brief, they are:

- premises where the sum of internal floor area of non–residential parts exceeds 25% of the internal floor area of the whole premises;
- premises that 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 an RTM company ceases to be responsible for the management of premises (other than where that company acquires the freehold) then a party cannot acquire the right to manage within a period of four years from that date except with the consent of the Leasehold Valuation Tribunal.

Qualifying tenants of at least half the total number of flats in the premises must become members of the RTM company. If there are only two flats in the premises, the qualifying tenants of both flats must become members. It is worth noting that there is no residence requirement and there is no limit on the number of flats that can be owned by one tenant.

A business tenant cannot be a qualifying tenant.

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 & Articles of Association must be in the prescribed form. If a company is formed with a Memorandum & Articles that differs from the prescribed provisions, they will be automatically overridden by the prescribed provisions.

The only people entitled to become members of the RTM company are:

- qualifying tenants;
- 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).

The RTM company may be formed by any number of qualifying tenants; there is no minimum number.

The company cannot be an RTM company, or will cease to be one, if another RTM company already exists for the same premises or if the RTM company is a Commonhold association or if the freehold of the premises is conveyed to the RTM company.

Once the RTM company has been formed it is entitled to serve a notice on any person requiring him to provide the company with information in his possession or control which it reasonably requires for the purpose of making the claim to acquire the right to manage and to permit a person authorised by the RTM company to inspect the relevant documentation and supply a copy to the RTM company. The recipient must comply within 28 days of receiving the notice.

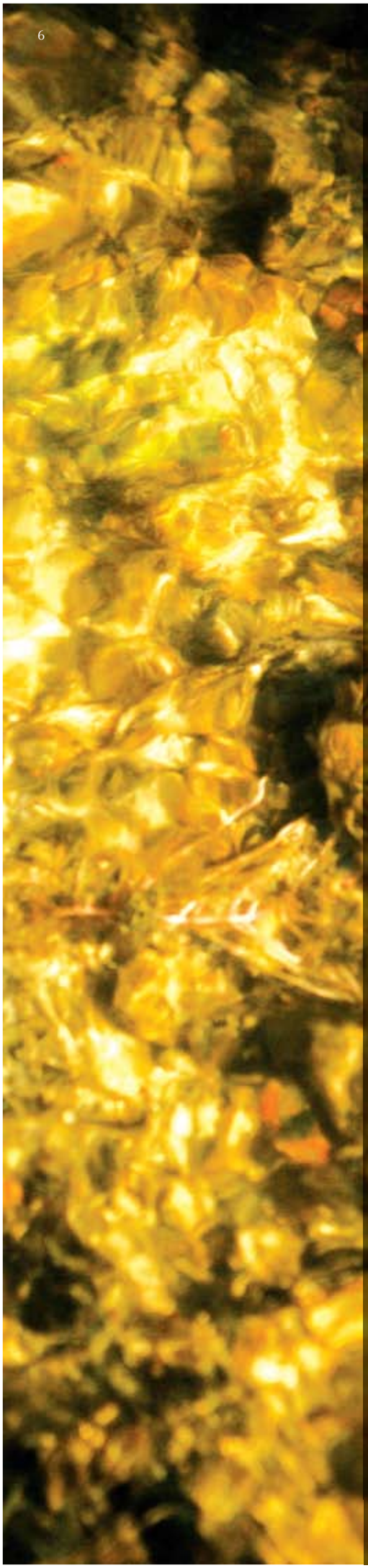
INVITATION NOTICE

All qualifying tenants are entitled to become members of the RTM company. Once the company has been set up it must give Notice to each qualifying tenant in the building who is not already a member of the RTM company. That 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 tenants to become members;
- provide the additional information required by regulations that is:
  - 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 and the name of any other person who is party to the lease other than the leaseholders;
- state that the RTM company will take over the landlord's management functions under the lease;
- state that the management powers to be transferred to the RTM company will not extend to any parts of the building which are in commercial use or to flats under the control of the landlord;
- state that each member of the RTM company will be liable for the landlord's reasonable costs arising from the service of the Notice;
- state whether or not the RTM company intends to employ the existing managing agent or a new agent. If a new agent is to be appointed his name and address must be given. If it is intended that the RTM company will manage the building itself the Notice must give details of the management experience of the existing members of the company, if any.

The Notice must be accompanied by a copy of the Memorandum & Articles of Association or state where they can be inspected. Failure by the RTM company to allow the inspection of the Memorandum & Articles or to provide a copy will invalidate the Notice.

Qualifying tenants who are not already members of the RTM company and who respond to the Notice seeking to become members must be enrolled and noted as members in the company's records.



CLAIM NOTICE

Once the RTM company has been set up and 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 the Claim Notice.

The Claim Notice must be served not less than 14 days after the Notice inviting participation.

The Notice must be in the prescribed form and must:

- give details of the premises (including appurtenant property that the RTM company wishes to include such as a garage, outhouse, garden or a yard etc usually enjoyed with the building) and state the grounds on which the premises comply with the Act;
- state the name of every member of the RTM company who is a qualifying tenant, the address of his or her flat and particulars of his or her lease sufficient to show the date on which the lease was entered into, the term for which it was granted and the date of commencement of the term;
- give the name and registered office of the RTM company;
- state a date (at least one month after the giving of the Claim Notice) by which each recipient of the Notice may respond by giving a Counter-Notice;
- state 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.

Under the Regulations the Claim Notice must also include a statement informing the landlord that he may bring to the attention of the RTM company any inaccuracies in the Notice, a statement that a landlord who does not object to the claim may serve “contract” and “contractor” notices and a statement confirming that the landlord has a statutory right to become a member of the RTM company.

A Claim Notice will not be invalidated by any inaccuracy in the particulars given in relation to the leases. Further, the Claim Notice will not be invalidated if it refers to a member of the RTM company who is not, at the time when the Claim Notice was given, a qualifying tenant as long as the minimum number of qualifying tenants were members on that date.

The Claim Notice must be served on:

- the landlord (including the freeholder and any intermediate landlord between the freeholder and the qualifying tenants);
- any party to a lease who is neither the landlord nor the tenant;
- any manager appointed under Part II of the Landlord & Tenant Act 1987.

A Claim Notice does not need to be given to a person who cannot be found or identified but if this means that none of the above listed would be served, 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 Claim Notice must be given to every person who at the date on which the Claim Notice is given is a qualifying tenant of a flat in the premises, whether or not they are members of the RTM company, and to a manager appointed by the Leasehold Valuation Tribunal or Court.

Once a Claim Notice has been given in respect of particular premises it is not possible to serve another Claim Notice in respect of all or part of those premises until it is withdrawn, deemed withdrawn or ceases to have effect.

If the RTM company wishes to withdraw the Claim Notice it must give notice of withdrawal to every recipient and will be liable to pay the reasonable costs incurred by the landlord and others as a result of it being given to them, including professional fees incurred by surveyors and solicitors.

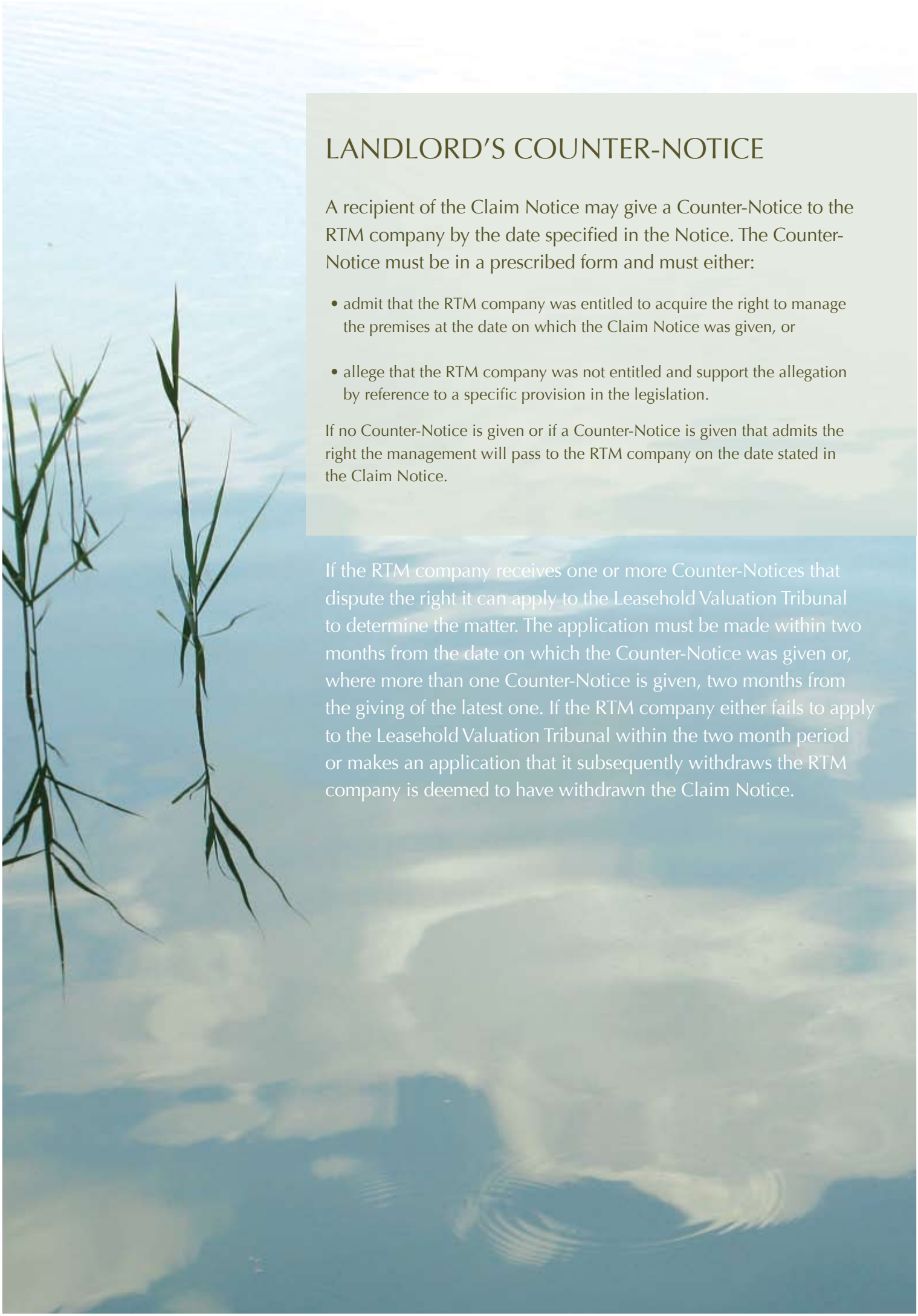
A Notice of Claim will be deemed to have been withdrawn if:

- an Order is made for the winding up or administration of the RTM company or if it passes a resolution for voluntary winding up; or
- if a receiver or manager is appointed for the premises; or
- if possession of any of its properties is taken under a floating charge by the holder of a debenture given by the company; or
- if a voluntary arrangement for the company is approved under Part I of the Insolvency Act 1986; or
- if the name of the company is struck off the register of companies under Section 652 or 652A of the Companies Act 1985.

The same cost consequences follow where the Claim Notice is withdrawn by the RTM company.

THE RIGHT TO INSPECT

Once the Claim Notice has been given an authorised representative of the RTM company and any of those served with the Claim Notice (i.e. the landlord, any third parties and/or any 1987 Act manager) and their authorised representatives have 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 to inspect is exercisable on not less than 10 days notice. There is no prescribed form for this notice.



LANDLORD'S COUNTER-NOTICE

A recipient of the Claim Notice may give a Counter-Notice to the RTM company by the date specified in the Notice. The Counter-Notice must be in a prescribed form and must either:

- admit that the RTM company was entitled to acquire the right to manage the premises at the date on which the Claim Notice was given, or
- allege that the RTM company was not entitled and support the allegation by reference to a specific provision in the legislation.

If no Counter-Notice is given or if a Counter-Notice is given that admits the right the management will pass to the RTM company on the date stated in the Claim Notice.

If the RTM company receives one or more Counter-Notices that dispute the right it can apply to the Leasehold Valuation Tribunal to determine the matter. The application must be made within two months from the date on which the Counter-Notice was given or, where more than one Counter-Notice is given, two months from the giving of the latest one. If the RTM company either fails to apply to the Leasehold Valuation Tribunal within the two month period or makes an application that it subsequently withdraws the RTM company is deemed to have withdrawn the Claim Notice.

If a person who gives a Counter-Notice alleging that the RTM company was not entitled to exercise the right to manage subsequently agrees that it was entitled to do so after all, the agreement can be recorded in writing and the RTM company will not need to make or continue with an application to the Leasehold Valuation Tribunal in relation to that Counter-Notice.

When the Leasehold Valuation Tribunal makes a determination as to the entitlement of the RTM company to exercise the right to manage its decision will become final on the expiration of any appeal period. Otherwise, it will not become final until the appeal has been determined and any period for a further appeal has expired. There is a right of appeal from the Leasehold Valuation Tribunal's decision to the Lands Tribunal but only with the permission of the Leasehold Valuation Tribunal or the Lands Tribunal.

Where the RTM company obtains an order from the Leasehold Valuation Tribunal in the circumstances that there is no person ascertainable or identifiable on whom the Claim Notice could be served, the right to manage will be acquired on the date specified in the Tribunal's determination.

Where the final determination is that the RTM company was not entitled to acquire the right to manage the premises it will not acquire that right and the Claim Notice will cease to have effect.

Generally, the recipients of the Claim Notice are entitled to recover their reasonable costs of dealing with it. These costs would include the professional fees of, for example, accountants, managing agents and solicitors as well as costs incurred in dealing with a hearing before the Leasehold Valuation Tribunal where the Tribunal determines that the RTM company was not entitled to make the claim. The latter costs are not recoverable where it is determined that the RTM company was entitled to make the claim.

Members of the RTM company can be personally liable for costs if a claim ceases to have effect.

LANDLORD'S MEMBERSHIP OF THE RTM COMPANY

As soon as the RTM company has acquired the right to manage the landlord and any intermediate landlords is eligible to become a member of the company.

This is so whether the landlord or intermediate landlord owns a unit or does not. The votes in the RTM company are allocated to the flats among the qualifying tenants and the landlords in a way to ensure that any one tenant has the same number of votes as a landlord.

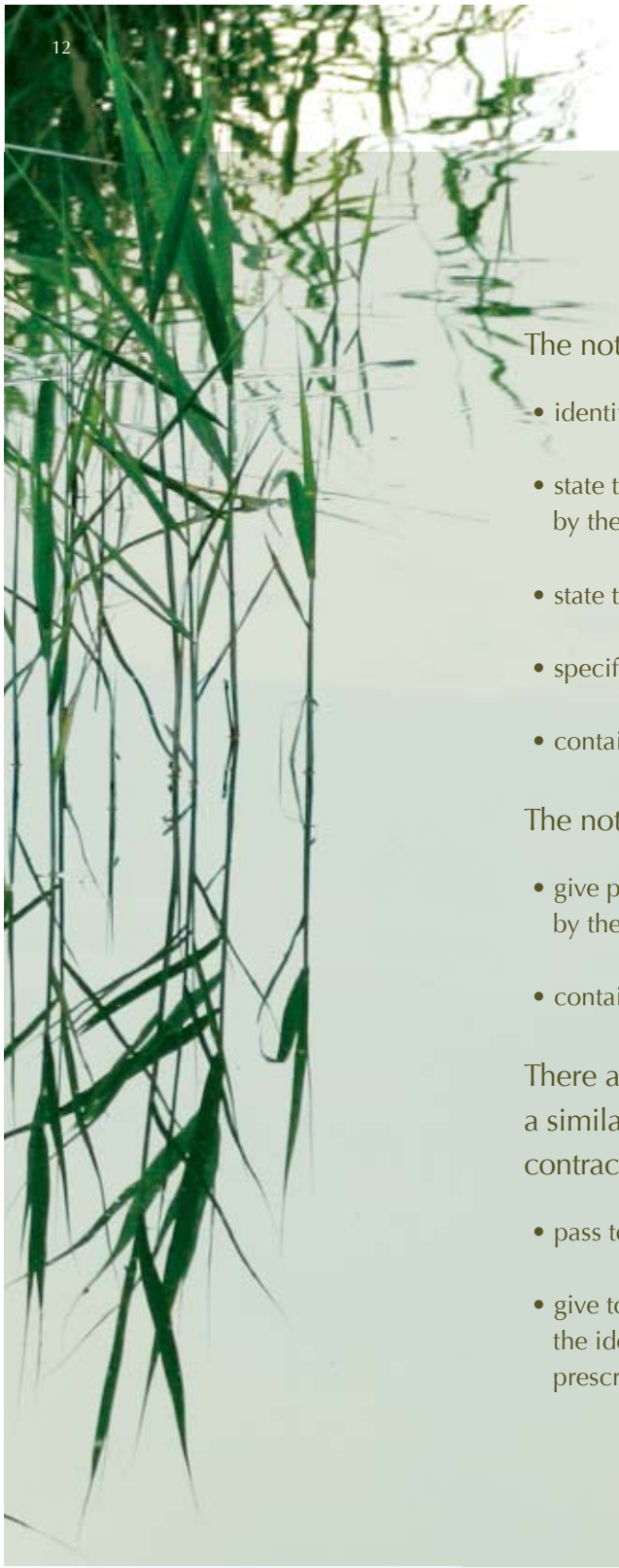
Votes attaching to commercial units are calculated on the basis of floor area.

PRE-DETERMINATION AND POST-DETERMINATION CONTRACTS

At the date that the eligibility of the RTM company to acquire the right to manage has been determined it is likely that contracts will be in place with various parties for the provision of services or works falling within the management functions that will become the responsibility of the RTM company. Unless the RTM company wishes to do so it is not obliged to take over any of the existing contracts. Further, there may be circumstances in which the contractors do not wish to provide services to the RTM company.

In order to inform the contractors of the impending change in management responsibility and to give the parties the opportunity to negotiate with regard to these contracts, the Act provides for notices to be given.

The "manager party" (in most cases likely to be the landlord but could be a third party management company or a manager under Part II of the 1987 Act) must give notice to each of the contractors employed by him and to the RTM company on or as soon as reasonably practicable after the determination date in relation to contracts existing before that date. In relation to contracts coming into existence after the determination, the Notices must be given on or as soon as reasonably practicable after the date on which the contracts are entered into.



The notice given to the contractor must:

- identify the contract;
- state that the right to manage the premises is to be acquired by the RTM company;
- state the name and registered office of the RTM company;
- specify the acquisition date, and
- contain any other particulars as may be prescribed by regulations.

The notice to the RTM company must:

- give particulars of the contracts and the contractors already employed by the manager to carry out the management of the premises, and
- contain such particulars as may be prescribed by regulations.

There are provisions for a contractor who receives a notice to give a similar notice to any sub-contractor. On receipt of the notice the contractor must:

- pass to the sub-contractor a copy of the notice he has been given, and
- give to the RTM company a notice giving particulars of the sub-contract, the identity of the sub-contractor and conform to any further requirements prescribed by regulations.

EXERCISING THE RIGHT TO MANAGE

The management functions that the RTM company acquires in respect of the premises are those relating to "services, repairs, maintenance, improvement, insurance and management". 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 from the acquisition date those management functions become the responsibility of the RTM company and:

- any provision in a lease concerning the landlord and/or the third party and such function no longer has effect, and
- the landlord and/or 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 for 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 the tenants's obligations to the RTM company.

However management functions relating to flats or other units that are not let to qualifying tenants are excluded.

PROVISION OF INFORMATION TO THE RTM COMPANY

There is 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 a notice. Copy documents and information must be supplied within 28 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, before the end of that four month period.

SERVICE CHARGE FUNDS

Where the landlord or other managing party is holding service charge contributions these must be paid over to the RTM company 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 manage unless that date is less than four months after the date on which the claim notice was given in which case payment must 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.

GRANTING APPROVALS

The rights that are passed to the RTM company as part of acquiring the right to manage include the right to deal with requests from tenants for approvals under the terms of their leases in the place of the landlord giving such approval, for example, requests for licences for assignment, subletting, making alterations or making changes of use etc. Neither the landlord nor any other party will continue to be directly involved in this process but the landlord must be consulted on any request received by the RTM company.

Where the RTM company receives a request for an approval it must give notice to the landlord (and any superior landlord) at least 30 days before it grants approval to requests concerning:

- assignment, underletting or otherwise parting with possession of the whole or any part of the tenant's flat or other part of the premises; or
- mortgaging a tenant's lease; or
- making structural alterations or improvements; or
- changing the use of the tenant's premises.

For other requests for approval the RTM company must give at least 14 days notice to the landlord before granting that approval.

During the 14 or 30-day consultation period a party notified of the request has an opportunity to object or to require conditions to be imposed if approval is to be granted.

Objections are made by notice to the tenant who made the request and to the RTM company but objections or conditions can be imposed only when the landlord would have been entitled to object or impose conditions under the terms of the lease or under relevant legislation.

Where the landlord objects to the grant of any approval within the time limit 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 may be made by the RTM company or by the tenant seeking the approval or by the landlord.

MONITORING AND ENFORCING COMPLIANCE WITH COVENANTS

The RTM company has a duty to monitor observance of the lease covenants by the tenants and to report breaches to the landlord within three months of the RTM company becoming aware of the breach save where, during that period, the breach has been remedied or where the tenant has paid reasonable compensation in respect of it or where the landlord has waived this requirement.

The RTM company has the power to enforce covenants on the part of the tenants but cannot exercise the right of re-entry or forfeiture.

STATUTORY OBLIGATIONS

Schedule 7 of the Act imposes on the RTM company similar statutory restraints as are currently imposed on the landlords. They are set out at some length in that schedule and include:

- Section 19 of the Landlord & Tenant Act 1927;
- the duty of care imposed by Section 4 of the Defective Premises Act 1972;
- Section 11 of the Landlord & Tenant Act 1985 (with modification);
- the service charge etc protection given under the Landlord & Tenant Act 1985 and 1987;
- the appointment of a manager under the Landlord & Tenant Act 1987;
- the Landlord & Tenant Act 1988.

LANDLORD'S LIABILITY FOR SERVICE CHARGES

Where the premises:

- contain one or more flats or other units not let to qualifying tenants (called "an excluded unit"), and
- has a service charge regime in the leases of flats held by qualifying tenants under which each qualifying tenant is liable to pay a service charge equal to a proportion of the service costs, and
- the aggregate of the service charges payable by those qualifying tenants amounts to less than 100% of the total service costs.

Then the shortfall can be recovered by the RTM company from the "appropriate persons".

The appropriate persons are:

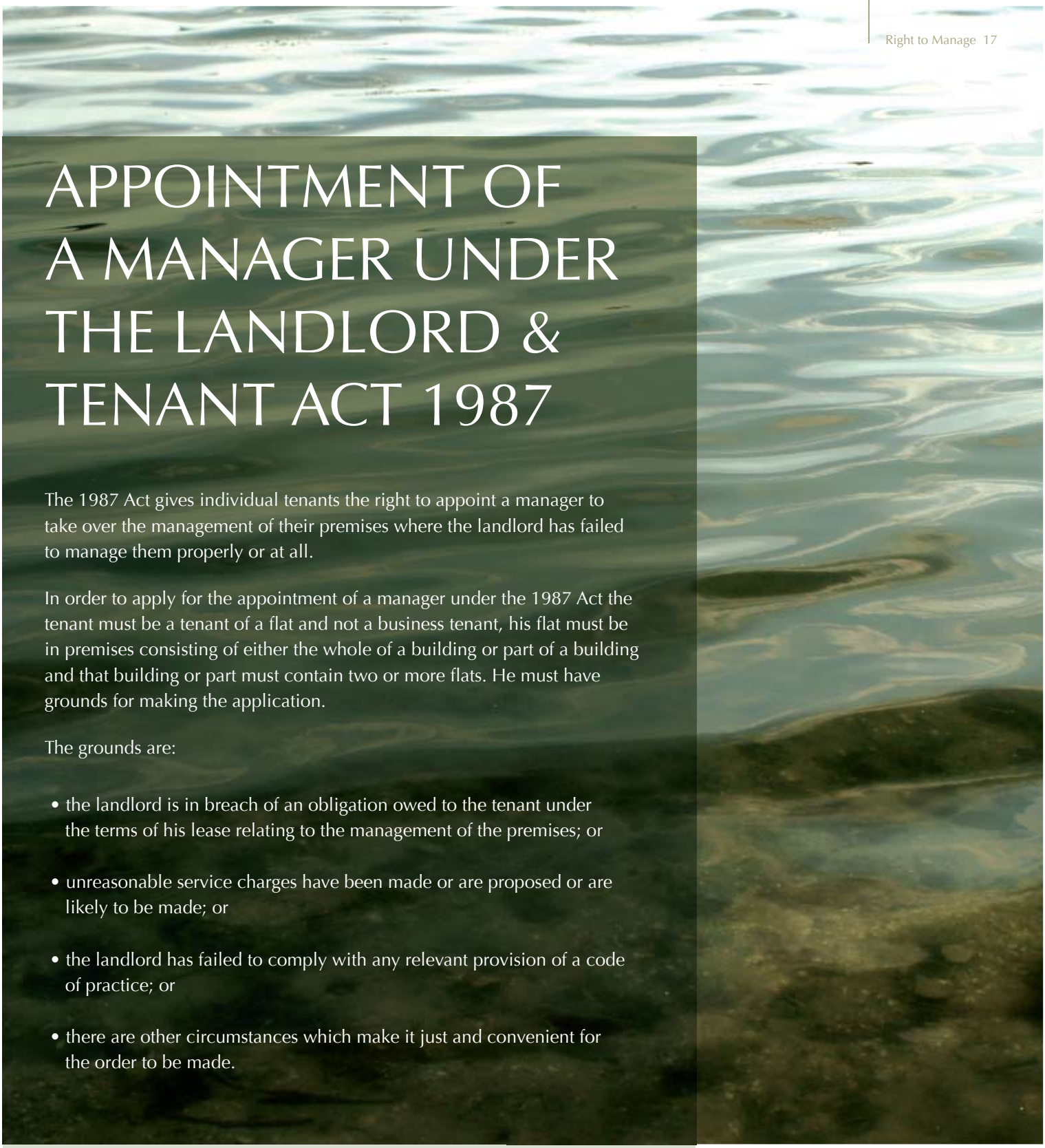
- in respect of an excluded unit which is not let, the freeholder;
- in respect of an excluded unit which is subject to a lease, the landlord under that lease;
- in respect of an excluded unit which is let and sublet, the landlord of the most inferior of such lease.

Where there is more than one excluded unit the appropriate persons bear the shortfall between them according to the internal floor areas of their excluded units.

CESSATION OF MANAGEMENT BY RTM COMPANY

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

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



APPOINTMENT OF A MANAGER UNDER THE LANDLORD & TENANT ACT 1987

The 1987 Act gives individual tenants the right to appoint a manager to take over the management of their premises where the landlord has failed to manage them properly or at all.

In order to apply for the appointment of a manager under the 1987 Act the tenant must be a tenant of a flat and not a business tenant, his flat must be in premises consisting of either the whole of a building or part of a building and that building or part must contain two or more flats. He must have grounds for making the application.

The grounds are:

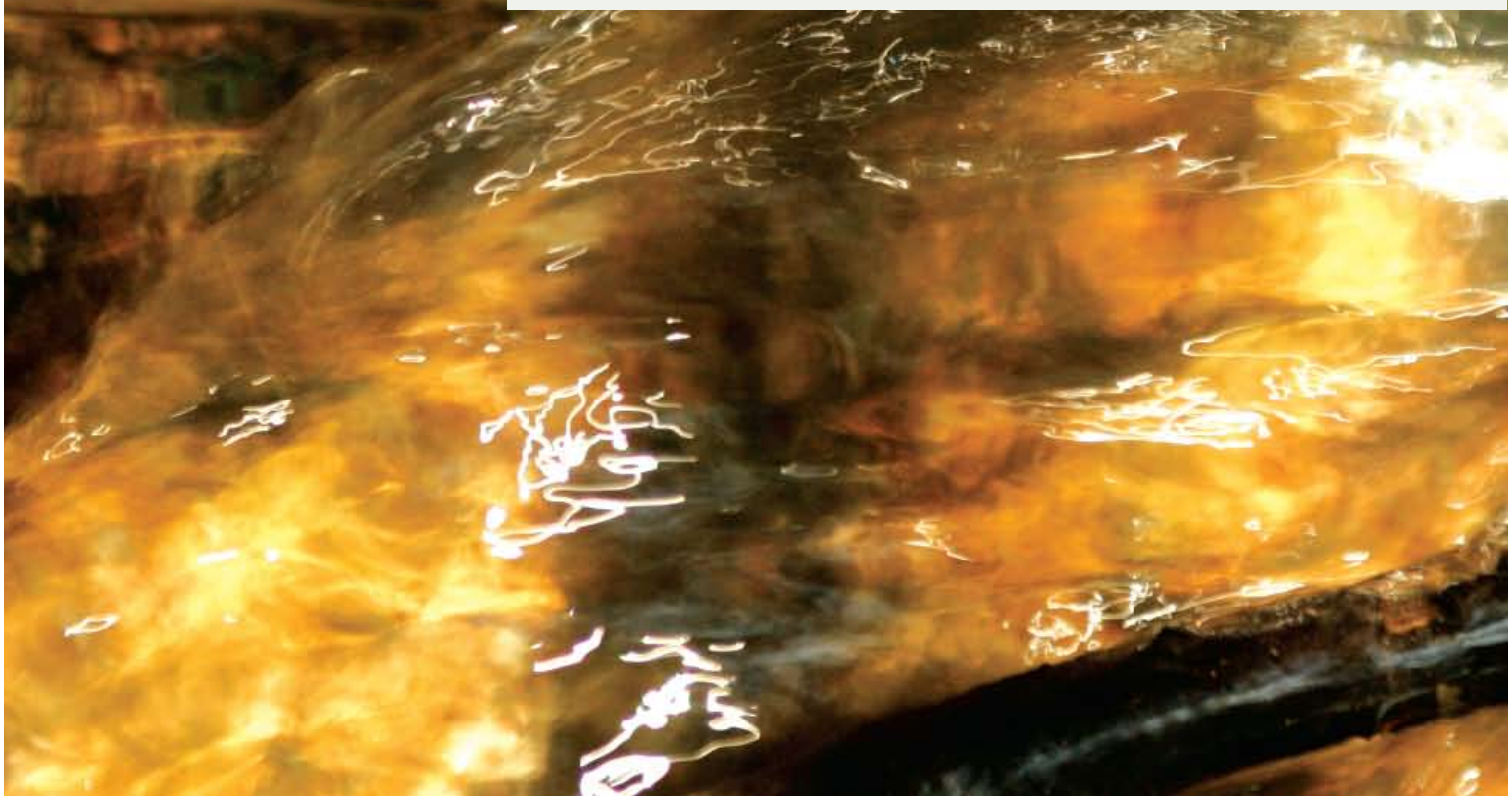
- the landlord is in breach of an obligation owed to the tenant under the terms of his lease relating to the management of the premises; or
- unreasonable service charges have been made or are proposed or are likely to be made; or
- the landlord has failed to comply with any relevant provision of a code of practice; or
- there are other circumstances which make it just and convenient for the order to be made.

PRELIMINARY NOTICE

There is a two-stage procedure for obtaining an order for the appointment of a manager. The applicant must first serve a written Notice on the landlord which must:

- specify the applicant's name, the address of his flat and give an address in England & Wales at which the landlord may serve notices and proceedings on him;
- state that he intends to make an application for an Order under the 1987 Act, specifying the premises to be comprised in the Order and stating that he will not make the application if the landlord complies with the relevant requirement where this is capable of remedy;
- specify the grounds on which the Leasehold Valuation Tribunal will be asked to make the Order and the matters relied upon by the tenant in establishing those grounds;
- where matters are capable of being remedied by the landlord, require the landlord to take specified steps to remedy them within a specified period (which must be reasonable);
- contain such further information as may be prescribed by regulations.

The Leasehold Valuation Tribunal can dispense with the requirement to serve the notice where it is satisfied that it would not be reasonably practicable to do so.



APPLICATION

Where the period specified in the Preliminary Notice has elapsed and the landlord has not remedied the matter complained of the tenant may make an application to the Leasehold Valuation Tribunal that must state:

- the premises to which the application relates;
- the name and address of the application and the landlord of the premises;
- the name and address of every person known to the applicant who is likely to be affected by the application (including the tenants of the other flats, any mortgagee or superior landlord and residents association);
- the name, address and qualifications of the person to be appointed as manager;
- the functions which it is desired the manager should carry out;
- the grounds of the application.

The application must be accompanied by a copy of the Preliminary Notice and it must be served on the landlord, the persons named in the application as likely to be affected by it and the proposed manager.

The Leasehold Valuation Tribunal has wide powers in dealing with the tenant's application. It may:

- make an order for the appointment of a manager over an extent of the premises which can be greater or smaller than the extent specified in the application;
- make provision on such matters as it feels fit in relation to the exercise by the manager of his functions;
- include provisions for the manager to take over from the landlord or other managing agent any appropriate contracts;
- appoint the manager to carry out such functions in connection with the management of the premises or such functions of a receiver, or both, as it thinks fit;
- make provision for the manager's remuneration to be paid by the landlord or by some or all of the tenants in the premises;
- make provision for the manager's functions to be exercisable either during a specified period or indefinitely;
- make its order subject to any conditions it thinks fit as well as suspending the order if it thinks fit to enable the landlord to have a further opportunity to comply with any outstanding requirements under the lease.

THIS GUIDE IS A GENERAL STATEMENT OF THE LAW AS AT JANUARY 2009

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