

right to manage

with Hurford Salvi Carr

THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

AN OUTLINE GUIDE

guidance notes section 1

ACQUISITION

Sections 72 to 94 of the Commonhold and Leasehold Reform Act 2002

In order to exercise the Right to Manage, there is no need for flat owners to prove any fault, or bad management by a landlord (or indeed a management company). This Right to Manage is an absolute right and there is no requirement for the approval or involvement of the Courts. The following is provided as a general guide only to the Process of Acquisition involved.

- 1.1 In order for the flats to qualify for the **Right to Manage (RTM)** under Section 72:
 - The building must be self-contained.
 - It must include at least two flats.
 - At least 2/3 of tenants (flat owners) must 'qualify'.
 - There is no limit to the number of flats owned by one person.
 - No past or present residence is needed.
 - Any commercial / non-residential content must be no more than 25% of the total floor area.
 - To 'qualify', the original lease must be for more than 21 years.

- 1.2 The **Right to Manage (RTM)** can only be implemented through a **RTM** company.
 - The company will need qualifying tenants from at least 50% of the flats in the building.
 - On larger estates, separate blocks qualify separately.
 - Where more than one block is involved, an individual RTM notice is served for each block.
 - Where there is more than one block in an estate, not all blocks need to participate.
 - The RTM company exercises the RTM and it must be formed before Notice is served.

- 1.3 Forming the RTM company:
 - The RTM company must be Limited by Guarantee and comply with the legislation.
 - It must have the prescribed form of Memorandum and Articles of Association (Mem & Arts).
 - It will not be a valid RTM company if the correct Mem & Arts are not used.
 - The full number of tenants is not initially needed to form the company, BUT
 - Subsequently ALL qualifying tenants must be invited to join; NO ONE may be excluded.

- 1.4 Section 78, giving notice once the RTM company has been formed:
 - A section 78 Notice Inviting Participation must be in the prescribed form (S.I.2003 No.1988)
 - The Notice must be to all qualifying tenants who are not already members of the company.
 - This Notice must give the prescribed information:
 - State the intention of the RTM company to acquire the Right To Manage.
 - Give the names of the existing members of the RTM company.
 - Provide the names of the RTM company directors and secretary.
 - State the address of the registered office and registered company number.
 - Give the name of the landlord and (apart from the lessees) any other party to the lease.
 - State the company will take over all the landlords management functions, including:
 - Enforcement of tenants' covenants (but not Forfeiture),
 - Granting approvals required under the terms of the lease.
 - Invite the flat owner to become a member of the RTM company.
 - Make it clear the RTM company will not have management power over:
 - Flats in the building owned by the landlord,
 - Any commercial units.
 - The Notice must state that all members will be liable for the landlord's reasonable costs.
 - The notice must also advise:
 - (i) Whether a managing agent is to be used.
 - (ii) If so, their name and address.
 - (iii) Alternatively, whether the existing agent will be used.
 - (iv) If no agent is to be used, the management experience of members of the company.

- The Mem and Arts of the RTM company must accompany the Notice, or
 - Advise where they may be seen and copied (the Notice is invalid without this information).
- 1.5 Service of the Section 78 **Notice Inviting Participation**:
- The 'prescribed form' is found in Statutory Instrument 2003 No 1988 available from HMSO.
 - The Notice may be served by post, or by hand to the flat, unless
 - The tenant has given the company an alternative address (in England and Wales only).
 - Procedure is important, particularly if the landlord may wish to try to thwart the RTM.
 - The RTM company should ensure there is proof of posting, or delivery, in case of challenge.
 - All who respond and wish to be members must be recorded in the company records.
- 1.6 Before serving the Notice of Claim on the landlord:
- The company is entitled to information from the landlord, and
 - Access to inspect the premises.
 - Prudently, the company should not proceed without knowing what is going to be involved.
- 1.7 Section 82 enables a company to require within 28 days:
- A landlord to provide information reasonably required in order to serve Notice of Claim.
 - Access to, and copying of, relevant documents.
- 1.8 Information needed will probably include:
- The immediate landlord and its address for service of notices.
 - The name and address of any superior landlord.
 - Names and addresses of other qualifying tenants in the building.
 - The current income and expenditure position affecting the building.
 - Accounts and bank statements.
 - Current service charge arrears.
 - Buildings Insurance arrangements.
 - Details of all contracts in place for maintenance of the building and services/equipment.
 - Any identified major works and copies of any recent or applicable survey reports.
- 1.9 There is no statutory requirement to:
- Prepare budgets in advance of the RTM company taking control.
 - Provide details of future management beyond that stated above.
- 1.10 BUT the RTM company does have a duty of care to the landlord and after taking control:
- Must not allow depreciation in value through under spending, neglect or mismanagement.
 - It would be prudent to prepare a planned maintenance programme after acquisition.
- 1.11 The **Notice of Claim**; exercising the Right To Manage under Section 79:
- Cannot be served until 14 days after the Notice of Participation to lessees.
 - The claim can only be exercised where:
 - The RTM company complies with the statutory requirements (see items 1.1 to 1.4)
 - The building complies with these requirements.
 - The membership of the company comprises at least 50 % of the building.
 - The form for the **Notice of Claim** is set out in Statutory Instrument 2003 No. 1988 and
 - Must be served upon:
 - Any landlord of the whole or part of the premises;
 - Any superior or intermediate landlord;
 - Any other party to the lease, i.e. a Management Company named in the lease;
 - A manager previously appointed by the Court or by Tribunal.
 - The Notice is in a prescribed form, which **must** be complied with in both form and content.
 - The Notice includes a reminder to the landlord that he will be entitled to membership, BUT
 - The landlord is not entitled to membership until the RTM takes over.
- 1.12 The content of the Claim Notice is provided for under Section 80 and includes:
- The Notice of Claim gives the landlord a minimum of **one month** to serve a counter Notice, and
 - Specifies a date of not less than **a further 3 months** when the company intends to acquire the RTM.

- 1.13 Under Section 83, right of access to any part of the premises is to be given:
- If it arises from the claim to acquire the Right to manage,
 - It is a person authorised by the RTM company, or
 - It is the landlord or their representative, or
 - Any other party to the lease (not another tenant), or
 - A manager appointed under Part 2 of the 1987 Act.
 - It is only available after Notice of Claim has been served
- 1.14 Under Section 84 a Counter Notice may agree to the RTM, or **disagree only** on the basis of:
- The RTM company does NOT comply with the statutory requirements (SEE item 1).
 - The building does NOT comply with the requirements.
 - The membership of the company does NOT comprise at least 50 % of the building.
 - If the landlord disagrees, the RTM may apply to the Leasehold Valuation Tribunal (LVT).
 - Such an application must be made within 2 months of the Counter Notice.
 - The **Notice of Claim** must give a **minimum of 4 months notice** before the RTM commences.
 - Commencement may be specified for a later date if the RTM company needs longer.
- 1.15 Where a landlord is not traceable, then under Section 85:
- An RTM company may apply to the LVT for an order to acquire the RTM.
 - The RTM company must notify ALL qualifying tenants of the application to the LVT.
 - The RTM company must have taken all reasonable steps to find the missing landlord.
 - The LVT may require the RTM company makes further enquiries.
 - There is no prescribed form for application to the LVT, but the LVT does have a form available.
- 1.16 Section 88,89 and costs:
- The RTM company is liable for the reasonable costs of those who receive the Claim Notice.
 - Costs include reasonable professional costs.
 - If costs are disputed, either party may refer the matter to the LVT.
 - The landlord will not recover his LVT costs, unless the landlord wins the hearing.
 - The RTM company and its members are liable for the landlord's reasonable costs.
 - If the RTM does not proceed, the members will still be liable for such costs, and
 - Winding up the company would not avoid the liability for the members.
- 1.17 Under Section 90, the date of acquisition/commencement of the RTM company is given:
- Where there is no dispute, the RTM takes control on the date given in the Notice of Claim.
 - If disputed before the LVT, and the RTM wins, the RTM acquires control 3 months later.
 - If disputed but subsequently agreed, the RTM acquires control 3 months after agreement.
- 1.18 Under Statutory Instrument 2003 No. 1988:
- The landlord has a right to be a member.
 - Where there is more than one landlord, each is entitled to be a member and vote.
- 1.19 Under the Memorandum and Articles of Association:
- If a landlord owns individual flats, he is also entitled to one vote for each flat.
 - Where commercial units are present, vote allocation to the landlord is based on floor area.
 - If there are (say) 3 landlords, each flat owner will be allocated 3 votes to allow for this.
 - A flat owner, if he owns more than one flat, will have one vote for each flat.

- 1.20 The landlord is likely to have maintenance contracts in place. Under Section 92:
- The landlord must give a 'contractor notice' to the contractor advising of the RTM, and
 - A 'contract notice' to the RTM company giving details of the contract/s.
 - These notices should be given as soon as possible after receipt of the Notice of Claim, and
 - 'as soon as reasonably practical' after the date the 3 month 'countdown' commences.
 - Depending on circumstances (and possibly the law of Frustration):
 - The RTM may not wish to continue with the contracts.
 - The contractor may not wish to contract with the RTM.
- 1.21 Under Section 93, information may be requested for the purpose of managing the building:
- The landlord is obliged to provide the information within 28 days, but
 - NOT before the acquisition date.
 - Inspection of documents may then be at any reasonable time.
 - If requested, intelligible copies must be supplied.
- NOTES: It will be prudent for the Section 93 notice to be served to coincide closely with the acquisition date.
- 1.22 Under Section 94, any balance of Service Charge Funds:
- Must be paid across to the RTM company.
 - This fund will be the balance of funds held after proper expenses have been deducted.
 - The landlord is entitled to retain funds for proper costs incurred before the acquisition date.
 - In the event of disagreement, application may be made to the LVT.
 - There is a duty to pay as soon as possible after the acquisition/commencement date.
- 1.23 Section 104 provides for registration at the Land Registry. This ensures awareness:
- For a prospective new flat owner, and
 - If the landlord seeks to sell the block, the new owner is made formally aware of the RTM
- 1.24 Having finally acquired the management of the building, exercising the acquired management functions is now solely the responsibility of the RTM company, for which the directors are in turn responsible. The RTM company is now answerable to both the lessees AND the landlord for the management and maintenance responsibilities under the lease. At this juncture, it is perhaps appropriate to repeat the advice of the Leasehold Advisory Service :

'Unless the building is small (no more than, say, six flats) the day-to-day management may best be left to a professional managing agent. Management is a job which requires certain skills and experience and carries with it great responsibility.'

The directors of the RTM company should remember they are responsible for the decisions taken during their period of office.

The company will be responsible for compliance with all current legislation and regulations applicable to the company itself together with the responsibilities arising from the management of the building.

The management responsibilities imposed specifically by the Commonhold and Leasehold Reform Act 2002 are covered by sections 96 to 111 of the Act and are summarised in Part Two of this guide.

guidance notes section 2

MANAGEMENT FUNCTIONS

Sections 96 to 111 of the Commonhold and Leasehold Reform Act 2002

- 2.1. Section 96 sets out the RTM company's management functions under the lease:
- This relates to services, repairs, maintenance, improvements, insurance and management.
 - The company will be responsible for all those areas for which a service charge is payable.
 - This will include compliance with all statutory requirements.
 - The RTM company does NOT have responsibility for:
 - Premises consisting of a flat not held under a lease by a qualifying tenant,
 - Or for any other unit (shop, office, etc.) not held under a lease by a qualifying tenant
 - Functions relating to re-entry or forfeiture.
 - If recovery of future service charge arrears are a problem:
 - The RTM company has the usual debt recovery procedures available, but
 - The RTM company will need the co-operation of the landlord if forfeiture is needed.
- 2.2. Section 97 makes further provision:
- The RTM company will be responsible to the tenant for management functions.
 - Equally, the company will be responsible to the landlord.
 - Responsibilities for management are the sole domain of the RTM company.
 - These functions may not be undertaken by others without the RTM company's approval,
 - But any person may insure the whole or part of the premises at their own expense.
 - Management responsibilities owed by a tenant to a landlord pass to the RTM company.
 - BUT on the matter of service charge costs incurred before transfer to the RTM company:
 - The Act does not require or permit payment to the RTM company.
 - These costs remain collectable by and payable to the landlord.
- 2.3. Section 98 specifies the procedures for the granting of landlord's approvals:
- This is applicable where a qualifying tenant is required to obtain approval under a lease.
 - These functions pass to the RTM company to administer.
 - The RTM company must give 30 days notice to the landlord before granting approval for:
 - Assignment,
 - Underletting,
 - Charging,
 - Parting with possession,
 - The making of structural alterations, or improvements or alterations of use
 - In any other case, 14 days notice.
- 2.4. Section 99 sets out the procedures where a landlord objects to giving approval:
- The RTM company does not require the specific approval of the landlord, in that
 - If the landlord does not respond in the specified time, the company may grant approval.
 - The RTM must not unreasonably withhold such approval (Schedule 7 of the Act).
 - If the landlord does object the company may only grant the approval:
 - With the written approval of the landlord, or
 - In accordance with the determination of the Leasehold Valuation Tribunal (LVT).
 - The landlord cannot object unless entitled to under the lease.
 - The landlord cannot impose conditions unless permitted by the lease.
 - The landlord must give notice of any objection to:
 - The RTM company,
 - The tenant.
 - To a sub-tenant if the approval relates to an act of the sub-tenant.
 - An application may be made for to the LVT for determination by:
 - The landlord,
 - The RTM company,
 - The tenant (or sub-tenant if it relates to them).

- 2.5. Section 100 provides for enforcement of tenants' covenants:
- The RTM company acquires the right to:
 - Enforce all tenants' covenants.
 - Inspect a flat to ensure a tenant's compliance with the terms of the lease.
 - BUT the RTM company does not have the right of re-entry or forfeiture.
 - This does not diminish the authority of other parties to the lease.
- 2.6. Section 101 relates to monitoring and reporting on tenants covenants:
- The RTM company must monitor tenants compliance with the terms of the lease.
 - Report to the landlord within 3 months any breaches which take place, unless:
 - The failure is remedied within 3 months,
 - Reasonable compensation has been paid in respect of the failure, or
 - The landlord has advised the RTM company it need not report such breaches.
 - The landlord may then enforce the covenant through an action for forfeiture.
- 2.7. Section 103 deals with landlords contributions to the service charge if:
- He has a flat or unit not subject to a lease,
 - The service charges per flat are a proportion.
 - These proportions for the qualifying flats add up to less than 100%.
 - Where the premises comprise only one excluded unit, the landlord pays the difference.
 - Where there is more than one unit, payment is to be proportional to each, by floor area.
 - Where there is more than one lease, the immediate landlord pays the difference.
 - If the unit is not subject to a lease, the freeholder pays.
- 2.8. Section 105 deals with cessation of management by the RTM company. This will occur:
- Where the company wishes to cease and the landlord/s agree.
 - Where the company is wound up, enters receivership, becomes insolvent or is struck off.
 - Where a Manager is appointed under the 1987 landlord and Tenant Act.
 - An order is made under Part 2 of the 1987 Act withdrawing the RTM from the company.
 - The company ceases to be a RTM company (e.g. the company purchases the freehold)
- 2.9. Section 106 makes any provision void if it attempts to:
- Restrict the right of a tenant to participate in the RTM,
 - Provide for the surrender of the lease if the tenant participates in the RTM,
 - Penalise the tenant as a consequence of any action relating to the RTM company.
- 2.10. Section 107 provides for enforcement of obligations:
- Any interested party may apply to the County Court to enforce the provisions of the Act:
 - A notice must be previously given to the offender requiring him to make good, and
 - More than 14 days has elapsed without the fault being rectified.
- 2.11. Sections 108 to 110 refer to Crown property, power of trustees and prescribing of procedure.
- 2.12. Section 111 relates to the provision of notices:
- A notice must be in writing and may be sent by post.
 - A RTM company may give notice to a landlord in accordance with the 1987 Act, unless
 - An alternative address has been given in England and Wales.
 - The RTM company may give notice to a qualifying tenant at the flat, unless
 - An alternative address has been given in England and Wales.

Please remember, this is a guide and is NOT definitive. For further information, reference should be made to the Act and Regulations.

a *summary* of the *process* and *time limits*

- A group of leaseholders, as qualifying tenants, get together to form the RTM Company and register at Companies House.
- The RTM Company may serve a Section 82 Notice on the landlord, who has 28 days to respond, for information reasonably required in order to serve a Notice of Claim (Section 79)
- The RTM Company may serve a Section 83 Notice on the Occupier of any part of the building for access to be granted, at any reasonable time **within 10 days**, to any part of the premises for the purpose of inspection if needed in respect of the Claim Notice.
- Before serving a Notice of Claim, the RTM Company must serve a Section 78 Notice of Participation inviting all Qualifying leaseholders, who are not already members of the RTM company, to join it.
- The RTM Company then waits **at least 14 days** before serving a Section 79 Notice of Claim upon the Landlord and any Other Relevant Party (ORP).
- The Notice of Claim will give the landlord and ORP have **1 month** in which to respond and serve a Section 84 Counter Notice, which either:
 - Accepts the Claim or
 - Disputes the Claim on the basis of one of the three reasons given in the Act.
- If the landlord or ORP disputes the claim, the RTM Company must apply to the Leasehold Valuation Tribunal (LVT) within **2 months** of the date of the Section 84 Counter-Notice.
- If the Claim is accepted or determined by the LVT, then:
 - Under Section 92, 'Contractor' and 'Contract' notices are to be served (by the landlord and any ORP), as appropriate and "as soon as reasonably practicable" after the claim has been accepted by the landlord and any ORP, or determined by the LVT.
 - Between the time the claim has been accepted (or determined) and the Acquisition Date, the RTM Company may serve a Section 93 (Duty To Provide Information Notice, on the Landlord and any ORP for information the company reasonably requires. The information must be given **within 28 days**, although there is no duty to do so before the Acquisition Date.
- The Acquisition Date will be **3 months after** either:
 - The date set in the Notice of Claim, if it is accepted or not disputed by the Landlord/ORP, or
 - The date of determination by the LVT where the Landlord/ORP did not accept the Claim, or
 - If the Claim is initially disputed, but subsequently agreed, 3 months after the date of agreement.
- Subsequent to the Acquisition date:
 - The landlord may become a member of the company, with votes according to the interest held.
 - The landlord/ORP must transfer the relevant balance (after due allowance for outstanding costs) of service charge funds to the RTM Company on the Acquisition date, or "as soon after that date as is reasonably practicable".
 - The RTM Company is responsible to both the landlord/ORP and the tenants (flat owners) for the management of the building.
 - The RTM Company is responsible for monitoring tenant compliance with the terms of the lease and reporting to the Landlord any failure to comply, if not rectified.
 - Section 98 requires the RTM Company must give the landlord **30 days notice** before granting approval for assignment, under letting, charging, parting with possession or the making of structural alterations, improvements or alterations of use.
 - Section 98 requires that the RTM Company must give the landlord **14 days notice** before granting any other approval.

PROPERTY MANAGEMENT
UNIT 3, CASTLE GATE, CASTLE STREET
HERTFORD
HERTFORDSHIRE SG14 1HD
T 01992 500040 F 01992 509625 E management@h-s-c.co.uk

RESIDENTIAL LETTINGS, COMMERCIAL and INVESTMENT
ONE BRITTON STREET
CLERKENWELL
LONDON EC1M 5NW
T 020 7490 1122 F 020 7490 1210 E lettings@h-s-c.co.uk
T 020 7566 9444 F 020 7566 9445 E property@h-s-c.co.uk

RESIDENTIAL SALES, LETTINGS and NEW HOMES
9 BRANCH ROAD
LIMEHOUSE BASIN
LONDON E14 9HS
T 020 7791 7000 F 020 7791 7001 E sales.docklands@h-s-c.co.uk
T 020 7791 7011 F 020 7791 7012 E lettings.docklands@h-s-c.co.uk
T 020 7791 7071 F 020 7791 7072 E newhomes@h-s-c.co.uk

RESIDENTIAL SALES and NEW HOMES
37 - 41 ST JOHN STREET
CLERKENWELL
LONDON EC1M 4AN
T 020 7250 1012 F 020 7250 1015 E sales@h-s-c.co.uk

BUILDING SURVEYORS
TURNBERRY HOUSE, 1410 HIGH ROAD
WHETSTONE
LONDON N20 9BJ
T 020 8343 8006 F 020 8446 24885 E surveyors@h-s-c.co.uk

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CARR