

## **The Right to Manage – the basics and some specific issues arising from recent case law.**

### **Introduction**

1. Part 2 of the Commonhold and Leasehold Reform Act 2002 (the “Act”) gives qualifying tenants of a building containing leasehold flats the ability to acquire the right to manage their building (see s.71(2)). Acquiring the right to manage is often the first step taken by tenants of long leases en route to full enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. It has become increasingly popular amongst tenants of flats, as a relatively inexpensive method of taking more control of their building. The Act offers a “no-fault” regime which does not depend on a default on the part of the landlord for the right to manage to be acquired. As such, the right can only be obtained by following a series of predefined statutory steps.

### **The Mechanics**

2. Chapter 1 of Part 2 of the Act makes provision for the acquisition and exercise of the right to manage by an RTM company (see s.71).

#### To which buildings can the right apply?

3. The chapter applies to premises if they meet certain criteria set out in s.72 which provides as follows:

*(1) This Chapter applies to premises if*

*(a) they consist of a self-contained building or part of a building, with or without appurtenant property,*

*(b) they contain two or more flats held by qualifying tenants, and*

*(c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.*

*(2) A building is a self-contained building if it is structurally detached.*

*(3) A part of a building is a self-contained part of the building if—*

*(a) it constitutes a vertical division of the building,*

*(b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and*

*(c) subsection (4) applies in relation to it.*

*(4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—*

*(a) are provided independently of the relevant services provided for occupiers of the rest of the building, or*

*(b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.*

*(5) Relevant services are services provided by means of pipes, cables or other fixed installations.*

*(6) Schedule 6 (premises excepted from this Chapter) has effect.*

## Schedule 6

para. 1 Buildings with substantial non-residential parts

para. 2 Buildings with self-contained parts in different ownership

para. 3 Premises with resident landlord and no more than four units

para. 4 Premises owned by local housing authority

para. 5 Premises in relation to which rights previously exercised

### Who are the Qualifying Tenants?

4. Qualifying Tenants are defined in s.75(2) of the Act which provides that a qualifying tenant is a person who is tenant of the flat under a long lease. Tenancies which constitute a long lease under the Act are defined in s.76. The most common form is that specified in s.76(2)(a) i.e. *“a lease granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise”*
5. S.75 excludes the following from the definition of qualifying tenants:
  - business tenancies under Part 2 of the Landlord and Tenant Act 1954
  - leases granted by sub-demise out of a superior lease other than a long lease where the grant was made in breach of the terms of a superior lease, and there has been no waiver of the breach
6. By s.75(5) no flat may have more than one qualifying tenant at any one time. Where a flat is being let under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat. Where a flat is being let to joint tenants under a long lease, the joint tenants are regarded as jointly being the qualifying tenant of the flat.

### Who can claim the right?

7. The right can only be claimed by an RTM company. s.73 of the Act specifies what an RTM company is. It provides as follows:

*(2) A company is a RTM company in relation to premises if—*

*(a) it is a private company limited by guarantee, and*  
*(b) its articles of association state that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises.*

*(3) But a company is not a RTM company if it is a commonhold association (within the meaning of Part 1).*

*(4) And a company is not a RTM company in relation to premises if another company is already a RTM company in relation to the premises or to any premises containing or contained in the premises.*

*(5) If the freehold of any premises is transferred to a company which is a RTM company in relation to the premises, or any premises containing or contained in the premises, it ceases to be a RTM company when the transfer 2 is executed.*

8. There are strict rules in relation to the creation and membership of RTM companies. This is set out at s.74 of the Act which provides:

*(1) The persons who are entitled to be members of a company which is a RTM company in relation to premises are—*

*(a) qualifying tenants of flats contained in the premises, and*  
*(b) from the date on which it acquires the right to manage (referred to in this Chapter as the “acquisition date”), landlords under leases of the whole or any part of the premises.*

*(2) The appropriate national authority shall make regulations about the content and form of the articles of association of RTM companies.*

*(3) A RTM company may adopt provisions of the regulations for its articles.*

*(4) The regulations may include provision which is to have effect for a RTM company whether or not it is adopted by the company.*

*(5) A provision of the articles of a RTM company has no effect to the extent that it is inconsistent with the regulations.*

How can the right be claimed?

i) Notice of invitation to participate

9. By s.78(1) of the Act, before a RTM company can claim the right to manage any premises, the company must give notice to each person who at the time when the notice is given is (a) the qualifying tenant of a flat contained in the premises but (b) has neither joined nor agreed to become a member of the RTM company. This is known as the notice of invitation to participate. By s.78(2)(a) the notice must:

*(a) state that the RTM company intends to acquire the right to manage the premises,*

*(b) state the names of the members of the RTM company,*

*(c) invite the recipients of the notice to become members of the company, and*

*(d) contain such other particulars (if any) as may be required to be contained in notices of invitation to participate by regulations made by the appropriate national authority*

10. The notice must also be in the prescribed form (see s.78(3) and Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010) and be accompanied by a copy of the articles of association of the RTM company, or include a statement

about inspection and copying of the articles of association of the RTM company. If a statement relating to the inspection is to be included, pursuant to s.78(4) it must:

- (a) specify a place (in England or Wales) at which the articles of association may be inspected,*
- (b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,*
- (c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the articles of association may be ordered, and*
- (d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.*

11. Where a notice given to a person includes a statement under subsection (4)(b), the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement (s.78(6)).

12. It should be noted that the provisions are to be construed strictly and a errors, for example a failure to specify a Saturday or Sunday as a date for inspection may render the notice invalid (see the decision of the Upper Tribunal in Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] U.K.U.T. 0397 (LC)).

13. Having said that, certain inaccuracies can be cured by s.78(7) which provides that a notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of this section. Significantly, s.78(7) provides that only a particular category of defect is not to be taken to invalidate a notice of

invitation to participate i.e. inaccuracies in any of the particulars required by s.78. The saving provision in section 78(7) provides relief against the consequences of inaccuracy but by doing so it implicitly suggests that other more substantial defects should be taken to invalidate the notice. For example, it would not apply to a situation where there has been a total failure to provide any information at all.

ii) Notice of Claim to acquire right

14. By s.79(1) of the Act a claim to acquire the right to manage any premises is made by giving notice of the claim (“claim notice”). The claim notice may not be given unless each person required to be given an invitation to participate has been given such notice at least 14 days previously.

15. Only an RTM company is permitted to give the claim notice. If on the relevant date there are only two qualifying tenants of flats contained in the premises, both must be members of the RTM company. The “relevant date” for the purpose of the chapter, means the date on which notice of the claim is given (see s.79(1)). If there are more than two qualifying tenants of flats contained in the premises, the membership of the RTM company must on the relevant date, include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained (s.79(5)).

16. By s.79(6) the claim notice must be given to each person who on the relevant date is:

*(a) landlord under a lease of the whole or any part of the premises,*

*(b) party to such a lease otherwise than as landlord or tenant, or*

*(c) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 .... to act in relation to the premises, or any premises containing or contained in the premises.*

17. If the relevant person cannot be found so that the claim notice is not required to be given to anyone at all, s.85 applies to permit the RTM company to apply to the appropriate tribunal for an order that the company is to acquire the right to manage the premises.

18. S.80 of the Act contains detailed provisions as to the contents of a claim notice. It states:

*(1) The claim notice must comply with the following requirements.*

*(2) It must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies.*

*(3) It must state the full name of each person who is both—*

*(a) the qualifying tenant of a flat contained in the premises, and*

*(b) a member of the RTM company,*

*and the address of his flat.*

*(4) And it must contain, in relation to each such person, such particulars of his lease as are sufficient to identify it, including—*

*(a) the date on which it was entered into,*

*(b) the term for which it was granted, and*

*(c) the date of the commencement of the term.*

*(5) It must state the name and registered office of the RTM company.*



*(6) It must specify a date, not earlier than one month after the relevant date, by which each person who was given the notice under section 79(6) may respond to it by giving a counter-notice under section 84.*

*(7) It must specify a date, at least three months after that specified under subsection (6), on which the RTM company intends to acquire the right to manage the premises.*

*(8) It must also contain such other particulars (if any) as may be required to be contained in claim notices by regulations made by the appropriate national authority.*

*(9) And it must comply with such requirements (if any) about the form of claim notices as may be prescribed by regulations so made.*

19. Subsections 6 and 7 are of particular note. They set out the statutory time limits which must be adhered to. Following the date on which the notice of claim is given i.e. the relevant date, the recipient of the notice will have at least one month by which to respond with a counter-notice (s.84). Following this there is a further two month period before the specified date on which the RTM company intends to acquire the right to manage.

20. It is also worth noting that s.81(1) contains a saving provisions by which a claim notice is not invalidated by any inaccuracy in any of the particulars required by s.80. Furthermore, s.81(2) provides that:

*“where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a “sufficient number” is a number (greater than one) which is not less than one-half of the total number of flats contained in the premises on that date.”*

21. Ss.82 and 83 provide a mechanism by which an RTM company can obtain information required to be included in a claim notice and access to any part of the premises if it is reasonable in connection with the claim to acquire the right to manage.

Objections to the right to manage

22. By s.84 a person who is given a claim notice under s.79(6) can object to the claim by giving a counter-notice. The counter-notice must be given to the company by a date not later than the date specified in the claim notice. By s.80(6) this date must be not earlier than one month after the relevant date i.e. the date on which the claim notice is given.

23. S.84 (2) deals with the contents of a counter-notice. It provides that:

*(2) A counter-notice is a notice containing a statement either—*

*(a) admitting that the RTM company was on the relevant date entitled to acquire the right to manage the premises specified in the claim notice, or*

*(b) alleging that, by reason of a specified provision of this Chapter, the RTM company was on that date not so entitled,*

*and containing such other particulars (if any) as may be required to be contained in counter-notices, and complying with such requirements (if any) about the form of counter-notices, as may be prescribed by regulations made by the appropriate national authority.*

24. Following the giving of a counter-notice which alleges that the RTM company was not entitled to acquire the right to manage, the RTM company may apply to the appropriate tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises. Such application must be made “*not later than the end of the period of two months beginning with the day on which the counter-notice (or, where more than one, the last of the counter-notices) was given*” (s.84(4)).

Where a counter-notice objecting to the right is given, the RTM company will not acquire the right to manage unless:

- (a) on an application under s.84(3) it is finally determined that the company was on the relevant date entitled to acquire the right to manage the premises, or
- (b) the person or persons by whom the counter-notice(s) were given agrees, in writing that the company was so entitled.

25. s.84(7) and (8) deals with the meaning of finally determined:

- (7) A determination on an application under subsection (3) becomes final—*
  - (a) if not appealed against, at the end of the period for bringing an appeal, or*
  - (b) if appealed against, at the time when the appeal (or any further appeal) is disposed of.*
- (8) An appeal is disposed of—*
  - (a) if it is determined and the period for bringing any further appeal has ended, or*
  - (b) if it is abandoned or otherwise ceases to have effect.*

26. If on an application under s.84(3) it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect (s.84(6)).

### Statutory controls over claims

27. By s.81(3) where any premises have been specified in a claim notice, no subsequent claim notice which specifies the premises, or any premises containing or contained in the premises, may be given so long as the earlier claim notice continues in force.

28. S.81(4) provides that where a claim notice is given by a RTM company, it continues in force from the relevant date until the right to manage is acquired by the company. This is unless it has previously been withdrawn or deemed to be withdrawn or ceased to have effect by reason of any other provision of the Chapter (for example s.85(6)).
29. A notice can be withdrawn at any time before the RTM company acquires the right to manage the premises. A notice of withdrawal must be given to each person who is:
- (a) landlord under a lease of the whole or any part of the premises,*
  - (b) party to such a lease otherwise than as landlord or tenant,*
  - (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises, or*
  - (d) the qualifying tenant of a flat contained in the premises.*
30. By s.87 a notice will be deemed withdrawn if a counter-notice is given contesting the company's entitlement to acquire the right and either—
- (a) no application for a determination is made within the period specified in s.84(4),  
or
  - (b) an application is made but is subsequently withdrawn
31. The withdrawal shall be taken to have occurred at the end of the period specified under s.84(4) or on the date of the withdrawal of the application. There will be no deemed withdrawal if the person(s) who gave the counter-notice agree in writing that the RTM company was on the relevant date entitled to acquire the right to manage the premises.

32. Note also the provisions of s.87(4) which provide for the deemed withdrawal of the claim notice in situations where the RTM company is wound up or enters into administration.

### Some specific problems and recent case-law

33. As has been explained, the right to manage is a “no fault” procedure. As a result, the opportunities for landlords to challenge the qualifying tenant’s entitlement to exercise the right are limited. Nevertheless, the Act has already in its relatively short life produced a significant volume of authority arising out of challenges made by landlords to the exercise of the rights conferred by the Act.
34. The drafting of the relevant provisions of the Act leaves a lot to be desired and has received considerable judicial criticism for failing to make express provision for a number of important issues.
35. In this section, I will look at some particular issues which have arisen in the practical application of the Act and attempt to give some practical tips for how to approach specific factual scenarios.
- 1) Do the premises qualify for the RTM?
36. The most obvious question a client (whether landlord or tenants seeking to exercise the right to manage) is likely to ask in practice is: does the right to manage extend to my building? Unfortunately, this question does not always permit a straightforward answer and the authorities suggest that fine (and probably unintended) distinctions must be drawn. A series of complicated issues have arisen in connection with the definitions set out in the Act as to the premises to which the right attaches.

37. As noted above, the starting point is that by s. 72 of the Act, the RTM can only be exercised in respect of premises which consist of a self-contained building or part of a building, with or without appurtenant property containing the requisite number of flats owned by qualifying tenants.

38. S. 72 also extends the right to manage to a self-contained part of a building and provides a detailed definition of what constitutes a self-contained part.

39. These definitions have given rise to a number of difficult questions of construction, which have impact ramifications for the scope of the RTM and which have given rise already to a considerable body of authority.

i) *The problem of connected buildings*

40. The basic definition of a self-contained building is that a building is self-contained if it is structurally detached. One would expect this simple definition to provide little difficulty, but in fact in practice it can be hard to apply.

41. The paradigm case is, of course, a free-standing block of flats but difficulties arise if there is some form of connection between one building and another – what if there is some feature, for example, a walkway, which links two blocks, what if there is a decorative feature which is not integral to the structure of the building but which physically connects two otherwise independent structures?

42. In practice it can sometimes be difficult to identify where the line is to be drawn. These issues were addressed in the Upper Tribunal in No.1 Deansgate (Residential) Ltd v No.1 Deansgate RTM Co Ltd [2013] UKUT 580.

43. In that case, the building in question was initially constructed as a detached, self-contained building. When surrounding properties were built, weathering features were installed to cover the gaps between the buildings. The weathering features were the only connections with the surrounding buildings and they did not provide structural integrity to the building. The tribunal inspected the building and made a finding of fact that the degree of attachment between the buildings was insufficient to make the premises not "*structurally detached*". The RTM Company appealed that decision and argued that any form of connection between two buildings meant that neither building was structurally detached. The Upper Tribunal rejected that argument and held that :

*“to construe “structurally detached” as requiring the absence of any attachment or touching between the subject building and some other structure is to construe section 72(2) as though it said “detached” or “wholly detached” rather than “structurally detached”. What is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure.”*

44. So, it is now clear that landlord cannot resist an RTM application solely on the basis that there is some physical connection with another building; that connection must be a structural attachment.

45. Therefore, in practice, when considering this issue, it may be necessary to consider obtaining expert advice from a building surveyor at an early stage. Can the connection between two buildings be described as non-structural? That is often likely to involve close consideration of the method of construction and whether any attachment is integral to the design of the building. Relevant questions are likely to include whether the attaching element was part of the original design or a later addition, it's purpose and whether or not the structural integrity of the building would be affected if it were removed.

ii) *The problem of multiple blocks on an estate*

46. Another issue which has caused considerable difficulty arises where there is an estate consisting of two or more residential or mixed use blocks. These are hardly uncommon in practice, where one frequently encounters estates which have a single management regime across an estate with, often, separate service charge schedules for each block and a general charge, for example, for estate services.

47. Given the definition of premises, is it possible for the tenants to acquire the RTM of the whole estate via one management company and one application, or must a separate company be formed for each block on the basis that each block is a structurally detached building?

48. As the President of the Upper Tribunal, Martin Rodger Q.C. remarked in Fencott Ltd v Lyttelton Court 1 14-34a RTM Company Ltd:

*“There are many good reasons why an estate-wide right to manage is desirable, and many estates where it is necessary to enable the right to manage to be enjoyed at all, or at least to be enjoyed effectively. Where otherwise separate self-contained buildings receive services through inseparable communal installations, or where truly self-contained buildings share appurtenances (such as car parks, gardens or access roads), effective self-management is likely to require that control be vested in a single body. Not only is the prospect of dual management between an RTM company and the estate freeholder “not a happy one” (as Sullivan LJ described it in the Court of Appeal in Gala Unity) but the potential for discord, duplication of effort and wasted expenditure where multiple single block RTM companies must collaborate is almost as daunting.”*



49. Nevertheless, the wording of the Act does not easily permit a single RTM company acquiring more than one building. First, the definitions of what constitutes premises are couched in singular rather than plural terms; a building, a self-contained building. Second, this feeds into the definition of an RTM company, which is a company which has as an object of its articles of association the acquisition of the premises. Thirdly, the Act contains no control mechanism to limit the number of buildings or to provide for some geographical or management based connection between buildings.
50. The Upper Tribunal addressed this question directly in a case which involved four consolidated appeals; Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2013] UKUT 606.
51. In each of the cases under appeal, the RTM company had sought to acquire the right to manage in respect of more than one block of flat in a development. In each case, the landlord argued that s.72 of the Act meant that a single RTM company could only acquire the management of one building.
52. The Upper Tribunal held that while s.72 limited the application of the right to "a self-contained building or part of a building", it did not limit the number of self-contained buildings to which the right would apply. Its purpose was simply to define self-containment. The word "a" in the phrase "a self-contained building" was neither determinative of, nor of assistance in the consideration of, whether the right to manage could be exercised in respect of multiple premises. Furthermore, none of the other provisions in the Act militated against one RTM company exercising the right to manage in respect of multiple buildings.
53. Counsel for one of the landlords had argued that a number of absurdities/difficulties would arise if an RTM company could acquire the management of more than one building: firstly, if there were an estate with one block containing 20 flats and one block containing five flats, the lessees of the larger block would be able to acquire the

right to manage in respect of both blocks even if none of the qualifying tenants of the smaller block wished that to happen (or, even if there were no qualifying tenants in the smaller block).

54. Secondly, he posed the question, where does the right “stop” and how is this to be determined by the parties? If an RTM company can acquire the management of two blocks on the same estate, why not four blocks on two adjoining estates? Six blocks on unconnected estates? All blocks of flats in England or Wales?
55. Those concerns were dismissed by the Upper Tribunal. As to the prospect of the tenants of a larger block acquiring the right to manage a smaller block against the wishes of the tenants of the smaller block, the Tribunal thought that it would be necessary, by virtue of s. 79 of the Act, for each block to meet the qualifying criteria.
56. As for the submission that this interpretation of s. 72 would enable a single RTM Company to acquire geographically widespread properties, the Upper Tribunal remarked only that in the 10 years the Act had been in force, this had not been attempted and the possibility therefore appeared “fanciful”. It remains to be seen whether that assessment was unduly optimistic.
57. The same conclusion was reached in Lyttleton Court, where it was pointed out that around 16 RTM schemes had been approved which included more than a single block of flats.
58. At present, therefore, the authorities indicate that it is possible for an RTM company to acquire the right to manage more than one building, provided that each satisfies the membership criteria, even though there may be no particular connection between the buildings. The only restriction on the number and geographical proximity of the buildings would appear to be the extent to which the tenants consider it is desirable to have combined management.

59. Up to the level of the Upper Tribunal, at least, this avenue for opposing RTM applications now appears to be closed to landlords for the time being.

iii) *The problem of appurtenant property*

60. The definition of premises to which the right attaches also includes the apparently benign description “appurtenant property”. This is expressly defined to mean (by s. 112) any garage outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat.

61. Again, the apparent purpose is clear; the value of the right to manage the building will be substantially reduced if common parts such as communal gardens or parking spaces are not included.

62. However, the concept of estate wide management has again caused complications with this definition. What happens if one block on an estate exercises the RTM and wants to acquire some or all of the common parts of the estate? How can the management of the remaining blocks (previously in common ownership and with common management of the estate) be reconciled with the apparent right to acquire the appurtenant property?

63. The Court of Appeal had to grapple with this problem in Gala Unity Ltd v Ariadne Road RTM Co Ltd [2012] EWCA Civ 1372.

64. This case concerned a residential development near Swindon which comprised of two blocks of flats and two free-standing buildings described as “coach houses”. The coach houses consisted of first floor flats with eight parking spaces underneath at ground level. Two of the parking spaces were allocated to the occupiers of the coach

houses, whilst the remaining six were demised together with six of the flats in the neighbouring blocks.

65. As one would generally expect, the estate consisted of not only these buildings but also access roads, gardens and other communal areas. Again, as is usually the case, the leases of the flats conferred on the tenants, together with the landlord and all other persons having the like right, the right to use pavements, footpaths, forecourts, visitor parking spaces, a cycle store, roads, drives, landscaped areas, gardens and areas designed for the keeping and collecting of refuse.
66. The leases were made between the landlord, the tenants and a management company. The landlord was under an obligation to provide various services including, broadly speaking, the maintenance of the estate common parts. The tenants were obliged to pay service charges to the management company in respect of the cost of doing so. In short, therefore, the structure of the maintenance obligations and service charge provisions were entirely standard.
67. The tenants of the blocks of flats formed an RTM company to exercise the rights under the Act in relation to the two blocks but, critically, the premises in relation to which the RTM was sought did not include the two coach houses. The RTM claim did, however, include the estate common parts and the six car parking spaces beneath the coach houses demised with the flats, as property appurtenant to the premises. The FTT granted the RTM Co's application confirming it had acquired the RTM and the Upper Tribunal (Lands Chamber) dismissed the landlord's appeal and the matter went to the Court of Appeal.
68. The landlord argued that appurtenant property must mean property which appertained exclusively to the flats forming the premises. It was contended that the blocks on the estate did not satisfy the requirement in s. 72 (1) (a) that they must be self-contained because they were unable to function independently and without the need to make use

of shared facilities. The landlord (who, like the RTM Co, was unrepresented) focused on the practical difficulties flowing from a finding that the RTM Co was entitled to acquire the right to manage the blocks and the estate common parts whilst leaving the coach houses in the control of the landlord/management company. There was a risk that this would lead to a duplication of management efforts and possibly conflicts as to when maintenance was required since the management company would remain bound to provide services to the tenants of the coach houses in respect of the whole of the estate and the RTM Co would owe similar obligations to the tenants of the flats in the two blocks.

69. Sullivan L.J. gave the only reasoned judgment. His lordship expressed sympathy with the landlord's wish that the estate should be managed as a whole. However, his lordship went on to say, at paragraph 13:

*“The Act defines a self-contained building by reference to it being “structurally detached” and there is no justification for imposing [the landlord’s] further requirement that the structurally-detached building must be able to function independently, without the need to make use of any shared facilities such as private access roads, car parking, gardens or other communal areas.”*

70. As for the argument that in order for the RTM to be exercised in relation to appurtenant property it must be exclusively appurtenant to the Premises, Sullivan L.J. pointed out that the definition in s. 112 (1) refers to appurtenances belonging to or usually enjoyed with the building, part of a building or flat. The court was not persuaded that the potential practical difficulties identified by the landlord were sufficiently serious to justify adding a gloss to the words of the Act.

71. Again, therefore, the failure of the Act to deal adequately with estate wide management schemes has the potential to cause considerable practical difficulties.

Tenants are able, it would seem, to pick and choose which parts of an estate in relation to which they wish to acquire the RTM.

72. The potential headaches for a landlord are obvious but cut no ice with the Court of Appeal. There is no provision equivalent to s. 23 (4) of the 1993 Act, which enables a landlord subject to a collective enfranchisement claim to require the tenants to acquire a piece of land which will, post-enfranchisement, cease to be of any practical use.
73. One issue which does not appear to have been addressed in the Court of Appeal in Gala Unity is the possibility of the split estate scenario creating a windfall benefit for the tenants of the properties which are not subject to the RTM. It is clear that the RTM Co in the Gala Unity would have no entitlement to demand a contribution from the coach house tenants in respect of works done or services provided.
74. Accordingly it can only be presumed that if services are provided to the whole estate from which those tenants must inevitably benefit, they will obtain a windfall since they could not be required to contribute to the cost of services from which they have benefitted. Presumably also the contribution of the tenants in the blocks would have to increase to meet the shortfall since this is generally the only source of income for an RTM Co, but this would create potential difficulties where the percentage of the total costs which the tenants are required to contribute is fixed by the terms of the lease.
75. It follows that when advising tenants contemplating exercising the RTM careful thought must be given to which parts of an estate should be included as appurtenant property. If not all of the blocks on the estate are to be acquired, there is a substantial risk of the tenants incurring additional and unrecoverable service charge responsibilities by assuming the responsibility for management of common parts which others use.

## 2) Challenging the RTM; company constitution and notices

76. In contrast to the inadequate provision which the Act makes for defining the very important question of the premises which are subject to the right, the Act goes into minute detail to define the composition of an RTM and the notice procedures which must be followed.

77. These provisions have proved to be a fertile source of litigation, with landlords seeking to exploit mistakes made by RTM companies in following the detailed procedures laid down by the Act to resist (or at least postpone) the RTM.

78. An overview of the detailed procedural requirements which the RTM Co must comply with has been provided above. In the important recent case of Elim Court RTM Co Ltd v Avon Freeholds Ltd [2014] U.K.U.T. 0397 (LC) the Upper Tribunal decided that given the automatic consequences of the Act which flow from the procedural steps, strict compliance with the time limits is necessary; the lack of prejudice to the landlord will not generally exclude non-compliance with the strictures of the provisions.

79. The only answer is to carefully study each step of the procedure to ensure compliance (or, when acting for the landlord) to identify non-compliance. However, some common pitfalls, as revealed by recent cases, which should be considered are as follows:

- (1) Have valid notices inviting participation been served on all qualifying tenants, containing the information required by s. 78? Are the addresses for service valid? Have there been any changes in the identity of the qualifying tenants before the claim is made such that new notices are required?

- (2) Is the claim notice valid? It must be served not less than 14 days after the notices inviting participation have been served and within two months of the date of a counter-notice. If these timescales are not met the claim will likely be invalid Gateway Property Holdings Ltd v 6-10 Montrose Gardens RTM Co Ltd [2011] UKUT 349.
- (3) Check the signatures on the claim notice. Since the claim is, of necessity, made by a company, the requirements for the execution of documents set out in s. 44 of the Companies Act 2006 must be complied with (i.e. signed by two authorised signatories or by a director in the presence of a witness who attested the signature). If not the claim is invalid; see Elim Court.
- (4) Is the RTM Co properly constituted in accordance with ss. 73 and 74? The Upper Tribunal recently (in Fairhold Mercury Ltd v HQ (Block 1) Action Management Co Ltd [2013] UKUT 487) rejected an ingenious argument that a company was not an RTM company because it did not include the initial “RTM” in its name (the argument was based on the regulations which prescribe the content and form of the articles of association of RTM companies).
- (5) Is there already an RTM Company in existence in relation to the premises? By s. 73 (4) a company cannot be an RTM company if another company is already a RTM company in relation to the premises or to any premises containing or contained in the premises. The obvious purpose of the provision is to avoid confusion over competing claims. However, this provision gave rise to another ingenious argument, that a landlord could defeat the possibility of an RTM claim by its tenants by forming its own RTM company and then asserting that s. 73 (4) prevented any future claim by a tenant formed RTM company. Perhaps unsurprisingly, the Upper Tribunal rejected that attempt to avoid the Act altogether by purposively construing s. 73 (4) to the effect that it did not prevent an RTM claim where the landlord had earlier formed an RTM company for the specific purpose of defeating a claim by the tenants Danescroft RTM Co Ltd v Inspired





Holdings Ltd [2014] L. & T.R. 4. The case is a further example of how the deficiencies in the Act have required a certain amount of judicial inventiveness.