Law Commission

BPF

Leasehold home ownership: exercising the right to manage
Response to Consultation paper

The British Property Federation

1. The BPF represents the commercial real estate sector. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help provide essential infrastructure and create great places where people can live, work and relax.

2. The UK's commercial real estate sector contributes about 5.4% of GDP, and directly employs 1 million people, or 6.8% of the labour force. It provides the nation's built environment and is diversifying from its core investment in the nation's offices, shops, leisure facilities and factories, to support the new economy through investments in logistics, healthcare, student accommodation, infrastructure, residential and increasingly through Build to Rent investment in new housing.

3. As part of their extensive review of leasehold ownership generally, the Law Commission is conducting a major review of the current law on right to manage (RTM), very aware that although RTM was introduced in 2002, there have been, or have perceived to have been, difficulties in transferring management of buildings to RTM companies. The remit of the consultation is to try to simplify the process.

4. RTM has always been designed to be a no-fault right for lessees to take on the management of their buildings without the need to prove a complaint against their landlord or managing agent. It was intended to be a simple process, beginning with the leaseholders setting up a dedicated RTM company to take on the management function. There has been criticism that the strict compliance with statutory procedures has been 'unforgiving' to leaseholders and has in some cases afforded landlords the opportunity to frustrate or delay otherwise valid claims.

5. Whilst we understand that the current rules are probably overcomplicated, we are in favour of the procedure being simplified and made more transparent. However, our membership have commented that leaseholders in general, or more commonly, a caucus of interested or disaffected leaseholders can push for an RTM, without necessarily having a full understanding of all the implications and responsibilities of taking over the management functions designated by RTM. We also have experience of cases where the full legal implications of being a director of an RTM, with in some cases personal responsibility for health and safety matters and the liability that this entails, has only been understood after the event.

6. Our membership has experience of RTMs failing to live up to initial expectations, leading to the resignation of RTM directors and the dissolution of an RTM, necessitating the freeholder having to take over the management responsibility once more, having to resolve the muddles and unfulfilled issues and in some cases dealing with irrecoverable service charges due to Landlord and Tenant Act 1985 procedures not having been followed.

7. Such a scenario is a worst case, and we have no fundamental disagreement, if in a residential building, with a properly constituted RTM, with a full understanding of the issues, and with directors who appreciate the possibly onerous liability they are accepting, there is a wish to be in control of the management of their building. We support the suggestions in the consultation that education and

training of directors is an important element in ensuring a successful RTM, although we query how this might be organised and funded.

8. Our membership is also concerned at the proposals to abolish the restriction on part commercial building being exempted from RTM.

9. The 25% non-residential exemption, which follows leasehold reform practice, is a necessary protection for commercial landowners to protect the management and value of their investment. The proposal to allow for any part-residential building, with the necessary quorum, to apply for RTM is an unacceptable proposition and is strongly resisted. The stipulation that in such cases the protection offered to the commercial landowner, that the RTM must employ professional managing agents, is in our view insufficient. An agent owes a professional duty to his client, which if it is the residential leaseholders could work to the disfavour of the commercial holding. It is unrealistic to assume that in such circumstances the agent should act as 'honest broker,' in cases of divergent views or aspirations between the residential and commercial ownerships.

10. This is a major consultation, running to over 350 pages with over 140 specific questions. In this response, we attempt to answer these questions within the context of the BPF membership. This membership includes landlords of large London estates, institutions, private investors with significant holdings and developer/investors who have differing concerns.

11. A great deal of thought has gone into the proposals which offer some sensible rationalisation of the over complicated and overly legalistic existing rules. We have serious concerns however, if under the new proposals many more RTMs are set up, particularly in large and complex buildings, without the members of the RTM and especially its directors being aware of the onerous obligations involved. We are aware of at least one case where an RTM director, found to his consternation, that the managing agents of his building, who were responsible for making the necessary Companies Act returns, had failed to do so, and therefore that RTM director was logged as a defaulter under the Companies Act, which had serious repercussions on his professional job as a director of a financial services company. If there is a risk that taking on a pro-bono task as an RTM director could put one's livelihood at stake, it would be surprising in such circumstances if there were many candidates from company directors generally.

12. One comment, which came from discussions with the Law Commission, was that RTM is to some extent intended to be a spur to landlords to be more accommodating to residential leaseholders, either in reacting to requests to change managing agents who were deemed unsatisfactory, or otherwise to be more receptive to their aspirations. Whilst there are situations where the impetus for RTM is so strong, that the statutory right will be exercised, come what may, there may well be many cases where a change in management style and personnel will satisfy leaseholders and thus avoid the complications of RTM which affects both leaseholders and landlords.

13. We welcome the chance to respond to this consultation and look forward to working with the Government on developing the policy proposals into real actions.

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Q.1. We provisionally propose that the RTM should be exercisable in respect of leasehold houses as well as flats. Do consultees agree?

We agree

Q.2. Do consultees think leasehold houses qualifying for the RTM would increase the number of RTMs? Do consultees think this would be used by leaseholders of houses to acquire single-building RTMs, or only to join multi-building RTMs on estates?

We assume that the demand for inclusion would come predominantly from multi-building RTMs on estates.

Q.3. We provisionally propose that leaseholders of houses should follow the same process as leaseholders of flats in order to acquire the RTM. Do consultees agree?

We agree.

Q.4. We provisionally propose to adopt the same approach as in our proposals relating to enfranchisement, so that the RTM will be exercisable over "residential units". Do consultees agree it should be a consistent approach? If not, how can we justify different terminology and what should it be?

We agree with the consistent approach outlined. We think that in mixed use estates it is vital that there is a single landlord tasked with the responsibility of overseeing the whole estate including the public realm. Where there is a mixed commercial and residential block it is important that the current 25% threshold continues to apply.

Q.5. Our provisional view is that the different underlying considerations for enfranchisement and for the RTM justify a divergent approach to the qualifying criteria for premises. Do consultees agree?

We understand the differing underlying considerations and that RTM does not involve the transfer of any property interest. However, as it is proposed that RTM will be made cheaper and easier, we are concerned that if the qualifying criteria is reduced it may encourage more cases of RTMs being set up without fully understanding the duties and obligations involved. The failure and dissolution of RTMs is a major concern of our membership.

Q.6. We provisionally propose that there should be a broader definition of "building" for the purposes of the RTM qualifying criteria for premises. Do consultees agree?

We prefer the proposition in Q.7 below

Q.7. Instead of introducing a broader definition of "building", would consultees prefer to retain the existing requirements for a self-contained building or part of a building, with an additional judicial discretion to allow the RTM to be acquired where the qualifying criteria are not met?

As suggested above, we prefer this proposition.

Q.8. Do consultees have experience of failing to acquire the RTM because of the current definition of "building"?

We have no examples to hand.

Q.9. We provisionally propose that one qualifying tenant should be able to claim the RTM over:

(1) buildings which contain no other residential premises; and

(2) buildings in which there are no other qualifying tenants.

Do consultees agree?

We do not agree. Our views, as set out in the preamble to this response, is that RTM should be limited to wholly or preponderantly residential buildings held by long leaseholders.

Q.10. We provisionally propose that the requirement for at least two-thirds of the flats in the premises to be held by qualifying tenants should be reduced to 50%. Do consultees agree?

As stated above, we do not agree to this proposed widening of RTM qualification rules.

Q.11. We provisionally propose that the current rule requiring the participation of both qualifying tenants in a two-unit building should be retained, because of the particular risk of dispute and deadlock in the RTM context. Do consultees agree?

We agree.

Q.12. We provisionally propose that the exemption for buildings containing more than 25% non-residential premises should be removed, so that the RTM could be acquired in respect of such buildings. Do consultees agree?

We disagree strongly with this proposition. Our reasons are set out in our preamble.

Q.13. We provisionally propose that the RTM company should be required to instruct professional managing agents, satisfying applicable regulatory standards, for any buildings containing commercial premises which represent more than 25% of the total internal floor area. Do consultees agree?

As set out above we do not agree with the proposal to remove the 25% exemption. Where an RTM succeeds then there should be a requirement for professional property managers if there are more than 10 units.

However, if such a proposal is accepted, we do not consider that requiring the appointment of a professional managing agent will resolve likely difficulties in ensuring an equitable management regime. Managing agents must act for their clients and cannot be expected to act as honest brokers between their residential clients and the commercial interests of the freehold owner of the building.

Q.14. Do consultees have experience of being unable to acquire the RTM because of the exemption for buildings containing more than 25% non-residential premises?

N/A

Q.15. We provisionally propose that shared ownership leaseholders with long leases should be qualifying tenants for the purposes of RTM, regardless of whether they have staircased to 100%. Do consultees agree?

We think this is fair, as such shared owners are responsible for the service charge payments.

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Q.16. We provisionally propose that the law should be changed to allow leaseholders to qualify for the RTM in premises with a resident freeholder. Do consultees agree?

We do not agree. The current exemption seems fair in the circumstances where a resident owner has control of the management of his property.

Q.17. Do consultees have experience of leaseholders being prevented from exercising the RTM by the resident landlord exemption?

N/A

Q.18. Do consultees consider that our provisional proposal to allow leaseholders to qualify for the RTM on premises with a resident freeholder is likely to deter home owners from converting part of their property into a leasehold flat or flats?

Yes. We think this could well be the case. We do not see the need to override the right of resident freeholders to manage their own buildings.

Q.19. Do consultees consider that an RTM company should be able to acquire the RTM over the whole building where the freehold of the building is in split ownership?

We do not support this proposal.

Q.20. If the law was changed to allow the RTM over a building in split freehold ownership, do consultees agree that the tribunal should have the power to reconcile any conflicting covenants in the leases with the different freeholders?

If, in spite of our objection to this general proposal, the law is changed to provide for an RTM in cases of split freehold ownership, we consider it essential that the tribunal has powers to reconcile conflicting covenants.

Q.21. Do consultees have experience of the RTM in relation to a building owned by different freeholders?

N/A

Q.22. We provisionally propose that National Trust properties should be excluded from the RTM. Do consultees agree?

We agree. How are local authorities or Housing Association blocks affected where they have leasehold interests? The same rules should apply to them.

Q.23. We provisionally propose that the existing exclusion for leases which allow any non-residential use should be replaced with an exclusion for leases which prohibit residential use. Do consultees agree? If not, is there any justification for having a different position in the RTM than in enfranchisement?

We do not support RTM in part commercial buildings or where the commercial element has substantial value to the landlord, for the reasons we have explained above. We reiterate our support for the concept of RTM for the benefit of residential leaseholders.

Q.24. Do consultees have experience of leaseholders being prevented from exercising the RTM by the exclusion for leases which allow any non-residential use?

N/A

Q.25. We provisionally propose that qualifying tenants of a single building on an estate should retain the existing right to claim the RTM over that single building. Do consultees agree?

We generally agree. However, there must be exceptions where there are shared common shared services (such as heating and hot water) where separation of the block by RTM makes no practical sense.

We cite an example provided by one of our membership: A landlord member owned the freehold of three adjoining blocks, all of which were under different freehold titles. They were managed separately, with separate service charge accounts but there were some shared services.

One of the blocks applied for RTM which was resisted by the landlord (for reasons outlined below) but was permitted following a Tribunal decision.

The RTM wanted management control over their building which in itself was fine, but the boiler plant providing hot water to flats in the neighbouring buildings was in the basement of the building seeking the RTM.

Shortly after the RTM took control, they disconnected the boiler (as they had made internal arrangements to go independent) but without consulting the neighbouring blocks, who were still getting hot water from the RTM block.

The landlord was still under an obligation under the terms of the leases to provide the neighbouring lessees with hot water and because of the RTM's decision they were put in breach.

Matters were eventually resolved by everyone agreeing in the end to go independent but we wish to highlight the unintended consequences of the RTM provisions and hope that issues such as this can be looked at more carefully in cases where there are shared services.

Q.26. We provisionally propose that the law should allow for a single RTM company to acquire the RTM over two or more buildings situated on the same estate in a single RTM claim. Do consultees agree?

We agree.

Q.27. Do consultees think it would be cheaper for leaseholders on an estate to carry out a multi-building RTM rather than multiple single-building RTMs (both in terms of acquisition costs and ongoing costs)?

Potentially yes.

Q.28. We provisionally propose that the RTM should be capable of being exercised over multiple buildings by a single RTM company in a single RTM claim if either:

(1) the buildings to be managed by the single RTM company share some appurtenant property; or

(2) the qualifying tenants in each building contribute to a common service charge (whether or not other, separate service charges are payable).

Do consultees agree?

Yes.

Q.29. We provisionally propose that the qualifying criteria and participation requirement should have to be satisfied by each individual building included in the claim for a multi-building RTM, rather than as a whole across all of the buildings included in the claim. Do consultees agree?

Yes.

Q.30. We do not consider that there should be an automatic right for qualifying tenants of premises not originally included in an RTM claim to later join an existing multi-building RTM arrangement. Do consultees agree?

Yes.

Q.31. We provisionally propose that qualifying tenants of buildings should be able to "break away" from existing multi-building RTM arrangements and exercise the RTM in their own right. Do consultees agree?

No. See our response to Q.25.

Q.32. We provisionally propose that the restriction on successive claims should apply to break-away claims, so that the qualifying tenants of the building(s) wishing to break away have to wait for a minimum period following the multi-building RTM acquisition before making the break-away claim. Do consultees agree?

Yes.

Q.33. We do not consider that members of a multi-building RTM company should have different voting rights to members of a single-building RTM company, because of the likely associated complexity and cost. Do consultees agree?

Yes.

Q.34. We provisionally propose that there be a presumption that the management functions relating to appurtenant property which does not belong exclusively to, or is not usually enjoyed exclusively with, the building(s) over which the RTM is being acquired should not transfer to the RTM company. Do consultees agree?

Yes.

Q.35. We provisionally propose that RTM companies should continue to be companies limited by guarantee. Do consultees agree?

We agree.

Q.36. We provisionally propose that, if our proposals on prescribed articles for nominee purchasers are adopted, it should not be permitted to use RTM companies as nominee purchasers in collective freehold acquisitions, as it is easier to set up a new company for this purpose. Do consultees agree?

We agree.

Q.37. We provisionally propose that the limit on the number of RTM companies that can exist in relation to a set of premises should be removed and replaced by a rule that once one RTM company serves a claim notice in relation to a set of premises, no other RTM company can do so until:

(1) the RTM claim is withdrawn or rejected by the tribunal; or

(2) the RTM, having been acquired, ceases.

Do consultees agree?

Yes.

Q.38. Do consultees have experience of landlords setting up RTM companies in an attempt to prevent leaseholders from acquiring the RTM?

We have no such experience.

Q.39. Do consultees have experience of third parties such as managing agents setting up RTM companies in an attempt to gain some benefit?

We have no such experience.

Q.40. We invite consultees' views on whether any requirements of company law should be relaxed for RTM companies.

We see no reason why this should be the case.

Q.41. We provisionally propose that the prescribed articles of association should be amended to require company directors to hold a general meeting once a year. Do consultees agree?

We agree.

Q.42. We provisionally propose that training for RTM company directors should be encouraged and well-publicised, but not mandatory. Do consultees agree?

We consider such training should be mandatory. Unless such directors are aware of the onerous responsibilities and duties attaching there is a grave risk that RTMs fail in time due to the inability to attract directors.

Q.43. We provisionally propose that the Government should ensure that training resources for prospective RTM directors are provided free of charge. Do consultees agree?

We consider it essential that RTM directors receive training, but we are unsure from which public budget such free training would come.

Q.44. In your experience, do most RTM companies appoint managing agents?

The legislative burden of residential management is onerous and, in our experience, in any but the smallest building, a managing agent is appointed.

Q.45. Should it ever be mandatory for RTM companies to use a managing agent which meets the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government?

If a landlord is to have the management of his building removed by an RTM, we consider that the appointment of a manging agent should be a requirement.

There should be a mandatory requirement to use a managing agent where there are a minimum of 10 units or commercial premises.

Q.46. If consultees think it should be mandatory for RTM companies to use a managing agent meeting the regulatory standards expected to be set by the Ministry of Housing, Communities and Local Government, are any (or all) of the following the appropriate circumstances in which it should be mandatory:

(1) Where more than 25% of the internal floorspace of the premises is commercial property?

(2) Where the premises have more than a certain number of units?

(3) Where the premises have special characteristics such as:

(a) being a listed building; or

(b) having a specialised use, such as retirement property?

We refer to our response to Q.45 above.

Q.47. If consultees think that use of a managing agent should be mandatory in premises with more than a certain number of units, would 10 units be an appropriate threshold? If not, what would be an appropriate threshold?

We think 10 units is a sensible threshold.

Q.48. Are there any other circumstances in which consultees think it should be mandatory to use a managing agent which meets the regulatory standards set by the Ministry of Housing, Communities and Local Government?

We reiterate our response to Q.47 above.

Q.49. We provisionally propose that RTM companies should be able to recover their management costs (including administration costs) from leaseholders as if the lease made express provision for them to be recovered as part of the service charge. Do consultees agree?

We agree.

Q.50. Do consultees think that there would be a reduction in litigation if RTM companies were permitted to recover their management costs (including administration costs) through the service charge? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

We presume this to be the case, but we have no specific evidence in this regard.

Q.51. We provisionally propose that the requirement to serve notices inviting participation should be abolished. Do consultees agree?

No. It is vital that there is a statutory requirement for the proposed RTM company to serve notice on all lessees of its intention to exercise RTM as otherwise the is the danger of a special interest group taking over the management of the block.

There should also be an obligation to consult with 100% of lessees and secure a minimum threshold of 70% support to proceed with RTM

Q.52. Do consultees think the acquisition process would be shorter and/or cheaper if notices inviting participation were abolished? If possible, please estimate how much time and/or money the average RTM company might save.

It is essential for fairness that 100% of lessees are consulted/invited to participate and the RTM should have to warrant that it has done so.

Q.53. We provisionally propose that the prescribed notes accompanying the claim notice should include a statement that qualifying tenants are entitled to join the RTM company at any time. Do consultees agree?

We agree.

Q.54. In our enfranchisement consultation paper, we provisionally proposed to replace the current deemed withdrawal provisions for a claim notice. If this proposal applied in the RTM context, landlords who have served a counter-notice and leaseholders would have a new right to apply to the tribunal for an order striking out the claim where the RTM company has not initiated the next step in the process.

We provisionally propose that the same right should be introduced in the RTM context. Do consultees agree? This would replace the rule that the RTM company is deemed to have withdrawn its claim if it does not apply to the tribunal after receiving a negative counter-notice. If consultees think the position should be different from that in enfranchisement, please give reasons.

We agree.

Q.55. We provisionally propose that landlords should be required to state all possible objections in the counter-notice and should not generally be permitted to raise new arguments at a later stage. Do consultees agree?

We think this is reasonable.

Q.56. We provisionally propose that, where a counter-notice has not been served, the RTM company should be able to apply to the tribunal to determine:

(1) that the RTM company was on the relevant date entitled to acquire the RTM;

(2) the acquisition date on which the RTM was or will be acquired; and/or

(3) the transfer of management functions in respect of non-exclusive appurtenant property.

Do consultees agree?

We agree.

Q.57. We provisionally propose that, where no counter-notice is served and an RTM company applies to the tribunal for a determination as to its acquisition of the RTM and/or the transfer of management functions in respect of non-exclusive appurtenant property, then:

(1) the landlord should have to apply to the tribunal for permission to participate in the proceedings; and

(2) the tribunal should be able to make the permission conditional on such terms as it thinks fit.

Do consultees agree?

We agree.

Q.58. Do consultees think that giving RTM companies the right to apply to the tribunal to determine their entitlement to acquire the RTM when no counter-notice has been served is likely to prevent future litigation over the validity of the RTM? If possible, please provide an estimate of the percentage of cases in which this might make a difference.

We presume this to be the case.

Q.59. We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the claim notice and make any other directions it considers appropriate. Do consultees agree?

We agree.

Q.60. We provisionally propose that the tribunal should be given a power to waive defects or allow amendments in the counter-notice and make any other directions it considers appropriate, provided that

amendments are not permitted unless the landlord has made a genuine mistake or other exceptional criteria are met. Do consultees agree?

We agree.

Q.61. Do consultees think that giving the tribunal the power to waive defects or allow amendments in notices would reduce litigation and therefore reduce costs? If possible, please estimate how much money an RTM company might save.

We presume this to be the case.

Q.62. Do consultees consider that there should continue to be a requirement for the claim notice to be signed by or on behalf of the RTM company?

Yes.

Q.63. If the requirement for a claim notice to be signed by or on behalf of the RTM company is to be retained, do consultees consider that the claim notice should be signed by either:

(1) a single officer of the RTM company; or

(2) a person authorised by an officer of the RTM company to sign the claim notice on behalf of the RTM company.

Either.

Q.64. We provisionally propose that an RTM company should be able to serve the RTM claim notice on the landlord at the following email addresses:

(1) an address they have specified for the service of RTM notices;

(2) an address they have specified for the purposes of serving notices (including notices in proceedings); or

(3) an address included on or at HM Land Registry as one at which the registered proprietor can be served with notices.

Do consultees agree?

Yes.

Q.65. We provisionally propose that the law should be clarified to confirm that an RTM company is entitled to serve a copy of the claim notice on a qualifying tenant at an email address they have confirmed to the RTM company as an email address for the service of notices under the RTM provisions. Do consultees agree?

Yes.

Q.66. We provisionally propose that a claim notice should be deemed to have been served on the landlord if it is delivered by hand, or sent by post or email (where permitted) to one of the specified addresses in Group A or Group B.

Group A addresses for service include:

(1) any address (including an email address) that has been provided by the landlord to the leaseholders or RTM company as an address at which an RTM notice may be served; and

(2) the landlord's current address.

Group B addresses for service include:

(3) the landlord's last known address;

(4) the latest address given by the landlord for the purposes of section 47 of the Landlord and Tenant Act 1987;

(5) the latest address given by the landlord for the purposes of section 48 of the Landlord and Tenant Act 1987; and

(6) the latest email address given by the landlord for the purposes of serving notices (including notices in proceedings).

Do consultees agree?

Yes. Plus RTM to provide declaration that it has invited ALL lessees to participate.

Q.67. We provisionally propose that before serving a claim notice, the RTM company should be required to check the landlord's address on or at HM Land Registry. Do consultees agree?

Before service of a claim notice at a Group B address, we provisionally propose that the RTM company should be required to:

(a) search the Probate Register;

(b) search the Insolvency Register; and

(c) (in the case of a company landlord) check its status at Companies House.

1.69 We also provisionally propose the following:

(1) if an individual landlord is dead, the designated address for service should be the address of any personal representatives given in any grant of probate (or, if none, the office of the Public Trustee);

(2) if an individual landlord is insolvent, the designated address for service should be the address for their trustee in bankruptcy as shown on the Insolvency Service website;

(3) if a company landlord is insolvent, the designated address for service should be the address for its administrator, liquidator or receiver as listed at Companies House. If no such person has been appointed, the Official Receiver should be served.

Do consultees agree?

Yes.

Q.68. Do consultees consider that a claim notice should include a statement of truth confirming that specified checks (if required) have been carried out?

Yes.

Q.69. We provisionally propose that if the identity of the landlord is known, but the RTM company does not have an address for them falling within Group A or B, they should carry out the Group B checks above. If this fails to provide an address, an advertisement should be placed in the London Gazette. Do consultees agree?

Yes.

Q.70. We provisionally propose, in line with our proposals in the enfranchisement consultation paper, that an RTM company applying to acquire the RTM under the missing landlord procedure should be required to:

(1) conduct the pre-service checks for using a Group B address for service;

(2) place an advertisement in the London Gazette inviting the owner of the identified property to contact the RTM company within 28 days; and

(3) include confirmation that these preliminary checks have been undertaken in the application to the tribunal for a determination that the RTM company is entitled to acquire the RTM.

Do consultees agree that the procedure where there is a missing landlord should be the same for RTM as for enfranchisement claims?

Yes.

Q.71. We provisionally propose that an RTM company should be able to specify in the claim notice an alternative address (other than the company's registered office) at which a landlord should serve a counter-notice. This could be:

(1) an address in England or Wales for service by post or hand delivery; or

(2) an email address.

Do consultees agree?

Yes.

Q.72. We provisionally propose that, in the absence of agreement between the landlord and the RTM company, the minimum period between:

(1) either

(a) the withdrawal of a counter-notice opposing the RTM claim; or

(b) the tribunal's final determination that the RTM company is entitled to acquire the RTM; and

(2) the acquisition date of the RTM,

should be three months. Do consultees agree?

Yes.

Q.73. We provisionally propose that, where the claim notice does not specify a date for acquisition, this should be determined by the tribunal, following an application by the RTM company or landlord. Do consultees agree?

Yes.

Q.74. We provisionally propose that the tribunal should be able to change the acquisition date on an application from an RTM company. Do consultees agree?

Yes.

Q.75. Do consultees consider that we should prescribe a form for the information notice? The form would contain information which should always be provided, as well as information which, depending on the circumstances, it may be reasonable to request/provide.

We consider that this is a sensible provision.

Q.76. Do consultees think that landlords should be exempted from providing information which they cannot reasonably provide without incurring disproportionate expense (whether these costs are to be met by the RTM company or the landlord)?

Whilst it is reasonable for landlords, or their managing agents to provide necessary information, and on a timely basis, such provision, if completely comprehensive can be time consuming and thus expensive. Reasonable costs should be reimbursed, but a statutory requirement to provide every detail of management information in the finest detail is likely to lead to conflict and litigation which is to be avoided if possible.

Q.77. Do consultees think that the provision of information before the RTM company finds out whether it is actually entitled to exercise the RTM is a good idea? If so, which of the two options relating to the timing of the provision of information would you prefer and why? Please also provide any further comments on your preferred option which may improve it.

If possible, when setting out your preferred option for the timing of the provision of information, please set out how you consider the costs should be allocated and estimate the cost/impact of the different options.

It appears to be perfectly sensible that a prospective RTM should seek information before formally exercising the legislation, but we see no reason why the landlord should not be reasonably reimbursed for any costs involved in this exercise.

Q.78. Do consultees think that the landlord should have:

(1) 28 days, with a possible extension in exceptional circumstances; or

(2) a fixed period of 60 days,

in order to provide the information needed by the RTM company in connection with the RTM.

We think (2) is more reasonable.

Q.79. We provisionally propose that the landlord should be under a duty to notify the RTM company of any material changes to the information previously provided and confirm, on the date of acquisition, that there are no material changes that have not been notified. Do consultees agree?

We agree.

Q.80. Do consultees think that RTM companies need a copy of every lease to understand their management obligations? Is a copy of each lease provided to or obtained by RTM companies at the moment?

If the management by an RTM is to be complete and comprehensive, then they should have a copy of every lease. The vast majority of leases are downloadable from Land Registry. If however landlords are required to provide copies of leases then they should be able to charge fair and reasonable costs for this.

Q.81. Do consultees consider that the benefits of the RTM company accessing a copy of each lease would outweigh the additional time and cost incurred in preparing these?

As indicated above we think such provision is necessary and should be paid for by the RTM.

Q.82. We provisionally propose to require the landlord, RTM company and contractor parties to communicate within prescribed periods to clarify how existing contracts will be dealt with prior to the RTM acquisition date. Our proposals would require:

(1) the landlord to provide copies or details of the management contracts, (including the contract terms, cost and notice period) in response to the information notice or with the counter-notice, depending on the preferred option for provision of information;

(2) the RTM company to notify the landlord of the contractor parties which it does not wish to, or cannot agree terms with on which to maintain a contractual relationship within one month of the determination date; and

(3) the landlord to notify the RTM company's preference to the contractor parties within 14 days. The landlord should also confirm that it considers the contract terminated as a matter of law as it will no longer be managing the premises post acquisition.

Do consultees consider that these additional requirements will provide sufficient clarity and certainty for all parties involved in the management of the premises?

We consider these provisions sensible. Management is a complex operation and an RTM should be aware of all such complexities and the contractual obligations that form part of this.

The RTM should not be able to terminate contracts early provided they have been entered into in accordance with S20 consultation requirements. Any existing contractual obligations should be adhered to.

Q.83. We invite consultees to share their experiences of TUPE where the RTM has been acquired. Did the landlord's employees, who were involved in management of the premises, transfer over to the RTM company? If so, in what circumstances? If not, what happened to them once the RTM transferred?

The employment of staff in a property by a landlord or RTM is one of the most onerous obligations. TUPE transfers require professional input and the RTM and its directors must take over health and safety and other obligations of these staff. We are aware that some managing agents will not take on the employment of such staff due to these onerous obligations and therefore the RTM must be aware that they could become direct employers in many cases.

Q.84. Do consultees have experience in relation to a caretaker or landlord's employee's rights to occupy a flat in the premises? What happened once the RTM was transferred?

Such rights of occupation need to be dealt with carefully if secure tenure is to be avoided.

Q.85. Do consultees consider that any amendments could be made to the definition of "management functions", or more information provided by way of guidance, to improve clarity and certainty?

It is very important that such management functions are strictly defined so that both RTM and landlords are aware of which party is responsible for particular functions.

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Q.86. Are consultees aware of cases where the RTM company and landlord have arranged for certain management functions to remain with, or transfer back to, the landlord? If so:

(1) What functions, and why?

(2) Did any disputes arise from the agreement to transfer them back?

We have no examples to hand but the strict delineation of functions between landlords and RTM is crucial for effective management.

Q.87. Do consultees think that regulated activities, such as the provision of personal care, should be excluded from the definition of "management functions", so that they do not transfer to the RTM company?

Yes.

Q.88. If consultees do not think that regulated activities should be excluded from the definition of "management functions", do they consider that any changes are needed to the current law, under which the RTM company acquires the obligation to carry out any regulated activities specified in the lease?

See answer yes to Q.87 above.

Q.89. Are there any regulated activities other than the provision of care which consultees think RTM companies should not, or might not want to, acquire?

We agree with the proposal put forward in the consultation that any regulated activity should be excluded entirely.

Q.90. We provisionally propose that a copy of the current insurance policy, the insurance claims history and a copy of the last reinstatement valuation should be part of the documentation provided by the landlord to the RTM company before acquisition of the RTM. Do consultees agree?

Yes**.**

Q.91. Do consultees think that landlords providing a copy of the current insurance policy, claims history and a copy of the last reinstatement valuation would lower the cost of securing insurance for RTM companies? If possible, please provide an estimate of how much could be saved.

It may well be the case that the block benefits from bulk buying power of a larger landlord and therefore it is not possible to be certain that there will be a cost saving.

Q.92. Do consultees think that it should it be made explicit in legislation that the RTM company has an insurable interest?

Yes.

Q.93. We provisionally propose that the RTM company should acquire the duty to reinstate the building, provided that the lease places this duty on the landlord. Do consultees agree?

If not, should there be a solution based on separate insurances obtained by the RTM company and the landlord respectively ("split insurance")?

We agree this proposal and a RTM should be made fully aware of this important duty and the potential liability if the insurance is not properly constituted.

Q.94. We provisionally propose that the RTM company should provide the landlord with a copy of any contract of insurance entered into by the RTM company in respect of the premises, within 21 days of a request from the landlord. Do consultees agree?

Yes. It is essential that a landlord can receive early confirmation that their property is properly insured. It should be a strict requirement that insurance is in place at the time of the RTM becoming effective. Our membership has experience of a case where the insurance was not put in place until two weeks after the RTM became responsible for the insurance.

There is also the issue of Terrorism insurance or under insurance. The RTM should be obliged to put in place the insurance cover that is appropriate and it should be made aware of the danger of excluding Terrorism cover.

Q.95. Do consultees have experience of landlords purchasing additional insurance for a premises subject to the RTM because an RTM company failed to secure comprehensive insurance? If so, what was the cost of this additional insurance?

We have no details of cost, but we are aware from our membership that there have been occasions where a landlord has had to take out precautionary additional insurance where there was concern that the RTM had not taken on sufficient cover.

Q.96. We provisionally propose that the landlord should be able to apply to the tribunal for a *determination* ***that the RTM company has under-insured. Do consultees agree?***

Yes.

Q.97. We provisionally propose that, if the tribunal finds that the RTM company has under-insured, the tribunal should be able to:

(1) direct that legitimate costs of "top up" insurance are recoverable; and/or

(2) make a direction for the future insurance of the building to be procured by the RTM company.

Do consultees agree?

Yes and the RTM should be responsible for costs.

Q.98. Do consultees consider that RTM companies should be required to obtain reinstatement valuations periodically?

Yes with a recommended frequency of every five years.

Q.99. In consultees' experience, how much does it cost to obtain a reinstatement valuation?

Whatever the cost, which should not be prohibitive, it must be cheaper than the risk of under-insurance in the case of a major claim, for which we assume the RTM will be liable, if they have taken on the responsibility for insurance.

Q.100. In consultees' experience, how common is it for RTM companies to recover accrued service charge arrears from the landlord? What are the consequences for the financial security of the RTM company if arrears are not recovered?

We understand that an RTM will require immediate funds to be able to operate. Landlords should make all reasonable endeavours to pass over funds on receipt but should not be obliged to expend substantial time and effort in trying to collect arrears when they can pass on this right to the RTM.

Q.101. We provisionally propose that the landlord should be required to pay to the RTM company 50% of the estimated uncommitted service charges at the latest on the acquisition date, with the remainder payable within six months of the acquisition date. Do consultees agree?

We agree.

Q.102. We provisionally propose that the landlord should be required to use reasonable endeavours to pursue service charge arrears accrued prior to the acquisition date, and to pay any recovered funds to the RTM company. Do consultees agree?

No. as soon as the management of the block falls under the control of the RTM then all the management function becomes their responsibility. There should not be a split responsibility for the ongoing collection of earlier service charge arrears.

Q.103. We invite consultees' views on the following points.

(1) Do consultees consider that there is a practical solution to avoid some of the existing delays and duplication of costs associated with lease consents under the RTM regime?

(2) If so, do consultees consider:

(a) that the RTM company and landlord should be required to appoint joint advisors (chosen by the RTM company), in order to keep down the costs to be met by the leaseholder ("option 3");

(b) that the existing process should be sped up, by requiring the leaseholder to seek consent from the RTM company and landlord concurrently, or requiring the RTM company to pass the request to the landlord within a set period of time ("option 4"); or

(c) that there is another model which would work better (in which case, please give details)?

(3) In relation to option 4, do consultees agree that the RTM company and/or landlord should have a limited period within which to respond? How long would be appropriate? We suggest 30 days as an initial position. How could costs be kept down?

It is an inevitable consequence of RTM with split responsibility for lease consents that the process is more complicated than with direct landlord responsibility. We agree in principle that position (4) seems the most appropriate but a landlord must have continuing rights and obligations over such consents and should be paid commensurately for their involvement.

Q.104. What experiences of delays and/or duplication of costs have consultees experienced in relation to lease consents under the RTM regime? If possible, please give an indication of the costs incurred.

As indicated above the process is likely to be slower and more expensive than with a direct landlord relationship, but this seems an inevitable consequence of RTM.

Q.105. Do consultees consider that the law should be clarified to make clear that the RTM company is not entitled to grant retrospective consents or consents in respect of absolute covenants?

Yes.

Q.106. We provisionally propose that the law should require the RTM company to include its own name and address for service on service charge demands, but not those of the landlord. Do consultees agree?

Yes.

Q.107. We provisionally propose that the tribunal should have exclusive jurisdiction over disputes between the RTM company and landlord arising from the RTM provisions. Do consultees agree?

Yes.

Q.108. Do consultees consider the tribunal having exclusive jurisdiction over disputes between the RTM company and landlord over RTM provisions would save time and lower costs?

Yes.

Q. 109. If consultees do not agree that the tribunal should have exclusive jurisdiction over disputes between the RTM company and the landlord arising from the RTM provisions, over which disputes should the county court retain jurisdiction.

As set out above we consider that the tribunal should have jurisdiction.

Q.110. We provisionally propose that enforcement of the requirements in the 2002 Act should be the exclusive preserve of the tribunal. Do consultees agree?

Yes.

Q.111. Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a third party?

Do consultees agree that the tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a leaseholder?

Yes.

Q.112. We invite consultees' views as to whether there is any stage of the RTM process or any issue (pre- or post- acquisition of the RTM) in which mediation or arbitration might play a helpful role. If so, please give details.

We consider the tribunal is a preferable forum to resolve issues and disputes.

Q.113 We invite consultees' views as to whether the RTM company should be required to make any contribution to the landlord's non-litigation costs.

We see no reason why a landlord's reasonable non-litigation costs should not be paid in respect of services or professional time spent dealing with RTM matters.

Q.114. We invite consultees' views as to how any contribution that is to be made by the RTM company to the landlord's non-litigation costs should be calculated. Should the contribution be based on:

(1) fixed costs;

(2) capped costs;

(3) fixed costs subject to a cap on the total costs payable; or

(4) the landlord's response (the counter-notice) to the claim notice, and/or whether the landlord succeeds in relation to any points raised in his or her counter-notice?

There should be reimbursement of reasonable costs, taxed if necessary.

Q.115 We invite consultees' views as to whether, if a fixed costs regime were to be adopted:

(1) such a regime should apply to claim notices; and

(2) if a fixed cost regime were to apply to apply to claim notices:

(a) what additional features might justify the recovery of additional sums: and

(b) whether landlords should be able to recover all their reasonably incurred costs in respect of those additional features (subject to assessment) or only further fixed sums.

We reiterate that we see no reason why the reasonable costs of a landlord should not be reimbursed. What is the equitable justification for a landlord having to provide detailed information and a series of tasks which will cost him time and money if he cannot recover reasonable costs for this work?

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Q.116. We provisionally propose that:

(1) no additional costs should be recoverable where there are intermediate landlords or split freehold titles; and

(2) the RTM company pays an additional fee owed to third party managers if they incur expense due to the RTM company's claim.

Do consultees agree?

(1) No

(2) Yes.

Q.117. We provisionally propose that where a claim notice fails, is withdrawn, or is struck out, the RTM company should be liable to pay a percentage of the non-litigation costs that would have been payable had the claim been completed.

Do consultees agree?

Yes and 100%.

Q.118. We provisionally propose that the percentage of the fixed non-litigation costs that should be payable where a claim notice fails, is withdrawn, or is struck out should vary depending on the stage that the claim has reached.

Do consultees agree? If so, what percentages should apply at particular stages of the claim?

In such cases we consider that the entire litigation costs of landlords should be reimbursed.

Q.119. We provisionally propose that the litigation process in respect of an RTM claim should not confer a right to costs on either party. Instead, each party should bear their own costs, except where there has been unreasonable behaviour or wasted costs, or where one of the exceptions we refer to above applies.

Do consultees agree?

No. Costs should follow the event.

Q.120. Do consultees think that each party having to bear their own costs of litigation would lead to fewer tribunal cases?

No. We think that a regime of costs following the event would reduce vexatious or bad claims.

Q.121. We provisionally propose there be a presumption in favour of an order under section 20C of the Landlord and Tenant Act 1985 and/or paragraph 5A of schedule 11 to the 2002 Act to prevent landlords

recovering litigation costs from leaseholders through service charges or administration charges. Do consultees agree?

No

Q.122. Do consultees have experience of the RTM ceasing to be exercisable by an RTM company? What caused the termination, and what happened afterwards?

Our membership has experience of cases where RTM directors resign, cannot find replacements and the RTM collapses with the landlords having to step back into a full management role and sort out the mess, with arrears of service charge, often requiring temporary funding so as to pay for insurance and onsite staff etc. This is a most unsatisfactory experience.

Q. 123. We provisionally propose that when evaluating an application to appoint a manager under Part 2 of the Landlord and Tenant Act 1987, or for management to revert to the landlord, the tribunal should consider whether the RTM company's membership satisfies the RTM participation requirements. Do consultees agree?

Yes.

Q.124. We provisionally propose that, on termination of the RTM, the functions of the RTM company should, by default, revert to:

(1) the party who is responsible for management functions in the ordinary course of events under the leases;

(2) if that person no longer exists, the landlord.

Do consultees agree?

Yes.

Q. 125. We provisionally propose that the default position should not however apply where:

(1) the tribunal has made an alternative determination or order; or

(2) the issue has been otherwise agreed between the RTM company and every landlord.

Do consultees agree?

Yes.

Q. 126. We provisionally propose that, where an agreement between the RTM company and the landlord to terminate the RTM does not have the support of all qualifying tenants, that agreement should have to be approved by the tribunal. The tribunal should approve the agreement if it is satisfied that the leaseholders will be able to enforce performance of the management functions in the leases against the party proposed to be responsible for management. Do consultees agree?

Yes.

Q. 127. We provisionally propose that, where an RTM company which has been struck off is restored to the Register of Companies relatively quickly, the tribunal should have the ability to declare that the RTM is restored to the RTM company. Do consultees agree?

Yes.

Q.128. Do consultees consider that an application to restore the company to the register should have to be made within 30 days of the strike off taking effect? If not, how long?

We think 30 days is an appropriate period which should be ample if the striking off was due to a procedural error rather than a fundamental failure of the functioning of the RTM.

Q.129. We provisionally propose that interim management should revert to the landlord or other responsible party under the lease, unless the leaseholders apply to the tribunal for a manager to be appointed on an interim basis. Do consultees agree?

Yes.

Q.130. We provisionally propose that the tribunal should have the power to reinstate the RTM even if the RTM has been terminated, if termination has occurred as a result of a clerical or administrative error which does not cause loss or prejudice to any party. Do consultees agree?

Yes.

Q.131. We provisionally propose that regulations should set out a non-exhaustive list of the circumstances in which an RTM company ceases to be an RTM company in respect of the premises. Do consultees agree?

Yes.

Q.132. We provisionally propose that those grounds on which an RTM company ceases to be an RTM company in respect of the premises should include:

(1) where the freehold of any premises over which RTM is exercised is transferred to the RTM company;

(2) where the articles of the company are changed so that they no longer provide that the purpose of the company is to manage the premises in question (subject to the RTM company being able to add/remove premises); and

(3) where the RTM company is a commonhold association.

Do consultees agree? Do consultees consider that any other circumstances should be included?

We agree.

Q.133. We provisionally propose that the appointment of a manager provisions in Part 2 of the Landlord and Tenant Act 1987 should be extended to apply to any premises which are being managed by an RTM company. Do consultees agree?

Yes.

Q.134. We provisionally propose that an RTM company should be able to apply to the tribunal at any time, whether it is solvent or not, to give up the RTM, and for an order that a manager is appointed, or that the management functions revert to the landlord or other person who has management functions under the lease. Do consultees agree?

Yes.

Q.135. Do consultees think there will be a time and/or financial saving if RTM companies can apply to the tribunal at any time to give up the RTM? How often do consultees think this option would be used?

Yes.

Q.136. We provisionally propose that the landlord should be able to object to an RTM company's application to give up the RTM only in exceptional cases. Do consultees agree? What should these be?

Yes.

Q.137. We provisionally propose that, while the RTM is continuing, the landlord should have the right to apply to the tribunal either:

(1) for the management functions to be transferred back to the party under the lease, failing which, the landlord; or

(2) if the default party is not best placed to manage the premises, for the appointment of a manager;

on the basis that the fault-based grounds for appointment of a manager under the Landlord and Tenant Act 1987 are made out. Do consultees agree?

Yes.

Q.138. We provisionally propose that, after the RTM has ceased, the landlord should be able to apply to the tribunal to appoint a manager instead of management reverting to the landlord or other party under the lease. Do consultees agree?

Yes, provided that this is at the landlord's discretion.

Q.139. We provisionally propose that the application to appoint a manager instead of management reverting to the landlord or other party under the lease should have to be made within 30 days of the RTM ending. Do consultees agree?

Yes.

Q.140. We provisionally propose to clarify that the uncommitted service charges held by a solvent RTM company when the RTM ceases should be transferred to the party who takes over management. Do consultees agree?

Yes.

Q.141. We provisionally propose that there should be a statutory assignment from the RTM company to the new manager of the right to collect service charge debts when the RTM ceases. Do consultees agree?

Yes.

Q.142. We provisionally propose that the existing four-year restriction on successive RTM companies should be reduced. Do consultees agree?

No. If the landlord has had to endure a failing RTM, then pick up the pieces, he ought to be protected from a subsequent applicant for at least the current four-year period

Q.143. What period of time do consultees think is appropriate for a restriction on successive RTM companies and why?

See response to Q 142 above.

Q.144. Do consultees have experience of cases where the tribunal has disapplied the four- year ban? If so, has there been any negative impact on any of the parties?

N/A