

Laceys Guide to Right to Manage

What is the Right to Manage?

This is the right for flat owners on long leases to form a company to take over the management of their block of flats without purchasing the freehold. Previously the right was only available on application to court where the landlord was at fault, but changes in the law mean that there no longer needs to be a complaint. As with enfranchisement, leases and other agreements cannot exclude the Right to Manage provisions.

How does this new right tie in with enfranchisement?

This new right is not intended to replace the existing right to purchase the freehold (known as collective enfranchisement). Flat owners who are unhappy with the running of their block can now choose between owning and managing the freehold or simply managing the block. Exercise of a Right to Manage only will affect the payment of service charges and not ground rent. The qualifying conditions are generally the same and the legal process is similar although Right to Manage is simpler. Right to Manage may be preferred where the funds cannot be raised to purchase the freehold.

What properties are affected?

There are several qualifying conditions for a Right to Manage to exist: a. At least two thirds of the flats in the building must be held on long leases of which there must be at least two. b. The participating flat owners must hold the leases of at least half of the flats in the block-if there are only two flats they must both participate. c. The proportion of the building in non-residential use must not exceed 25% of the floor area. There are also detailed rules as to what buildings, or parts of buildings, can qualify.

Are there any properties excluded from the right?

There are exclusions for the following types of property: a. Where there has been a conversion of a single property into up to 4 units AND the landlord (or an adult member of his family) lives in one of those units and has done so for the previous 12 months. b. Where the landlord is a Local Authority or charitable housing trust. c. Where the Right to Manage has been exercised and lost for whatever reason within the last 4 years (unless the permission of a leasehold valuation tribunal is obtained). d. Where an initial notice has been served to enfranchise the premises.

What happens where the block is part of an estate of properties?

If a block of flats is part of an estate of properties, several blocks may enjoy a number of common facilities. The company will become responsible for the management of the block for which the Right to Manage had been exercised. It will also be entitled to take over management of gardens, roads, paths and parking areas, bin stores, garage blocks etc., even if those facilities are shared with other blocks. There was some legal debate whether one RTM company can exercise the right in relation to more than one building. The Court of Appeal has resolved this by deciding that it cannot.

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Laceys Guide to Right to Manage

PROCEDURE- What are the stages involved in exercising the Right to Manage?

Stage 1. Set up a Right to Manage ("RTM") Company

An RTM Company is a company limited by guarantee, with certain provisions in its memorandum and articles suited to the purpose of managing a building. Regulations - provided a complete memorandum of association and articles which can only be amended to the extent that there is no conflict with the regulations. In practice, there is little scope for addition. Each qualifying tenant has a right (but is not required) to be a member of the RTM Company. Once the Right to Manage has been exercised then the landlord is also entitled to become a member and there are complex rules in relation to voting rights if he chooses to do so.

Stage 2. Invitation to participate

The RTM Company will then serve a Notice of Invitation to participate on all qualifying tenants who have not yet signed up to be members of the Company to do so, sending out relevant information such as a copy of the Memorandum and Articles of the Company. This is a detailed document and takes some time to prepare and must be validly served. The RTM Company is then required to wait for at least 14 days following the service of the invitations before it can serve the "Claim Notice".

Stage 3. Claim Notice

The Claim Notice is a formal legal document served by the RTM Company once it has at least 50% of the flat owners as members. It must contain a statement that all of the qualifying conditions for the Right to Manage have been met, together with certain prescribed particulars including the deadline for the recipient to serve a counter notice. It specifies a date for the take-over of management which must be at least 4 months after the notice. The Claim Notice must be served not only on the landlord but on all qualifying tenants and a court-appointed manager (if any). Where none of the landlords on whom a Claim Notice should have been served can be found, the RTM Company can apply to the county court for consent to exercise the Right to Manage. Once a claim notice is issued by the RTM Company it is registrable at the Land Registry in order to protect the right against any change in ownership of the freehold or intermediate leasehold interest. Upon service of the claim notice, the RTM company becomes liable for reasonable costs incurred by the landlord and third parties to the lease as a consequence of the claim. If the claim is withdrawn, or otherwise fails, then the members of the RTM company will also become liable for those costs.

Stage 4. Counter Notice (if applicable)

Within one month or such later date specified in the Claim Notice each landlord may serve a counter notice either accepting or denying the Right to Manage. If it does not do so by the deadline it is deemed to accept the claim.

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Laceys Guide to Right to Manage

Stage 5. Dispute

If the landlord and the RTM Company cannot agree that the conditions above have been complied with, we would advise the parties to resolve the dispute without reference to formal proceedings. If the parties cannot agree, however, then the Company should apply to the Property Chamber within only two months of the counter notice. The RTM Company cannot claim its costs from the landlord even if it is successful before the Property Chamber. By contrast, if the landlord is successful in persuading the Property Chamber that the claim of the RTM Company is not valid, then it can ask the tribunal to award costs in its favour which are payable both by the RTM company and by the members of the RTM company.

Stage 6. Information

After service of the Claim Notice, notices can be served upon the landlord or other manager party requiring it to provide information and copy documents which are reasonably required in connection with the right to manage claim. This includes management contracts, service charge information, insurance and other practical matters relating to the block. Unfortunately, the time for compliance is whichever is the later of 28 days after service of the information notice or the date specified in the claim notice for the RTM company to take over the right to manage. This is unfortunate as clearly the RTM company needs the information ahead of that date in order to prepare.

Stage 7. Taking Over

Where the RTM Company takes over responsibility then the landlord is required to pass to it all papers relating to the management, maintenance and insurance of the property (including copies of all relevant leases). This must be done within 28 days of the acquisition. The Company can apply to court to enforce these obligations and the landlord has an ongoing duty to hand over any further documents which come into his possession. The landlord is also required to hand over uncommitted reserves and monies held in trust on behalf of leaseholders immediately on the acquisition date.

Stage 8. What is taken over?

The legislation has complex rules as to the "management functions" which are taken over. In essence the following are included:

- services
- repairs
- maintenance
- improvements allowed under the leases
- insurance
- management

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Laceys Guide to Right to Manage

Stage 9. What is not taken over?

Again there are complex rules in relation to this but examples include:

- the right to collect service charges accrued prior to the acquisition date
- management functions relating solely to units which are not flats let on long leases
- management of parts of the building that have commercial tenants
- the right to forfeit leases
- the receipt of ground rent
- the statutory right to be consulted by the RTM Company in respect of requests for approvals or assignments, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use by flat owners (disputes are referred to the Property Chamber)
- those management functions which it is agreed will be delegated back to the Landlord by the RTM Company

Stage 10. What about on-going service contracts?

The landlord or existing manager must serve a "Contractor Notice" on all existing contractors providing details of the RTM Company and the take over date to give those contractors an opportunity to re-negotiate existing contracts. There is no automatic right provided by the Act which entitles contractors to be re-engaged and it is generally thought that the original contracts will be subject to the doctrine of frustration (where a contract comes to an end because neither party is able to perform its obligations because of an external event beyond their control) although it might be decided by the court that the landlord is in breach of that contract in some situations. Persons employed by the existing manager in relation to the particular building, such as a caretaker or porter, are likely to have their employments transferred automatically to the Company under the existing Transfer of Undertakings Regulations. It seems unlikely that contract insurance will come to an end under the doctrine of frustration as the landlord will still be entitled to insure the block although not entitled to recover the cost of so doing by way of the service charge. The lease will need careful consideration as to how to deal with insurance and ideally agreement should be reached with the landlord prior to the acquisition date as to how this will be dealt with upon acquisition and thereafter. It may be sensible to agree with the landlord that the existing policy will be kept going until at least the end of its term. The manager must also serve Contract Notices on the RTM Company giving details of existing contracts and contractors.

Stage 11. What if there is an existing manager appointed under the lease or by the court?

The RTM Company can exercise the right to manage regardless of any manager appointed in the lease or by the court. The Company takes on the management functions both of the landlord and of the appointed manager.

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Laceys Guide to Right to Manage

LANDLORD'S OBLIGATIONS

What happens to the landlord's obligations under the leases?

If the right to manage is exercised, it is not intended to override any aspect of the lease other than to transfer relevant repair and management functions or responsibilities to the RTM Company. Nor is it intended for the exercise of a Right to Manage to affect the ownership of any interest in the building.

COMPANY'S OBLIGATIONS

What are the Company's obligations towards the landlord?

The Company must monitor whether the leaseholders observe the obligations placed upon them under the lease and advise the landlord of any breaches of covenant, so that the landlord can decide whether he wishes to take any action to remedy the breach.

What are the Company's obligations towards the tenants?

Leaseholders will have the same rights in relation to consultation and control of management costs against the Company as they would have had against the landlord. The Company will of course become legally obliged to carry out the management functions that it takes over within the terms of the lease and either the landlord or the tenant can take action against the Company if it does not do so.

TENANT'S OBLIGATIONS

Leaseholders who exercise the Right to Manage have continuing obligations to the landlord, to each other and any other tenants in the buildings.

REVERSION OF RIGHTS

Can the landlord reassume the Right to Manage?

The rights and obligations transferred under the Right to Manage provisions will revert back to the landlord in the following circumstances:

- a) By agreement between the RTM Company and the landlord
- b) Where the RTM Company is the subject of a winding-up order or struck off the register
- c) Where the RTM Company is the subject of any insolvency proceedings
- d) Where the Company ceases to be an RTM Company (i.e. through a change of Memorandum or Articles where the Company is to be used as a vehicle for enfranchisement)
- e) Where the court appoints a manager on the basis of the RTM Company's inability to manage appropriately

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Laceys Guide to Right to Manage

DISADVANTAGES OF RIGHT TO MANAGE CLAIMS

This is one remedy amongst others for disgruntled flat owners. It is not always a panacea however and the following points need to be borne in mind:

- If the complaint is that service charges are too high, they will not necessarily be lower after RTM. The flat owners may be better off leaving the responsibility with the landlord and applying to the Property Chamber for a determination of the reasonableness of the service charges.
- If the block is on an estate with other blocks, or with houses, with which it shares common parts, there are legal and practical complications in exercising the right. These may lead to high legal costs being incurred and, if the claim is successful, there may be on-going problems in managing those areas shared with other blocks and/or recovering the full cost of managing those areas.
- In respect of buildings which are not obviously self detached blocks of flats, it may be difficult to establish that there is a right to manage and high legal and surveyor's costs may be incurred in relation to that issue.
- There may be difficulties in recovering service charges from flat owners who do not pay as the RTM company will not be in a position to threaten forfeiture of flat leases for non-payment.
- The RTM company will not usually be allowed to charge the costs of running itself as part of the service charges and may therefore have difficulties in funding itself, particularly if some flat owners do not pay promptly or at all their service charges.
- The flat leases may be defective causing problems in carrying out services or recovering the costs of them.

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WHY CHOOSE LACEYS?

Laceys has a specialist team. Some of the benefits are:

- Specialist knowledge avoids technical mistakes in this difficult and rapidly changing area of practice.
- Our development of efficient systems means we are able to spend less time doing the work and so reduce the cost to you (solicitors usually charge on a time basis for this type of work).
- Whenever possible the partners supervise the other members of the team in doing the work so that much of it is done at a lower hourly rate (ask for our terms of business to see the rates).
- We can do our work quickly and so keep the momentum going in the process to help drive the matter through to a conclusion; it is difficult enough for you to manage your group through the process without having a solicitor who delays.

WARNING

This is a complex and developing area of law and procedure in respect of which this is a brief guide which must not be relied upon without seeking specific advice from us based upon your particular circumstances.

For further advice and a more detailed estimate of our fees, please contact:

Mark Timberlake: m.timberlake@laceyssolicitors.co.uk or 01202 377863

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