

THE RIGHT TO MANAGE

Frequently leaseholders of flats in a building want to have more say in how their building is run. One obvious solution to this is to make a collective enfranchisement claim and buy the freehold interest in the building from the landlord. This can be a lengthy procedure and will take time, particularly if the landlord resists the claim or there are intricate points of law to be considered. There is also the issue of cost. Not all tenants can afford to buy the freehold, especially if some of the tenants are not interested in participating.

AN ALTERNATIVE TO ENFRANCHISEMENT?

If the tenants are unable to proceed with a collective enfranchisement claim, all is not lost. They should consider making a claim to take over the management of the building. The procedure for exercising the “right to manage” (“RTM”) was introduced in the Commonhold and Leasehold Reform Act 2002 (“the Act”). Compared to buying the freehold or extending an individual lease, the statutory procedure is relatively simple but this should not lull tenants into a false sense of security. There are many issues to consider before making an RTM claim. The reasons for making an RTM claim must be made clear. The following questions should be considered:

- Do the tenants:
 - Want to have more control over how much money is spent on the building?
 - Raise the standards of management?
 - Want more say in the key decisions made about the management?
- Is the landlord “doing a bad job” and the tenants think they can do better?

It is more than likely going to be a combination of all of the above factors that lead tenants down the road of making an RTM claim.

DOES THE BUILDING QUALIFY?

The tenants will need to find out if their building qualifies under the Act. The requirements are as follows:

- The building must be self-contained;
- There must be at least two flats in the building;
- Two-thirds of the flats must be let to qualifying tenants; and
- Any non-residential parts of the building must not exceed 25% of the building’s total floor area.

DOES THE TENANT QUALIFY?

There are some exceptions but, in simple terms, a qualifying tenant is one who holds a lease that was originally granted for a term of 21 years or over. There are no requirements relating to residence or length of ownership and there is no limit on the number of flats that can be owned by one person.

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WHO MAKES THE CLAIM?

An RTM claim must be made by a company specifically set up for the purpose of managing the building. The company is the legal entity that will be responsible for the management in the event of a successful claim. An RTM company must be limited by guarantee, not by shares. Prior to making the claim, all qualifying tenants must be invited to become members of the company. At the date upon which the claim is made, the company's membership must be made up of at least 50% of the qualifying tenants of flats in the building. There are requirements as to what should be included in the notice inviting other tenants to join in and the notice of claim itself. In the future, as tenants sell their flats, the membership of the RTM company will change.

FACTORS TO CONSIDER

Before deciding to make a claim, however, there are other factors to consider. The size of the building will be a key one. It may be relatively simple to take over the management of a small building but administering a large building can be similar to running a small business. Tenants in smaller buildings may decide that the RTM company can carry out its responsibilities without the help of professional managing agents. Indeed, removing or changing the managing agents may be a key motivation for making the claim. Careful thought should be given before making a decision like this. Whilst there are some managing agents who are not performing as required, there are also many who are frustrated by the lack of instructions they receive from a landlord. It may be the case that on speaking to a managing agent about a particular building, tenants discover that the managing agent would be able to achieve the tenants' wishes if they were given the correct instructions.

PROFESSIONAL ASSISTANCE OR EXPERIENCED "VOLUNTEERS"?

Even if managing agents are retained for the building, someone will have to take on the responsibility of administering the RTM company. Accounts have to be filed at Companies House, directors have to be appointed, decisions have to be made and meetings must be attended for a start. Professionals can be brought in to help with the accounts and administration but this will cost money.

If people are not willing to help with the company's duties and become company directors, there will be pressure on the people that do volunteer their time. Not all the tenants will be happy with the decisions that are made, particularly in larger buildings. How do you appease the wants and needs of all the different tenants?

For those tenants going it alone without managing agents, they will need to make sure that there is someone with sufficient expertise to do what is needed. Depending upon the terms of the leases, managing a building could include taking responsibility for the following:

- repairing and maintaining structural parts (including the roof);
- decorating the exterior and common parts;
- putting in place a contract for the maintenance of the lift or other machinery;
- arranging cleaning, gardening, and caretaking; and
- the provision of any other services detailed in the leases, such as heating and hot water.

Advance plans will have to be made for all of the above. The RTM company will also have to deal with disputes between residents and the potentially unreasonable demands of the "problem tenant". Provision is made in the Act allowing the tenant to obtain certain information about the management of the building so advance planning can be carried out. In the event of a successful claim, there are procedures for notifying any contractors who provide services to the building. These contractors are not obliged to work with the RTM company in the same way as the landlord did so contingency plans will also have to be made.

PROCEDURE

If a claim is made, the landlord must be given a minimum of one month to respond. There are only limited grounds for rejecting the notice. If the tenants have complied with the requirements of the Act, there is little the landlord can do to resist the claim. There is no requirement to prove that the landlord is at fault in its current management of the building. The tenants' claim notice must also specify a date upon which they wish to take over the management functions. This date must be at least three months after the date by which the landlord has to respond.

In summary, four months after making a claim, the RTM company can take over the management of the building. This appears to be plenty of time for a small building but tenants in large buildings should consider whether they need longer to prepare to take over.

PLAN AHEAD

Although making an RTM claim should be easier and quicker than buying the freehold interest, there is still much for tenants to think about before making such a claim. If the process is rushed and not enough thought is given to the issues involved, the tenants could find themselves in a worse position and out of pocket. If the issues are thought through thoroughly, an RTM claim can be a relative inexpensive way of achieving the wishes of the majority of tenants.

This article offers general guidance only. It reflects the law as at November 2008. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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