

RIGHT TO MANAGE FAQs



Author: Roger Hardwick, Partner

Roger has extensive knowledge of statutory lease extensions, collective enfranchisement claims and the enfranchisement of leasehold houses.

He is frequently involved in proceedings before the First-tier Tribunal (Property Chamber) and Upper Tribunal (Lands Chamber), acting primarily for landlords and managing agents in connection with service charge disputes, applications to vary leases and applications to appoint a manager. Roger was named ERMA's Solicitor of the Year in 2017 and 2018 and Regional Professional of the Year in 2016, 2017 and 2018.

Roger has attended five advisory groups with the Law Commission to discuss their proposals to reform leasehold enfranchisement and the right to manage, respectively, prior to the issue of their consultation papers on both topics. Roger is also listed in the enfranchisement consultation paper as a member of the advisory group.

He is also in discussions with HMRC, via ARMA, and a number of other interested parties, with respect to their recent guidance on the application of VAT to residential service charges, and also the ability of RMCs and RTM companies to claim the benefit of an Extra Statutory Concession, found in VAT Notice 48, at 3.18. A test case to challenge HMRC's stated position is looking possible.

“Sources highlight **Roger Hardwick** as “one of the most knowledgeable professionals in residential leasehold law in England.” He is also held in high regard for his pragmatic approach: “He fully understands not just the law and case law, but also the practical implications for landlords, tenants and their agents.”

Chambers and Partners



What our customers say about us

“

We have been working closely with Brethertons' property management team for 10 years. We have always been impressed by their 'customer care' ethos and appreciate their understanding of our needs. The team throughout this time has remained consistent. Their flexibility in handling our customers' diverse demands in a friendly and professional manner has been invaluable. It means that we can concentrate on delivering our core services.”

“Having worked within the Property Management industry for many years, I have been faced with many different, sensitive and challenging scenarios. I can honestly say that the 'First Class' advice and support the Brethertons Banbury team have always provided me with has been invaluable - They have literally been my savior! The team has always provided fast, excellent advice which is explained in an understandable way! And furthermore, they genuinely care about providing the best service possible. Brethertons will continue to be our 'Number One' choice solicitors throughout many more years within the Property Management industry...”

“I have worked with Brethertons for over 10 years and have found their service to be extremely professional and all of their staff very competent. They have acted on some very difficult cases and have given clear and reasoned advice throughout and across their departments. Their staff are a pleasure to deal with and their fortnightly updates on cases are very helpful for both us and our Clients.”

“We have been using Brethertons solicitors to recover our clients Service Charge Arrears for several years now with great success. The instruction process for new cases is straight forward and during the cases the staff at Brethertons always keep us fully updated and informed of all action being taken. All their staff are always very friendly and helpful also providing assistance on other matters falling outside the cases. Recovery of arrears is quick and without stress to our clients.”

“Brethertons Solicitors are our first choice for all of our debt recovery matters. We have a very challenging portfolio where we regularly need to request an individual approach and Brethertons are always able to put together a workable solution at short notice. Their reporting is tailored to our company's needs and where we need additional resources, these are always provided. This is imperative to our business with the high levels of debt we need to recover all year round. Clients and customers are a huge focus for Brethertons and they do everything possible to resolve any complex matters we pass to them. We have also recently started to take advantage of the additional legal services Brethertons offer and find it refreshing that all our legal requirements can be met within one multi-disciplined organisation and via Lorna, our designated client contact.

”

What is the “Right to Manage”?

Provided certain conditions are satisfied, leaseholders of flats in a building can collectively take control of the management of the building, through the vehicle of a company, known as an “RTM company”, which the participating leaseholders are members of.

It is a “no fault” right, which means there is no need to prove bad management on the part of the existing landlord or manager.

What “Conditions” Must be Satisfied?

The “premises” over which the right to manage is claimed must satisfy certain conditions. We will check that these are satisfied before proceeding with the claim.

The below is not a comprehensive or detailed list and explanation of all of the conditions, but a summary of some of the main conditions:

1. The premises must either consist of a “self-contained building” or a “self-contained part of a building”.

- If the building is “structurally detached”, it will be a “self contained building”.
- If not, the premises will be a “self-contained part of a building” if it satisfies three conditions:

- It must be divided vertically from the other parts of the building

(in one clear vertical division). An underground car park spanning two parts/blocks might prevent this, for example.

- It must be capable of being independently redeveloped.
- The services (e.g. water, gas, electricity) must be provided independently or must be capable of being provided independently without significant interruption to those services. Common examples of shared services include a single water pump, tank etc. serving all parts of a building.

2. The premises must have at least two flats which are let to qualifying leaseholders (e.g. subject to a “long lease”, originally granted for a term exceeding 21 years). A shared ownership leaseholder who has not staircased to 100% can still be a qualifying leaseholder.

3. At least 2/3rds of the flats in the building must be let to qualifying leaseholders (see above).

The premises must not fall within a list of exclusions. The most common exclusion is a building with non-residential parts which exceed 25% of the internal floor area of the building (excluding common parts).

At the date of service of the claim notice, at least 50% of the qualifying flats must be members of the RTM company.

One RTM company cannot acquire the right to manage more than one building. For estates comprising multiple buildings, you will need a separate RTM company for each building.

What is the Process?

1. Preliminary steps include obtaining and reviewing a selection of leases and some other relevant information and documents from the Land Registry.

2. Next, the **RTM company** will be **incorporated**. Due to the way online incorporation process works, the company will initially be incorporated with one or two members (often the first directors).

Two forms will be sent out to all of the leaseholders in the building who have expressed an interest in participating in the right to manage claim: one “application for membership” and one form containing personal information, which we can use to add new members online, following the company’s incorporation. Once we have the forms, we will amend the company’s register of members to include all the participating leaseholders as members of the company.

3. We may consider it prudent to serve a **notice** on the landlord requiring the **names** and **addresses** of all leaseholders

in the building. The landlord will have 28 days to respond.

We will cross refer this against the information we have from the Land Registry (which may not accurately reflect the ownership of a flat; if the owner has died, for example).

4. The RTM company must serve a notice on any qualifying leaseholder of a flat who is not a member of the RTM company or has not agreed to become a member. This is known as a **“notice of invitation to participate”** (or **“NIP”**). We will prepare the notice (which must be in a prescribed form and contain certain information) on your behalf.

The notice will be served personally on each flat (even if the flat owner does not live there). This is because the legislation provides that service on the flat will amount to valid service, unless another address has been provided to the RTM company. We may need a signed statement from the individual who served the notices, confirming as much. We will also send a copy of the notice to any other address for service which we have (for example, alternative addresses shown on the official copy of the register of the title to any apartment).

5. Not less than 14 days after the service of the NIPs, we will prepare and serve the **claim notice** on every landlord, third party (e.g. management company) and/or tribunal

appointed manager. The claim notice is in a prescribed form and must contain certain information.

6. The landlord must serve a counter notice by the date specified in the claim notice (which can't be any earlier than one month after (so, one month and one day from) the service of that notice). The **counter notice** must either admit or dispute the claim. If the claim is disputed, the counter notice must explain why it is disputed.

7. If the landlord serves a counter notice disputing the claim, the RTM company will need to apply to the First-tier Tribunal (Property Chamber) (**“the FTT”**) for a determination that the RTM company is entitled to acquire the right to manage. The application must be made within two months of the date at which the counter notice is received.

8. The date at which the RTM company acquires the right to manage will depend on what counter notice, if any, is served by a recipient of the claim notice:

i. Where a counter notice is served admitting the claim, or no counter notice is served, the right to manage will be acquired on the date specified in the claim notice, which must be not less than three months after (so, three months and one day from) the date specified in the claim notice for the service of the counter notice.

It follows that the earliest date at which you can acquire the right to manage is four months and two days from the date of service of the claim notice.

ii. Where a counter notice is served disputing the claim, the right to manage will only be acquired if an application is made to the FTT by the RTM company and the FTT determines that the RTM company was entitled to acquire the right to manage. In such a case, the right to manage will be acquired three months after the date at which the FTT decision (in favour of the RTM company) becomes “final”, i.e. after the expiry of all deadlines for applying for permission to appeal and, if permission to appeal is granted, once the appeal has been dealt with.

iii. Where a counter notice is served disputing the claim, but the claim is later admitted in writing by the landlord, the right to manage will be acquired three months after the date of the written admission.

How Long Will it Take

If the claim is not opposed, it is likely to take approximately 6 – 8 months from the date we are instructed to acquire the right to manage the premises.

If the claim is opposed, it is very difficult to tell how long it will take you to acquire the right to manage. Sometimes the landlord admits the claim very shortly after serving a counter notice. In some rare cases, Tribunal proceedings can last one

or two years or even longer (in the event of one or more appeals). However, such cases are becoming increasingly uncommon.

What Happens if the Landlord Opposes the Claim?

If the landlord opposes the claim, an application will need to be made to the FTT within two months of the date of service of the counter notice.

The landlord can only oppose the claim on technical grounds, e.g. because the landlord is arguing that the building does not qualify or because the landlord is disputing the validity of the claim notice or NIP. We will advise you if there are any potential grounds for opposing the claim. We will also draft the notices carefully, and ensure that they comply with the relevant technical requirements.

Upon receiving the application, the FTT will issue directions to the parties. This usually involves the parties exchanging legal submissions, and then exchanging evidence, consisting of witness statements (giving factual evidence) and any expert reports (which may be necessary if there is a dispute about the nature of the building, and whether it qualifies).

Why Would the Landlord Oppose the Claim?

Unfortunately, some landlords routinely oppose right to manage claims, even if they know their grounds for opposing the claim are weak.

They may have a financial interest in retaining the management of the development, and often rely on the reluctance of the RTM company to incur costs in making an application to the FTT.

However, if they know their grounds for opposing the claim are weak, they will probably admit the claim if an application is made to the FTT, because if they lose at the FTT they will not be able to recover their litigation costs.

What Property Does the Right to Manage Extend to?

The RTM company will acquire the right to manage the building containing the flats.

It will also acquire the right to manage all external communal areas, including communal areas which are shared with other blocks.

This makes acquiring the right to manage buildings in estates comprising multiple blocks and possibly freehold houses more complicated. However, there are ways around these issues. An agreement can be entered into between the RTM company and the other estate owners and/or management companies, where one company agrees to manage and maintain the external communal areas, and the other company or companies agree to contribute towards the costs incurred in managing and maintaining those areas.

What Happens After the RTM Company Acquires the Right to Manage?

The RTM company acquires the “management functions” of the landlord and any third party to the lease, such as a management company. So, its rights, powers and obligations flow from the lease. That normally means it will be responsible for the insurance of the building and the repair and maintenance of the structure of the building and communal areas; and for collecting service charges from the leaseholders in the building.

However, reference should be made to the individual leases. Some leases are defective, and do not make adequate provision for insurance, maintenance and the recovery of service charges. There are ways of fixing these problems and we will advise you further if the need arises.

Leases often contain a provision (or provisions) which require the leaseholder to obtain the prior written consent of the landlord (and/or another party) before carrying out alterations to the flat, or before subletting the flat. In that case, the process is as follows:

1. The application must be made to the RTM company.
2. The RTM company must pass the application to the landlord (and/or other party) within a reasonable period of time.
3. The landlord (and/or other party) has 30 days or 14 days (depending on the application) to

respond, indicating whether they consent, refuse consent, or agree to consent, but subject to certain conditions. In the case of an application for consent to carry out alterations which amount to an improvement, or an application for consent to sublet, consent cannot be unreasonably withheld.

4. The RTM company then considers the application, and may decide whether to consent, refuse consent, or agree to consent, but subject to certain conditions.

If the lease contains an absolute prohibition on subletting or the carrying out of alterations, the RTM company cannot waive those prohibitions.

What Will It Cost?

Upon review of all the relevant documentation, we will be able to provide you with a fully detailed quotation which will provide a clear breakdown of the costs throughout each stage.

Will I be Liable for My Landlord's Fees?

The RTM company and each of its existing and former members will be collectively and individually liable for any reasonable costs incurred by the landlord in consequence of the right to manage claim.

If the claim is admitted or no counter notice is served in response, we would not expect those costs to be significant.

If the claim is disputed, the landlord will only be able to recover costs incurred in connection with Tribunal proceedings if the claim is unsuccessful.

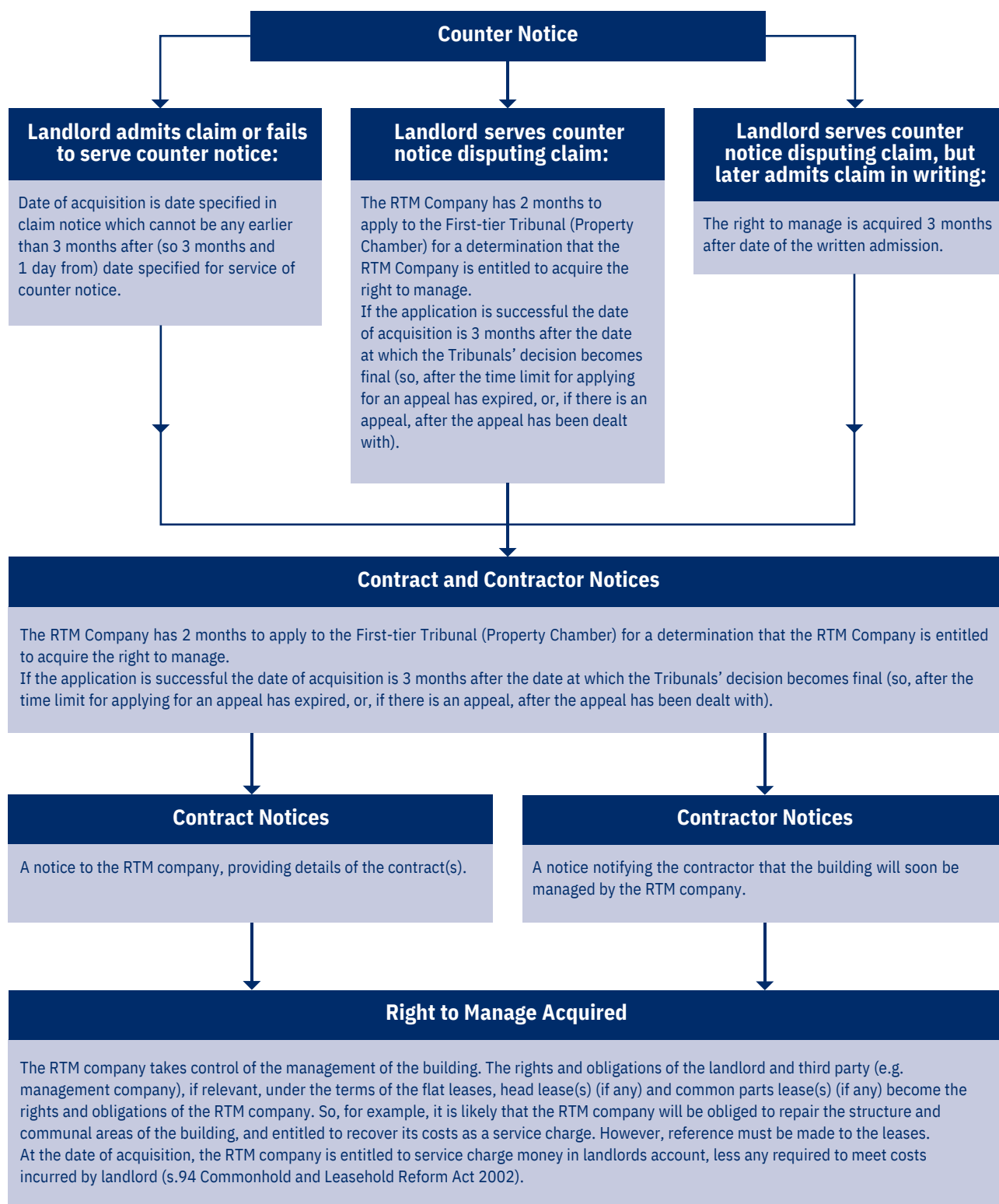
Reform

You may have heard that the Law Commission are proposing to reform the law relating to the right to manage. A number of wide ranging proposals have been made, with a view to making the process cheaper and easier, and also expanding the right to cover buildings which have non-residential parts which exceed the 25% threshold. The consultation period ended on 30 April 2019. A response is expected later this year. It is not known when new legislation will be drafted or introduced.

Right to Manage Flow Chart



THE LANDLORD MUST SERVE A COUNTER NOTICE ON OR BEFORE THE DATE SPECIFIED IN THE CLAIM NOTICE (WHICH CANNOT BE EARLIER THAN 1 MONTH AFTER SERVICE OF CLAIM NOTICE).



Disclaimer

Please treat the contents of this document as food for thought, but don't take any action based on its contents unless you have taken legal advice.

The authors cannot accept responsibility for any errors or inaccuracies, loss or damage unless we have given you, personally, specific advice relating to a matter about which you have given us full background details.

You must also bear in mind that the contents of this document is based on English Law, and because it contains archival material, that material is bound to go out of date (so please bear in mind the date this document was produced.)

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