



**Law
Commission**
Reforming the law

Leasehold home ownership: exercising the right to manage



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Reforming the law

(Law Com No 393)

Leasehold home ownership: exercising the right to manage

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

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The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Green, Chairman

Professor Sarah Green

Professor Nick Hopkins

Professor Penney Lewis

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

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Glossary and abbreviations

1987 Act: Landlord and Tenant Act 1987.

2002 Act: Commonhold and Leasehold Reform Act 2002.

acquisition date: the date on which the RTM company acquires the RTM.

appurtenant property: in relation to a building or part of a building or a flat, any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat.

articles of association: the rules governing how a company operates.

building: a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land. A building might be a house, a block of flats or commercial units.

collective enfranchisement / collective freehold acquisition: the purchase of a freehold interest of a building containing flats by 50% or more leaseholders. The former phrase is used in the current legislation. The latter phrase is the phrase adopted in our Enfranchisement Consultation Paper and in the Enfranchisement Report.

Commonhold Consultation Paper or Commonhold CP: Reinvigorating commonhold: the alternative to leasehold ownership (2018) Law Commission Consultation Paper No 241, published in December 2018.

Commonhold Report: Reinvigorating commonhold: the alternative to leasehold ownership (2020) Law Com No 394, published in July 2020. Available at <https://www.lawcom.gov.uk/project/commonhold/>.

Consultation Paper or CP: Leasehold home ownership: exercising the Right to Manage (2019) Law Commission Consultation Paper No 243, published in January 2019.

counter-notice: a notice that the landlord, or other relevant third party, may give to the RTM company in response to receiving an RTM claim notice. We refer to “negative counter-notices” where the counter-notice states that the RTM company is not entitled to acquire the RTM and/or management of the non-exclusive appurtenant property, and “positive counter-notices” where the counter-notice admits the RTM company’s entitlement.

claim notice: the notice served on the landlord by the RTM company to begin an RTM claim.

determination date: where the RTM is not disputed, the determination date is the date specified in the claim notice for service of a counter-notice. Where the RTM is disputed, the determination date is either the date when the Tribunal determines entitlement to RTM, or when the parties agree that it can be acquired.

ECHR: the European Convention on Human Rights.

enfranchisement: we use “enfranchisement” as a generic term to refer to claims to buy the freehold or extend a lease under the Leasehold Reform Act 1967 or the Leasehold Reform Housing and Urban Development Act 1993.

Enfranchisement Consultation Paper or Enfranchisement CP: Leasehold home ownership: buying your freehold or extending your lease (2018) Law Commission Consultation Paper No 238, published in September 2018.

Enfranchisement Report: Leasehold home ownership: buying your freehold or extending your lease (2020) Law Com No 392, published in July 2020. Available at <https://www.lawcom.gov.uk/project/leasehold-enfranchisement/>.

estate: a development containing multiple buildings with appurtenant property shared between them. A development may contain a mixture of flats and houses.

exclusive appurtenant property: appurtenant property the ownership or enjoyment of which is exclusive to the occupiers of a building (or multiple buildings) included within the same RTM.

flat: a separate set of premises (whether or not on the same floor) which forms part of a building, which is constructed or adapted for use as a dwelling, and either the whole or material part of which lies above or below another part of the building.

freeholder: the owner of the freehold interest in any property. The freeholder is at the top of any chain of leases of a given property.

house: a building designed or adapted for living in (whether structurally detached or not), so long as it can reasonably be called a house. A house may be held on a freehold or leasehold basis.

intermediate landlord: a landlord who has a leasehold interest in the property that is superior to that of the leaseholder’s interest. An intermediate landlord holds a lease of the property and has sub-leased it onto an inferior leaseholder. An intermediate landlord is distinct from the freeholder because they only own a leasehold interest in the property.

landlord: we use “landlord” as a general term for a person who holds an interest in property out of which a lease has been granted. A landlord may be either the freeholder of the property, or hold a leasehold interest in the property himself or herself.

lease: the document that grants the leaseholder a leasehold interest in their property and sets out the rights and responsibilities of the leaseholder and landlord.

leasehold: a form of property ownership which is time limited (for example, ownership of a 99-year lease), where control of the property is shared with, and limited by, the landlord.

leaseholder: a person who holds a leasehold interest in property. We generally use the term “leaseholder” instead of “tenant” when describing those who enjoy RTM rights. We do so because “leaseholder” is typically used to denote those who own their property through a long lease, whereas “tenant” is generally used to refer to those who rent their property on a short lease (such as a one-year “assured shorthold tenancy”). However, the 2002 Act uses

the word “tenant” and we adopt that usage when referring to the legislation, for example, when referring to a “qualifying tenant”.

leaseholder survey: Survey on Exercising the Right to Manage (2019).

lease consent: an approval given by the landlord or RTM company to a leaseholder to do some act for which the lease requires consent to be given. Examples might include consent to undertake alterations or to sub-let.

long lease: a lease that is granted for a term of 21 years or more, subject to some qualifications.

managing agent: an agent employed by a landlord, management company or RTM company to exercise management functions on their behalf.

management company: in the context of this Report, a party to a tripartite lease with responsibility for management functions.

model articles: articles of association which are prescribed by law. Currently an RTM company’s articles of association are prescribed by The RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767) in England and The RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680) in Wales.

MHCLG: Ministry of Housing, Communities and Local Government.

negative counter-notice: a counter-notice denying the RTM company’s right to acquire the RTM, and/or to acquire management of the non-exclusive appurtenant property.

non-exclusive appurtenant property: appurtenant property (such as gardens or car parks) the ownership or enjoyment of which is not exclusive to the occupiers of a building (or multiple buildings) included within an RTM claim.

non-participating leaseholder: a leaseholder who qualifies to participate (see qualifying tenant) in an RTM claim but does not do so.

non-residential limit: the rule that premises are completely excluded from the RTM if the non-residential parts exceed 25% of the total internal floor area. We recommend that this is raised to 50%.

notice inviting participation: the notice served by an RTM company before it makes an RTM claim, to all qualifying tenants who are not already members of the RTM company (or have not already agreed to become a member), inviting them to become a member. These notices are currently mandatory.

participating leaseholder: a leaseholder who qualifies for the RTM (see qualifying tenant), and who opts to participate in the RTM by becoming a member of the RTM company.

qualification requirement: the rule that to qualify for the RTM, qualifying tenants must hold at least two-thirds of the total number of flats in the building (or part of the building) over which the RTM is claimed,

qualifying premises: a building (or part of a building) or buildings which qualify for the RTM.

qualifying tenant: a leaseholder who holds a long lease and is eligible to participate in an RTM claim.

residential unit: (under our recommended reforms) a unit which has been constructed or adapted for the purposes of a dwelling (even where there might also be some non-residential use).

right to participate: the right, available to all qualifying tenants, to become a member of the RTM company, either before or after the RTM claim is made.

RTM: right to manage.

RTM company: the company which qualifying tenants must set up in order to make an RTM claim.

service charge: charges payable by a leaseholder to the landlord, management company or RTM company for services provided under the lease which typically relate to the building in which the leaseholder's flat is situated and, often, appurtenant property.

shared appurtenant property: appurtenant property the ownership or enjoyment of which is shared between the occupiers of two or more buildings. It may or may not be exclusive to those buildings.

shared ownership lease: a shared ownership lease is a lease under which the leaseholder purchases a "share" of a house or flat (usually between 25% and 75%) and pays a normal rent on the remainder of the property. The lease generally permits the leaseholder to acquire additional shares in the property over time, usually up to 100%.

tenancy: see "lease".

tenant: see "leaseholder".

the Tribunal: the First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales.

tripartite lease: a lease made between three parties: the landlord, leaseholder and a third party. We use this term where the third party is a separate entity with obligations in the lease to manage the premises.

uncommitted service charges: service charges which have been demanded and paid by leaseholders but not yet spent or allocated to particular work or services.

unit: (under our recommendations) a separate, independent set of premises (whether or not on the same floor), which must form all or part of a building. A unit can either be a residential unit or a non-residential unit.

Valuation Report: Leasehold home ownership: buying your freehold or extending your lease: Report on options to reduce the price payable (2020) Law Com No 387, published in January 2020.

Leasehold home ownership: exercising the right to manage

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: The future of home ownership

INTRODUCTION

- 1.1 Our homes are hugely important. It is no surprise, therefore, that housing policy is high up the political agenda. Problems that we experience with our homes can become particularly pronounced. Many leaseholders of flats would point to issues with cladding that were brought into focus following the Grenfell Tower fire tragedy as an illustration of this impact. A recent report from the UK Cladding Action Group found that 9 out of 10 leaseholders surveyed said their mental health had deteriorated as a direct result of the situation in their building.¹ For all of us, the COVID-19 pandemic, and consequential requirement to “stay at home”, has emphasised how much we depend on our homes.
- 1.2 Broadly speaking, we occupy our homes either as owners or as renters.
- (1) Owners: Many people own, or aspire to own, a home.² The focus of our projects, and of Government’s work on leasehold and commonhold reform, is on owners.
 - (2) Renters: There have been significant reforms to the way in which homes are rented in Wales,³ and Government intends to provide tenants with greater security in their homes in England.⁴ Renters are not the focus of this Report.

¹ UK Cladding Action Group, *Cladding and internal fire safety: mental health report 2020* (May 2020), p 6, at <https://drive.google.com/file/d/1ezKSaJqO3bVyG9-eH58SoiT2bH4D8PjW/view>.

² In the 2010 British Social Attitudes survey, 86% of respondents expressed a preference for buying a home and 14% preferred to rent: Department for Communities and Local Government, *Public attitudes to housing in England: Report based on the results from the British Social Attitudes survey* (July 2011), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6362/1936769.pdf.

³ Renting Homes (Wales) Act 2016. The 2016 Act was enacted following recommendations made by the Law Commission in its reports, Renting Homes (2003) Law Com No 284 and Renting Homes in Wales (2013) Law Com No 337.

⁴ See proposal for a Renters Reform Bill, which would remove the current right of landlords in the private rented sector to evict their tenants by giving two months’ notice to leave: *The Queen’s Speech, December*

- 1.3 Reforms concerning home ownership have been discussed for some time, and the future of home ownership is set to change.
- 1.4 In this Report, we recommend reform of the law governing the right to manage (“RTM”). Alongside this Report, we are publishing reports with our recommended reforms to leasehold enfranchisement, and to the law of commonhold. We have already published our report setting out the options for reducing the price that leaseholders must pay to make an enfranchisement claim.⁵

Enfranchisement is the right for people who own property on long leases (“leaseholders”) to buy the freehold or extend their lease.

The right to manage (“RTM”) is a right for leaseholders to take over the management of their building without buying the freehold.

Commonhold allows for the freehold ownership of flats, offering an alternative way of owning property which avoids the shortcomings of leasehold ownership.

- 1.5 Before we explain our recommendations for reform, it is important to consider the overall purpose of reform, to explain how our three reports fit together, and to explain their relationship with Government’s work on leasehold and commonhold reform.
- 1.6 In this chapter, we start by looking to the future and explaining what the future of home ownership could look like after reform. We then discuss the route to get there.
- (1) In Part A, we summarise how home ownership currently works and its problems.
 - (2) In Part B, we discuss our recommended reforms and Government’s reforms.
 - (3) In Part C, we explain how all the proposed reforms fit together.

2019, pp 46-47, at

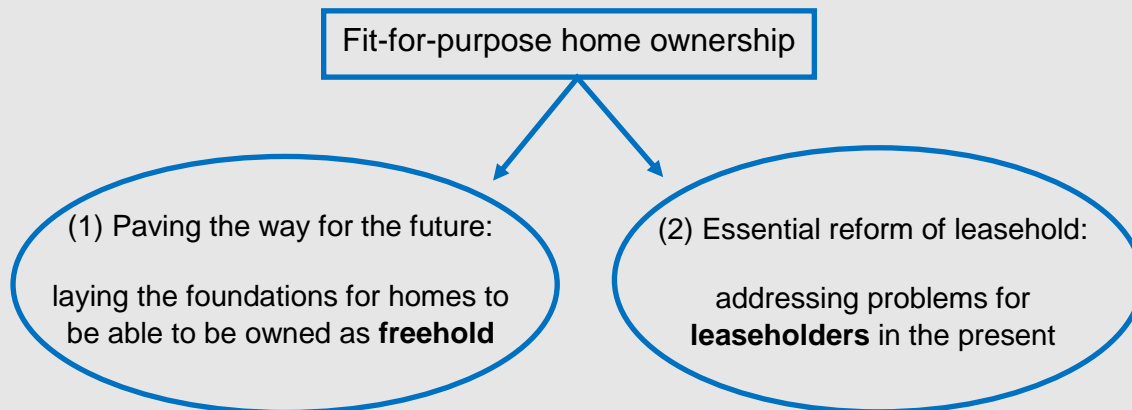
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf. See also temporary measures whereby landlords will have to give all renters 3 months’ notice if they intend to seek possession of a property in the Coronavirus Act 2020, s 81 and sch 29.

⁵ Leasehold home ownership: buying your freehold or extending your lease – Report on options to reduce the price payable (2020) Law Com No 387 (“the Valuation Report”).

HOME OWNERSHIP AFTER REFORM: A SUMMARY

1.7 The reforms proposed by the Law Commission and by Government are intended to create fit-for-purpose home ownership. They are about making our homes ours, rather than someone else's asset.

1.8 The reforms fall into two categories.



(1) Owners of future homes

1.9 For owners of future homes:

- (1) houses will always be sold on a freehold basis – because Government intends to ban the sale of houses on a leasehold basis.⁶
- (2) flats will:
 - (a) be sold *solely* on a freehold (that is, “commonhold”) basis – if Government requires commonhold to be used and bans leasehold; or
 - (b) sometimes be sold on a commonhold basis and sometimes on a leasehold basis – if Government actively incentivises commonhold, but does not go as far as to ban leasehold; or
 - (c) continue (as is presently the case) to be sold on a leasehold basis – if Government takes no action to require or incentivise the use of commonhold and/or does not ban leasehold.
- (3) commonhold will be a viable alternative to leasehold – because our recommendations will make commonhold workable.
- (4) insofar as any homes are sold on a leasehold basis, they will not contain any ground rent obligations – because Government intends to restrict ground rents to zero.⁷

⁶ Subject to exceptions.

⁷ Subject to exceptions.

1.10 As a consequence, for owners of future homes:

- (1) the right for leaseholders to buy the freehold of their house will be largely redundant – because houses in the future will already have been sold freehold;
- (2) if flats are *only* sold on a commonhold basis, the right for leaseholders (i) to extend their lease, (ii) to buy their freehold, or (iii) to take over the management of their block of flats (the RTM), will be redundant – because the flats will already have been sold freehold;
- (3) if flats continue to be sold on a leasehold basis:
 - (a) it will be significantly cheaper for leaseholders to extend the lease of their flat – because (i) restricting ground rents to zero, and (ii) our options for reducing enfranchisement prices, will limit the amount that leaseholders have to pay;
 - (b) it will be significantly cheaper for leaseholders (with their neighbours) to buy the freehold of their block – because (i) restricting ground rents to zero, and (ii) our options for reducing enfranchisement prices, will limit the amount that leaseholders have to pay.
 - (i) Those leaseholders would then be able to convert to commonhold, if they wanted to do so.
 - (ii) Those leaseholders are less likely to want or need to exercise the RTM (which involves taking over the management of a block but not buying the freehold) – because the cost of purchasing the freehold will be significantly cheaper than it is now.

(2) Leasehold owners of existing homes⁸

1.11 While there can be an ambition for freehold to be the basis of home ownership in the future, it is crucial to recognise that leasehold will continue to exist for some time. Many people already own a leasehold home. And some homes may be granted on a leasehold basis in the future – namely (i) any flats granted on a leasehold basis (if commonhold is not required, or sufficiently promoted), and (ii) any houses which are exempt from the leasehold house ban. For those leaseholders:

- (1) it is necessary for various problems with leasehold ownership to be resolved; and
- (2) they will need to have the improved rights that we recommend:
 - (a) to extend their lease or to purchase their freehold, and – in the case of flats – to convert to commonhold; and
 - (b) to take over the management of their block.

⁸ Including leasehold owners of future homes, to the extent that leases are still granted of future homes.

1.12 The recommendations that we make in our reports on enfranchisement and the right to manage will considerably improve the position of existing leaseholders, and any future leaseholders, in a number of respects. In particular:

- (1) a lease extension will result in a lease being extended by 990 years at a peppercorn rent, so that the need to extend a lease only arises once and no ground rent is payable;
- (2) more leaseholders will be able collectively to purchase the freehold of their block or take over the management of the block: leaseholders cannot currently do so if more than 25% of the block is commercial property, and we recommend raising the threshold to 50%;
- (3) it will be possible to purchase the freehold or take over the management of multiple buildings (for example, in an estate);
- (4) the process for making an enfranchisement or RTM claim will be easier, quicker, and cheaper, with procedural traps removed;
- (5) leaseholders making an enfranchisement or RTM claim will no longer have to pay their landlord's costs (in the case of enfranchisement, if Government sets premiums at market value); and
- (6) leaseholders making an enfranchisement claim will be better able to convert from leasehold to commonhold, if they wish to do so.

1.13 In addition, the options for reducing enfranchisement prices in our earlier report would reduce the amount that leaseholders have to pay to extend their lease or purchase their freehold.

Home ownership after reform	Existing homes	Future homes
Houses	Improved rights for leaseholders Existing leaseholders can buy the freehold – and it will be cheaper to do so	New houses are freehold
Flats	Improved rights for leaseholders Existing leaseholders can buy the freehold and convert to commonhold – and it will be cheaper to do so	Government to decide whether commonhold is compulsory, incentivised, or optional Even if leasehold continues, the right to buy the freehold (including converting to commonhold) will be significantly cheaper

PART A: HOW HOME OWNERSHIP CURRENTLY WORKS AND ITS PROBLEMS

Freehold and leasehold ownership

1.14 What does “ownership” mean? When an estate agent markets a house or flat as being “for sale”, what is the asset on offer? In England and Wales, property is almost always owned on either a freehold or a leasehold basis.

- (1) Freehold is ownership that lasts forever, and generally gives fairly extensive control of the property.
- (2) Leasehold provides time-limited ownership (for example, a 99-year lease), and control of the property is shared with, and limited by, the freehold owner (that is, the landlord).

1.15 So we refer to “buying” or “owning” a house or a flat. But when we buy on a leasehold basis, we are in fact buying a lease of a house or flat for a certain number of years (after which the assumption is that the property reverts to the landlord). A leasehold interest is therefore often referred to as a wasting asset: while it may increase in value in line with property prices, its value also tends to fall over time as its length (the “unexpired term”) reduces. There comes a point when the remaining length of the lease makes it difficult to sell, because purchasers cannot obtain a mortgage since lenders will not provide a mortgage for the purchase of a short lease.⁹

1.16 In addition, leasehold owners often do not have the same control over their home as a freehold owner. For example, they may not be able to make alterations to their home, or choose which type of flooring to have, without obtaining the permission of their landlord. The balance of power between leasehold owners and their landlord is governed by the terms of the lease and by legislation. Recently, concerns have been raised that the lack of control historically associated with leasehold ownership has – in some cases – become a feature of freehold ownership. We return to that issue below.

1.17 As well as a division of control, landlords may have different interests from leaseholders. For instance, the landlord may see a leasehold property solely as an investment opportunity or a way of generating income, while for leaseholders the property may be their home as well as a capital investment.

Different types of ownership	Freehold	Leasehold
Duration of ownership	Lasts forever	Time-limited
Control	Generally extensive	Shared with landlord

⁹ If a lease is unmortgageable, and if the leaseholder cannot afford to extend the lease, the leaseholder might be able to sell the lease to a cash-buyer who can afford to pay the landlord to extend the lease. The purchase price would be reduced by (at least) the cost of a lease extension.

- 1.18 In summary, therefore, leasehold does not provide outright ownership. The experience of leasehold owners has been described as being that of “owners yet tenants”.¹⁰ On the one hand, they are homeowners, with some of the benefits that ownership brings, such as a financial stake in the home. On the other hand, they have a landlord who maintains some control over their use of their home, who has a financial interest in their home, and who will ultimately take back the home on the expiry of the lease.

The inherent features of leasehold “provided the impetus for the development of commonhold, and remain at the heart of many criticisms of leasehold. They do not simply suggest the need for tighter regulation of developers and landlords in the interests of their leaseholders. Instead, they call into question the ability of the landlord-tenant relationship to deliver home-ownership, and provide an imperative for a radical increase in the control held by individuals over their homes. This change, which is reflected in the Law Commission’s three residential leasehold and commonhold projects, arguably marks a renewed focus on the home as a vital element in people’s financial and personal autonomy”.¹¹

Leasehold as a valuable asset for landlords

- 1.19 As we go on to explain below, these inherent features of leasehold ownership are the root cause of many criticisms that have been levelled at it as a mechanism to deliver home ownership. Conversely, these features of leasehold ownership are the very reason that it is an attractive investment opportunity, and a valuable asset, for landlords.

- (1) Since a lease is a *time-limited interest*, there will come a point when the leaseholder needs to extend the lease or buy the freehold in order to retain the property. The leaseholder has to pay the landlord in order to do so. In addition, throughout the term of the lease, the leaseholder will usually have to pay ground rent to the landlord, which provides a source of income for landlords.
- (2) The landlord’s *control* over the property provides a further source of income. For example:
 - (a) landlords can charge leaseholders a fee for certain actions, such as giving consent to alterations to a flat, or for registering a change of ownership when a leaseholder sells his or her flat; and
 - (b) landlords can receive income indirectly through the service charge that leaseholders are required to pay for the costs of maintaining their block or estate. For example, the premium for insuring a block will be paid by the leaseholders, but when arranging the insurance policy the landlord might receive a commission from the insurance company. Similarly, the landlord might arrange for the services at a block (such as for

¹⁰ I Cole and D Robinson, “Owners yet tenants: the position of leaseholders in flats in England and Wales” (2000) 15 *Housing Studies* 595.

¹¹ N Hopkins and J Mellor, ““A Change is Gonna Come”: Reforming Residential Leasehold and Commonhold” (2019) 83(4) *Conveyancer and Property Lawyer* 321, 331-322 (“A Change is Gonna Come (2019)”).

management, for cleaning, or for repair work) to be undertaken by an associated company.

Why are homes owned on a leasehold basis?

Flats

1.20 Flats are almost universally owned on a leasehold, as opposed to freehold, basis. There is a good legal reason for that: certain obligations to pay money or perform an action in relation to a property (such as to repair a wall or a roof) cannot legally be passed to future owners of freehold property. These obligations are especially important for the effective management of blocks of flats. For instance, it is necessary that all flat owners can be required to pay towards the costs of maintaining the block, which is important since flats are structurally interdependent. There are therefore good reasons, under the current law, why flats are sold on a leasehold basis.

Houses

1.21 But leasehold ownership is not limited to flats. Sometimes houses are sold on a leasehold basis. That has been the case for some years.¹² More recently there has been an increase in new-build houses being sold on a leasehold basis. That allows developers to sell the property subject to an ongoing obligation to pay a ground rent.

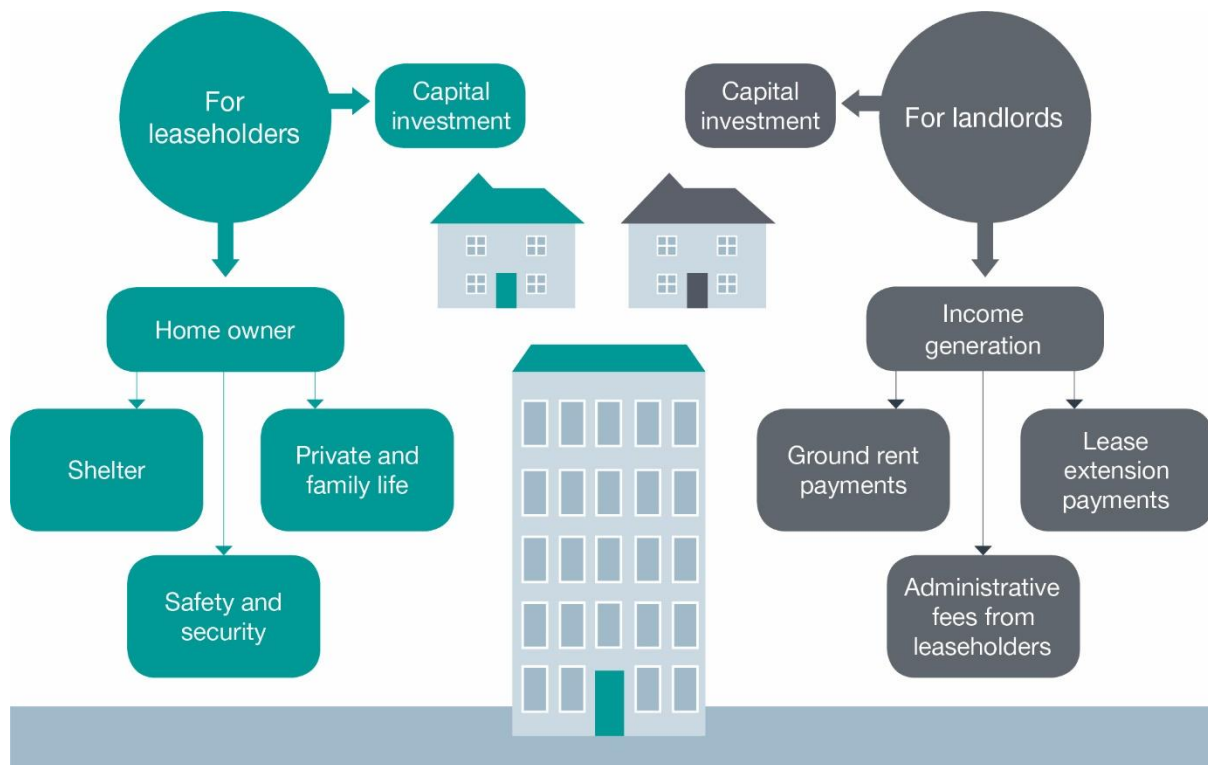
1.22 The legal reasons for selling houses on a leasehold basis are less apparent than those for leasehold flats. One reason might be the need to impose positive obligations on house owners in relation to the upkeep (management) of an estate, but that does not apply in all cases.

A source of income

1.23 We have explained that there can be good legal reasons why homes are sold on a leasehold basis. The reasons why, for legal purposes, houses and flats may be sold on a long lease do not, however, require the lease to provide income streams to the landlord (see paragraph 1.19 above), beyond those needed to maintain the property, the block, or the estate.

¹² Historically, the sale of houses on a leasehold basis became widespread practice in particular areas of the country.

Figure 1: The purpose of a leasehold home



Leasehold and feudalism

1.24 Leasehold is often referred to as “feudal”. In fact, leasehold developed outside of the main feudal tenures and later in time. Leases began as contracts, not interests in land. But while “feudal” is a misdescription of the landlord-tenant relationship, it is not necessarily a mischaracterisation. The language of “feudalism” reflects the power imbalance experienced by leaseholders, and concerns that the tenure has too readily facilitated the extraction of excessive monetary payments from those leaseholders.¹³

What is wrong with leasehold home ownership?

1.25 Residential leasehold has, for some time, been hitting the headlines and is the subject of an increasingly prominent policy debate. There is a growing political consensus that leasehold tenure is not a satisfactory way of owning residential property.

“too often leaseholders, particularly in new-build properties, have been treated by developers, freeholders and managing agents, not as homeowners or customers, but as a source of steady profit. The balance of power in existing leases, legislation and public policy is too heavily weighted against leaseholders, and this must change”.¹⁴ Housing, Communities and Local Government Select Committee

¹³ *A Change is Gonna Come* (2019).

¹⁴ Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 25, at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/1468/1468.pdf>.

Criticisms based on leasehold ownership being inherently unfair

- 1.26 Many people have a fundamental objection to leasehold being used as a mechanism for delivering home ownership. They argue that the fact that external investors have a financial stake in a person's home – which arises from the time-limited nature of the leaseholder's interest and the control enjoyed by the landlord – creates an inappropriate, unbalanced and inherently unfair starting point for home ownership. Leasehold, it is argued, is fundamentally flawed as a mechanism to deliver the type of home ownership that people want and expect. The solution is said to be for home ownership – of both houses and flats – to be delivered through freehold (including commonhold) ownership.
- 1.27 Arguments about inherent unfairness are compounded by the inequality of arms that exists, broadly speaking, between leaseholders and landlords in the current leasehold regime. It is a systemic inequality between leaseholders (as a whole) and landlords (as a whole), as opposed to an individual inequality as between particular people within those groups. We discussed the inequality of arms, the opposing views on whether leasehold ownership is inherently unfair, and competing arguments about reform in our earlier report on valuation in enfranchisement.¹⁵

Criticisms of ways in which the leasehold market operates

1.28 While there is a strong voice that leasehold is inherently unfair and should be replaced with freehold (including commonhold), there are also criticisms of specific aspects of how the leasehold market operates.¹⁶ To those who have a fundamental objection to leasehold, they are all symptoms of what they consider to be an inherently unfair system. But these criticisms are not made solely by those who have a fundamental objection to leasehold; many who do not object to the use of leasehold nevertheless have concerns about aspects of the way that it operates. For example, concerns have been raised about:

- (1) legal, practical and financial obstacles for leaseholders seeking to exercise their statutory rights, including:
 - (a) their right to extend their lease or buy their freehold (that is, their enfranchisement rights);
 - (b) their right to take over management of their block (that is, the RTM);
 - (c) their right to challenge the reasonableness of service charges that have been levied by landlords;

¹⁵ Valuation Report, para 1.71 and 3.45 onwards (on the inequality of arms), para 3.4 onwards (on inherent unfairness), and ch 3 generally on competing views about reform.

¹⁶ We summarise the wider policy debate in ch 1 of our Enfranchisement, Commonhold and Right to Manage Consultation Papers, where we refer to media coverage, the activities of campaign groups, Government announcements, the work of the All-Party Parliamentary Group on Leasehold and Commonhold, and various Parliamentary debates about leasehold.

- (d) the “right of first refusal”, which is intended to allow leaseholders whose landlord proposes to sell the freehold of their block of flats to step in to the purchaser’s shoes and themselves purchase the freehold instead;
 - (e) the right to apply to the Tribunal¹⁷ for a manager to be appointed to manage the block instead of the landlord;
 - (f) the right to form a recognised tenants’ association, and acquire the contact details of the leaseholders in a block in order to do so;
- (2) high and escalating onerous ground rents, with a particular concern about the imposition of ground rents which double at periodic intervals (generally ten years) during the term of a lease; such obligations can make properties unmortgageable and unsaleable, trapping the owners in their homes;
 - (3) houses being sold on a leasehold, as opposed to freehold, basis, for no apparent reason other than for developers to extract a profit from owning the freehold;
 - (4) the absence of any compulsory regulation of managing agents, either in terms of their qualifications or the quality of their work;
 - (5) excessive service charges levied by landlords;
 - (6) the ability of landlords to require leaseholders to pay all or some of the landlord’s legal costs when there has been a dispute between the parties, including in cases where the leaseholder has “won” a legal challenge against their landlord;
 - (7) the legal entitlement of landlords to “forfeit” (that is, terminate) a lease if the leaseholder breaches a term of the lease;
 - (8) the charging by landlords of unreasonable permission fees for leaseholders to carry out alterations to their property; and
 - (9) close relationships between property developers and particular conveyancers which may threaten the latter’s independence in advising clients seeking to buy leasehold properties from the referring developers.

1.29 The concerns set out above lie against a background, generally speaking, of leasehold purchasers not understanding what leasehold ownership involves.

“For most consumers, buying a house or flat will be their largest purchase and investment. Because it is a relatively infrequent purchase consumers are unlikely to accumulate significant knowledge of the process or of the salient characteristics of different forms of property ownership. Further, while the value of the purchase may make the consumer cautious, the sheer magnitude of the purchase price will typically

¹⁷ The First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales.

make other amounts of money involved seem insignificant by comparison”.
Competition and Markets Authority¹⁸

- 1.30 Further, even when purchasers do understand what leasehold ownership involves, there is often no choice over the form of ownership. As we explained above, flats are almost invariably owned on a leasehold basis.
- 1.31 Some criticisms outlined above can fairly be described as abusive practices by landlords or developers. The Competition and Markets Authority (“CMA”) launched an investigation into leasehold home ownership in 2019 and published an interim report in 2020.¹⁹ The CMA expressed concerns about ground rents in leases, about mis-selling of leasehold houses, about service charges and permission fees, and about a failure of “checks and balances” in the leasehold system. The CMA stated that it intended to take enforcement action in relation to the mis-selling of leasehold property, and in relation to leases containing high and escalating ground rents.
- 1.32 While there have been abusive practices in leasehold, we would emphasise that there are other landlords who operate fairly and transparently. But however fairly the system is operated, inherent limitations of leasehold remain.
- 1.33 All of the criticisms summarised above derive, at least to some extent, from those inherent limitations – namely that the asset is time-limited, and that control is shared with the landlord. Those limitations are compounded by the fact that the landlord and leaseholder have opposing financial interests – generally speaking, any financial gain for the landlord will be at the expense of the leaseholder, and vice versa. Accordingly, the leasehold system has been reformed over the years in an attempt to create an appropriate balance between those competing interests. Given their opposing interests, it is very unlikely that leaseholders and landlords will agree that the balance that has been struck between their respective interests is fair. Their interests are diametrically opposed, and consensus will be impossible to achieve.

“For landlords, property is fundamentally about money: both the capital value in the freehold and the income that is generated from ground rent payments, commissions, enfranchisement premiums and other fees. That is not to say that the profit generated cannot be used for good ends, and landlords come in many guises. ... But the fact remains that the primary value of property to many landlords is financial. And whether a particular landlord has observed better or worse practices does not alter the fact that, systematically, leaseholders still lack autonomy and control over their homes.

For homeowners, the home is also about money, but in a very different sense. It is about having a financial stake in the property in which we live; a stake we are increasingly being asked to draw upon to support us financially into retirement, as well as to support the next generation. But the more a person’s home is used as a financial asset to benefit their landlord, the less it is an investment for the individual. The more a leaseholder’s money is providing an investment for their landlord, the less their

¹⁸ Competition and Markets Authority, *Leasehold housing: update report* (February 2020) para 33, at <https://www.gov.uk/cma-cases/leasehold>.

¹⁹ Competition and Markets Authority, *Leasehold housing: update report* (February 2020).

money is providing an investment for their own future, their family and their next generation.

For homeowners, however, the home is about more than money. Britain has famously been described as a nation of homeowners. Fulfilling the dream of home-ownership has long been many people's ambition. Much of this ambition can be attributed to the non-financial, "x-factor" values that home-ownership encompasses, and which have become embedded in an ideology of home ownership. Our home is the focal point of our private and family lives; it is integral to our identity, reflecting who we are and the community we belong to. Bad law and bad practice that affect people's experience in their home therefore have a particular impact on them. The current programme of law reform marks an opportunity to reform the law so that it can better deliver both the financial and non-financial benefits of home ownership".²⁰

Freehold ownership of flats: commonhold

- 1.34 In many countries, leasehold ownership does not exist. Instead, forms of "strata" or "condominium" title are used so that flats can be owned on a freehold basis.
- 1.35 In England and Wales, commonhold was introduced as an alternative to leasehold in 2002, to enable the freehold ownership of flats.²¹ Commonhold allows the residents of a building to own the freehold of their individual flat (called a "unit") and to manage (or appoint someone to manage) the shared areas through a company. For many blocks, the homeowners would not themselves carry out the day-to-day management but would instead appoint agents to manage the block. Crucially, however, the homeowners (rather than an external landlord) would control the appointment of those agents.
- 1.36 For homeowners, commonhold offers a number of advantages over leasehold ownership. In particular:
- (1) it allows a person to own a flat forever, with a freehold title – unlike a leasehold interest, which will expire at some point in the future;
 - (2) no ground rent is payable;
 - (3) it gives the homeowner greater control of their property than leasehold; and
 - (4) it is designed to regulate the relationship between a group of people whose interests are broadly aligned. That is in stark contrast to the leasehold regime, which has to attempt to balance and regulate the competing interests of landlord and leaseholder.

²⁰ *A Change is Gonna Come (2019)*, 330-331.

²¹ Commonhold was created by the Commonhold and Leasehold Reform Act 2002. While primarily designed to enable the freehold ownership of flats, commonhold is equally capable of applying in a commercial context. It can, for example, regulate the relationship between individually owned offices within an office block.

1.37 Despite these apparent advantages, however, commonhold has not taken off – fewer than 20 commonholds have been created since the commonhold legislation came into force.²²

Why has commonhold failed?

1.38 Various suggestions have been made as to why commonhold has not taken off.

- (1) Some have suggested that shortcomings in the law governing commonhold can make it unworkable in practice and have led to a lack of confidence in commonhold as a form of ownership.
- (2) Some ascribe commonhold's low uptake to an unwillingness of mortgage lenders to lend on commonhold units.
- (3) Some think that there may be a lack of consumer and sector-wide awareness of what is a relatively unfamiliar form of ownership.
- (4) Others point out that commonhold remains less attractive to developers than leasehold because of the opportunities that leasehold offers to secure ongoing income-streams on top of the initial purchase price paid by the leaseholders.
- (5) Others point out that Government provided no incentives for developers to use commonhold – and no disincentives to them continuing to use leasehold (for example, by removing the financial advantages for developers of selling leasehold flats).
- (6) Others suggest that the low uptake is more the result of inertia among professionals and developers. Moreover, we have been told that there is insufficient incentive (financial or otherwise) for developers of homes and commercial property to change their practices and adopt a whole new system while the existing one (from their perspective at least) does the job.

Stewardship and culture change²³

1.39 A common thread that runs through all three of our projects is moving management and control from a third-party landlord to homeowners. But it is in relation to commonhold that the management of land has come under the greatest scrutiny, because of the removal of the relationship of landlord and tenant. This shift from leasehold to freehold tenure has raised questions as to the stewardship of land and the utility of the landlord-tenant relationship in the residential context. Stewardship is not always defined, but in this context, we use the term to mean the management of land over time and for the next generation of owners. It has been suggested that landlords are necessary to provide stewardship over residential property. Institutional landlords are said to act as custodians who take a long-term view of the investments needed in a building or estate.²⁴ Such landlords are also said to have superior

²² L Xu, "Commonhold Developments in Practice" in W Barr (ed), *Modern Studies in Property Law: Volume 8* (2015) p 332.

²³ Taken from *A Change is Gonna Come* (2019), 328-329.

²⁴ Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 81.

expertise in overseeing insurance, maintenance, health and safety, fire risks, planning obligations, building regulations and anti-social behaviour.²⁵

- 1.40 But this argument must address the following challenge: if owners of houses are trusted to be the stewards of their house, why can owners of flats not be similarly trusted? While leaseholders have a shorter-term interest than their landlords, it is the term of the lease granted by the landlord that so constrains them. There is no reason to assume that leaseholders would not have the same incentives as landlords presently do if they had the same enduring financial stake.²⁶ The management of a block is undoubtedly more complex than that of an individual house. It is not suggested that commonhold unit owners themselves will personally take charge. In all but small blocks, where self-management is a realistic choice, the expectation is that professional managers will be appointed.
- 1.41 This insistence on the necessity of landlord freeholders to provide inter-generational stewardship of a building or estate is symptomatic of a broader issue. The reform of leasehold, and particularly the reinvigoration of commonhold, bring about a need for cultural change, and for all participants in the housing market to re-think fundamental assumptions on which the market currently operates.
- 1.42 It has been suggested, for example, that developers will not build unless there is a professional landlord in place to manage the development. This ignores the fact that commonhold structures are used around the world and that large, mixed-use developments are built in those jurisdictions. It is also argued that commonhold owners will not take an active interest in the management of their block. Such arguments operate on the assumption that flat owners are ultimately apathetic about how their buildings or estates are run.²⁷ While commonhold is about empowering and giving responsibility to owners of flats, it is also about owners of flats being ready to accept responsibility and therefore being ready to take on that cultural change. Law reform must be matched by changes in people's expectations of what home-ownership will involve. It should not be assumed that apathy generated in a leasehold system – where the long-term financial investment and control of a building lie with an external third party – will carry over into a system in which, from the outset, investment and control lie with the unit owners.
- 1.43 In summary, therefore, commonhold should not be looked at through the lens of leasehold. Commonhold involves a culture change. It moves away from an “us and them” mindset, towards “us and ourselves”.

²⁵ See, for example, <https://wslaw.co.uk/wp-content/uploads/2019/07/LR-December-Bulletin-2018.pdf>, p 3.

²⁶ S Bright, “Do freeholders provide a unique and valuable service?” (2019) at <https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/04/do-freeholders-provide-unique-and-valuable-service>.

²⁷ Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, para 17.

PART B: LAW COMMISSION AND GOVERNMENT RECOMMENDATIONS FOR REFORM

The impact of COVID-19

1.44 The final stage of the preparation of our reports has been undertaken against the backdrop of the COVID-19 pandemic. In common with many people in England and Wales, Law Commission staff and Commissioners found themselves working from, as well as living in, their homes, as everybody limited contact with others to benefit the health of their communities. It is a reminder of the huge importance that a home plays in a person's life, and that individuals must work together to build and get the most out of a community. A significant part of our current work reforming leasehold and commonhold has been aimed at making sure that there exist the right tools to ensure homeowners have the comfort and certainty that they need to enjoy their homes into the future, and, where homes form part of bigger developments, the right people are involved in the decisions that enable their communities to flourish.

Law Commission recommendations for leasehold and commonhold reform

1.45 We have published a suite of final reports on our three projects:

- (1) leasehold enfranchisement;
- (2) the right to manage; and
- (3) commonhold.

1.46 Our three projects fall into two categories.

- (1) Improving leasehold: our recommendations about leasehold enfranchisement and the right to manage are aimed at improving the existing system of leasehold ownership, to make it easier, quicker and cheaper to exercise leasehold rights.

Our starting point in these projects is the fact that leasehold ownership exists. Our recommendations are aimed at improving the law governing leasehold ownership.

- (2) Reinvigorating commonhold, so that leasehold is no longer needed: our recommendations about commonhold are aimed at creating a workable alternative to leasehold ownership, with a view to its widespread use in the future.

Once we have commonhold in a way that works ... we do not need long residential leases. Commonhold solves the two underlying concerns that we hear about leases. ... Once commonhold is there and it is working, if you want a system of ownership that removes those underlying concerns with leasehold,

you can use commonhold”. Professor Nick Hopkins, evidence to the Housing Select Committee²⁸

Our starting point in this project is that it is not necessary for leasehold to be used as the mechanism for delivering home ownership. Rather, commonhold can be used instead, and we would go as far as to say that it should be used in preference to leasehold, because it overcomes the inherent limitations of leasehold ownership set out above. But commonhold can only replace leasehold if it is workable in practice.

“The right to manage and enfranchisement ... mitigate the systemic difficulties with leasehold. But commonhold alone removes those difficulties, delivering freehold ownership of individual flats or units, and collective freehold ownership and management of the common parts”.²⁹

1.47 We summarise our three projects below.

Our Terms of Reference

1.48 The Terms of Reference for all three of our projects include two general policy objectives identified by Government, which are:

- (1) to promote transparency and fairness in the residential leasehold sector; and
- (2) to provide a better deal for leaseholders as consumers.

1.49 Our Terms of Reference include specific provisions for each of our projects, which we set out in the following chapter and in Appendix 1 to this Report.

1.50 Our Terms of Reference are not neutral. They require us to make recommendations that would alter the law in favour of leaseholders. They indicate a policy conclusion reached by Government that the leasehold system in its current form is not a satisfactory way of owning homes.

1.51 We set out many criticisms of leasehold above. Some amount to abusive practices, which have often been a focus of concern (particularly in media reports). But the reform of leasehold is not intended simply to remove abuse. Those practices have served to highlight long-standing concerns with leasehold. Government’s work and our recommendations for reform are therefore not confined simply to removing abuses. Our Terms of Reference refer generally to providing “a better deal for leaseholders as consumers”. Our recommendations for reform are therefore intended to make the law work better for all leaseholders.

²⁸ Housing, Communities and Local Government Committee, Oral evidence: Leasehold reform (2017-19) HC 1468), response to Question 456, at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/housing-communities-and-local-government-committee/leasehold-reform/oral/95161.pdf>.

²⁹ *A Change is Gonna Come* (2019), 328.

Improving leasehold: reform of leasehold enfranchisement

- 1.52 Leasehold enfranchisement is the process by which leaseholders may extend the lease, or buy the freehold. In order to exercise enfranchisement rights, leaseholders must pay a sum of money (“a premium”) to their landlord.³⁰
- 1.53 We make recommendations for a brand-new, reformed enfranchisement regime. We recommend that the enfranchisement rights, and the leaseholders who qualify for them, should be expanded, improved, simplified and rationalised. And we recommend that the process that leaseholders must follow to exercise enfranchisement rights should be improved and simplified, and that the costs that leaseholders incur doing so should be reduced.
- 1.54 We previously published our final report concerning one aspect of leasehold enfranchisement, namely the amount that leaseholders must pay to their landlords in order to make an enfranchisement claim.³¹ As required by our Terms of Reference, we set out the options for Government to reduce the premiums paid by leaseholders.

Improving leasehold: reform of the right to manage

- 1.55 The right to manage is a right for leaseholders to take over the management of their building without buying the freehold. They can take control of services, repairs, maintenance, improvements, and insurance.
- 1.56 We make recommendations which will make the RTM more accessible, less confusing, and more certain. Our recommendations would simplify and liberalise the criteria that govern which properties may be subject to an RTM claim. We have designed a new process by which information and claims are exchanged between leaseholders, landlords, and RTM companies to clear the procedural thicket which currently plagues the regime but also will facilitate better communication between all parties. We also recommend that RTM companies should not be required to cover any non-litigation costs incurred by the landlord as a result of an RTM claim.

The alternative to leasehold – re-invigorating commonhold

- 1.57 We explain above that commonhold allows for the freehold ownership of flats (and other interdependent properties), offering an alternative way of owning property which avoids the shortcomings of leasehold ownership.
- 1.58 We also summarised some of the reasons why commonhold is said to have failed in paragraph 1.38 above.
- 1.59 Our project seeks to address the first suggested barrier to the uptake of commonhold: perceived shortcomings in the legal design of the commonhold scheme. Our project analyses which aspects of the law of commonhold have so far impeded commonhold’s success, for example by affecting market confidence, or making it unworkable. In accordance with our Terms of Reference, we recommend reforms to

³⁰ There is an exception: leaseholders of houses can extend their lease without paying a premium but instead paying a higher annual rent: see para 2.8(2) of the Enfranchisement Report.

³¹ Valuation Report.

reinvigorate commonhold as a workable alternative to leasehold, for both existing and new homes.

- 1.60 Other barriers to the uptake of commonhold, including those identified in paragraph 1.38 above, are not problems with the law and do not fall within our Terms of Reference.³² They are issues which Government is considering – and Government therefore has a crucial role in seeking to reinvigorate commonhold as a mechanism for delivering home ownership.

Government proposals for leasehold and commonhold reform

- 1.61 Improving and facilitating home ownership is a priority for Government, and – as part of that – reform of residential leasehold and commonhold law has become an increasing priority. The UK Government and Welsh Government have announced various proposals for reform. Our recommendations for reform will be considered by both Governments as part of their overall programmes of reform.
- 1.62 We summarise Government’s current proposals for reform below. We do not comment on those proposals. They are all matters which fall outside the scope of our projects. Nevertheless, it is important to explain those proposals in order to explain how all proposed reforms (including those that we recommend) fit together.

Ministry of Housing, Communities and Local Government

- 1.63 The Ministry of Housing, Communities and Local Government (“MHCLG”) has announced its intention to bring forward the following measures.³³
- (1) For the future, banning the sale of houses on a leasehold basis, other than in exceptional circumstances.³⁴ As we explain further below, the only good legal reason for selling houses on a leasehold basis – namely ensuring that owners

³² Our project did, however, provide an opportunity to gather evidence on these wider measures to reinvigorate commonhold, and we report on them in our Commonhold Report.

³³ See: (1) Department for Communities and Local Government (“DCLG”), *Tackling unfair practices in the leasehold market: A consultation paper* (July 2017) (“*Tackling unfair practices consultation, July 2017*”); (2) DCLG, *Tackling unfair practices in the leasehold market: Summary of consultation responses and Government response* (December 2017) (“*Tackling unfair practices response, December 2017*”); (3) MHCLG, *Implementing reforms to the leasehold system in England: A consultation* (October 2018) (“*Implementing reforms consultation, October 2018*”); (4) MHCLG, *Implementing reforms to the leasehold system in England: Summary of consultation responses and Government response* (June 2019) (“*Implementing reforms response, June 2019*”); and (5) MHCLG, *Government response to the Housing, Communities and Local Government Select Committee report on leasehold reform* (July 2019) (“*Response to Select Committee, July 2019*”). (1) and (2) are at <https://www.gov.uk/government/consultations/tackling-unfair-practices-in-the-leasehold-market>; (3) and (4) are at <https://www.gov.uk/government/consultations/implementing-reforms-to-the-leasehold-system>; (5) is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814334/CS0519270992-001_Gov_Response_on_Leasehold_Reform_Web_Accessible.pdf.

³⁴ *Implementing reforms response, June 2019*, ch 2. The ban would apply, predominantly, to houses that are built in the future. The ban on the grant of leases of houses would, however, also prevent the grant of a *new* lease over an *existing* house. The ban would not apply to existing leases of houses.

on an estate will contribute to (reasonable) shared costs – would be provided by the creation of “land obligations”: see paragraph 1.63(11) below.

- (2) For the future, when homes are sold on a leasehold basis (which, following the leasehold house ban, will predominantly be flats), restricting ground rents to zero in those leases.³⁵
- (3) Regulation of the property agent sector, including letting, managing and estate agents through mandatory licensing, mandatory codes of practice, new qualifications provisions and a new regulator with a range of enforcement options.³⁶
- (4) Consideration of reform of the regulation of the service charges that leaseholders must pay, including the requirements to consult with leaseholders before incurring expenditure on major works or on long-term contracts.³⁷
- (5) Reviewing the ability of landlords to charge leaseholders permission fees under long leases, such as fees for permission to make alterations to the property.³⁸
- (6) Reviewing the circumstances in which leaseholders are required to contribute to their landlord’s legal costs.³⁹
- (7) Requesting that the Law Commission update its previous recommendations to abolish forfeiture.⁴⁰
- (8) Protecting leaseholders from losing their homes for small sums of rent arrears.⁴¹

³⁵ *Implementing reforms response, June 2019*, ch 3.

³⁶ The proposals included plans for a mandatory code of practice covering letting and managing agents and nationally recognised qualification requirements for letting and managing agents to practise. In addition, an independent regulator was proposed which would oversee both the code of practice and the delivery of the qualifications: DCLG, *Protecting consumers in the letting and managing agent market: call for evidence* (October 2017), and MHCLG, *Protecting consumers in the letting and managing agent market: Government response* (April 2018). A working group chaired by Lord Best was subsequently tasked with “considering the entire property agent sector to ensure any new framework, including any professional qualifications requirements, a Code of Practice, and a proposed independent regulator, is consistent across letting, managing and estate agents”: see: *Regulation of property agents working group – final report* (July 2019), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf.

³⁷ *Response to Select Committee, July 2019*, pp 25-29.

³⁸ *Response to Select Committee, July 2019*, pp 23-24.

³⁹ *Response to Select Committee, July 2019*, p 29.

⁴⁰ *Response to Select Committee, July 2019*, pp 29-30. We have previously recommended that forfeiture be abolished and replaced with a regime to enforce the terms of leases in a proportionate way: *Termination of Tenancies for Tenant Default* (2006) Law Com No 303.

⁴¹ *Tackling unfair practices response, December 2017*, Ch 4.

- (9) Reviewing loopholes in the “right of first refusal”.⁴²
- (10) Implementation of most of the Law Commission’s recommendations on fees charged in leasehold retirement properties (“event fees”), including limiting the circumstances in which event fees can be charged and requiring the disclosure of information to prospective purchasers.⁴³
- (11) To support the leasehold house ban, relying on the implementation of the Law Commission’s recommendations to reform property law, including introducing “land obligations” and reforming the way in which rights over land are created, varied, terminated and regulated.⁴⁴
- (12) Extending mandatory membership of a redress scheme to landlords who do not use managing agents.⁴⁵
- (13) Setting a cap on what leaseholders can be charged for the provision of information about the lease to potential purchasers, and a minimum time within which the information must be provided.⁴⁶
- (14) Extending rights currently enjoyed by leaseholders to freeholders of houses – in particular:
 - (a) extending the right to challenge charges for the maintenance of an estate where they are unreasonable, as well as allowing freeholders of houses to apply to change their managing agent;⁴⁷
 - (b) protecting freeholders from losing their homes for unpaid service charges which are owed as “rentcharges”;⁴⁸

⁴² *Response to Select Committee, July 2019*, p 13. We explain the right of first refusal in para 1.28(1)(d) above.

⁴³ Letter from Heather Wheeler MP, then Minister for Housing and Homelessness, to the Rt Hon Lord Justice Green, Chair of the Law Commission, 27 March 2019, at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/Letter-from-Mrs-Heather-Wheeler-MP.pdf>.

⁴⁴ *The Queen’s Speech 2016*, p 61, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf; *Tackling unfair practices response, December 2017*, para 36; and *Implementing reforms consultation*, October 2018, para 2.21. See also *Making Land Work: Easements, Covenants and Profits À Prendre (2011) Law Com No 327*.

⁴⁵ MHCLG, *Strengthening consumer redress in the housing market* (January 2019), para 123, at <https://www.gov.uk/government/consultations/strengthening-consumer-redress-in-housing>.

⁴⁶ *Implementing reforms response, June 2019*, ch 5, which sets out proposals for a cap of £200 plus VAT and a timeframe of 15 working days.

⁴⁷ *Tackling unfair practices response, December 2017*, ch 5; *Implementing reforms response, June 2019*, ch 4.

⁴⁸ *Tackling unfair practices response, December 2017*, para 81.

- (c) reforming the “right of first refusal” by extending the right to leaseholders of houses;⁴⁹ and
 - (d) considering regulating the ability of developers and others to charge homeowners permission fees, such as to make alterations to their property.⁵⁰
- (15) Ensuring the New Homes Ombudsman is created and requiring developers of new-build homes to belong to it, which would provide new-build homebuyers with an effective route to resolve disputes, avoiding the need to go to court.⁵¹
- (16) Considering the case for creating a Single Housing Court, to see whether it could make it easier for all users of court and tribunal services to resolve disputes, reduce delays and to secure justice in housing cases.⁵²

1.64 Some measures have already been implemented.

- (1) Changes have been made to the recognition of residents’ associations, to require landlords to provide residents’ associations with information about leaseholders.⁵³
- (2) A Government-backed pledge, designed to help leaseholders with onerous ground rent terms, has been agreed by many landlords, developers, conveyancers and managing agents.⁵⁴

⁴⁹ *Implementing reforms response, July 2019*, paras 2.34-2.35; *Response to Select Committee, July 2019*, p 13.

⁵⁰ *Response to Select Committee, July 2019*, pp 23 to 24.

⁵¹ MHCLG, *Redress for purchasers of new build homes and the New Homes Ombudsman: technical consultation* (June 2019) and *Government response* (February 2020), at <https://www.gov.uk/government/consultations/redress-for-purchasers-of-new-build-homes-and-the-new-homes-ombudsman>.

⁵² MHCLG, *Considering the case for a Housing Court – A Call for Evidence* (November 2018), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf.

⁵³ The Tenants’ Associations (Provisions Relating to Recognition and Provision of Information) (England) Regulations 2018 (SI 2018 No 1043). The regulations are intended to make it easier for residents’ associations to contact leaseholders, increasing the likelihood of those leaseholders becoming members of the association. This affects the chances of the association being formally recognised under s 29(1) of the Landlord and Tenant Act 1985, which improve if a higher percentage of the leaseholders are members. For background, see s 130 of the Housing and Planning Act 2016; DCLG, *Recognising residents’ associations, and their power to request information about tenants* (July 2017), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf.

⁵⁴ MHCLG, *Public pledge for leaseholders* (27 June 2019), at <https://www.gov.uk/government/publications/leaseholder-pledge/public-pledge-for-leaseholders>.

- (3) Restrictions are to be placed on the properties that qualify for support from the Help to Buy scheme in England, reflecting the leasehold house ban and the restriction of ground rents to zero.⁵⁵
- (4) Government has committed that no new scheme will fund the building of leasehold houses.⁵⁶

1.65 In addition, commonhold has been brought back on to the political agenda. MHCLG has stated that, in addition to pursuing leasehold reform:

we also want to look at ways to reinvigorate commonhold. ... This will help ensure that the market puts consumers' needs ahead of those of developers or investors. We will also look at what more we can and should do to support commonhold to get off the ground working across the sector, including with mortgage lenders.⁵⁷

Welsh Government

1.66 The Welsh Government has imposed restrictions on properties that qualify for support from the Help to Buy Wales scheme, namely that houses should generally be sold on a freehold basis and that ground rents should be restricted.⁵⁸ At the same time, a Help to Buy Wales conveyancer accreditation was introduced, and the use of an accredited conveyancer was made mandatory for sales through the scheme, to ensure a minimum level of information is given to purchasers on a range of issues, including information about leasehold. In addition, the major developers operating in Wales pledged not to use leasehold for new-build houses, whether sold through the Help to Buy scheme or otherwise.⁵⁹

1.67 In addition, the Welsh Government established a working group on leasehold reform. The group's report, published in 2019, made a wide range of recommendations, including recommendations to:⁶⁰

⁵⁵ *Tackling unfair practices response, December 2017*, para 47; MHCLG, *Leasehold axed for all new houses in move to place fairness at heart of housing market* (27 June 2019), at <https://www.gov.uk/government/news/leasehold-axed-for-all-new-houses-in-move-to-place-fairness-at-heart-of-housing-market>; MHCLG, *Housing Secretary clamps down on shoddy housebuilders* (24 February 2020), at <https://www.gov.uk/government/news/housing-secretary-clamps-down-on-shoddy-housebuilders>.

⁵⁶ MHCLG, *Funding for new leasehold houses to end* (2 July 2018), at <https://www.gov.uk/government/news/funding-for-new-leasehold-houses-to-end>.

⁵⁷ *Tackling unfair practices response, December 2017*, p 25.

⁵⁸ Developers have to present genuine reasons for a house to be marketed as leasehold. In addition, starting ground rents need to be limited to a maximum of 0.1% of the property's sale value and leasehold agreements have to have a minimum term of 125 years for flats and 250 years for houses.

⁵⁹ *Written Statement: Leasehold Reform in Wales* (6 March 2018), at <https://gov.wales/written-statement-leasehold-reform-wales>.

⁶⁰ *Residential Leasehold Reform – A Task and Finish Group Report*, pp 21-22, at <https://gov.wales/independent-review-residential-leasehold-report>. See also *Written Statement: Response to Report of the Task and Finish Group on Leasehold Reform* (6 February 2020), at <https://gov.wales/written-statement-response-report-task-and-finish-group-leasehold-reform>.

- (1) legislate to ban the unjustified use of leasehold in new-build houses, with some exceptions;
- (2) legislate to ban onerous ground rents and implement the reduction of future ground rents to a nominal financial value;
- (3) improve education and awareness for all participants in the property market;
- (4) improve transparency for consumers with respect to the obligations that burden a leasehold or freehold property at the point of sale; and
- (5) introduce an updated Code of Practice in Wales for the licensing and accreditation of managing agents.

1.68 The Welsh Government has also published a Call for Evidence to better understand how private housing estates are maintained through the payment of estate service charges by homeowners and residents. The evidence base collected by this process will then be used by the Minister for Housing and Local Government to consider the case for reform.⁶¹

PART C: THE BIG PICTURE – HOW THE VARIOUS REFORM PROPOSALS FIT TOGETHER

Introduction

1.69 In Part B, we have summarised the areas in which we are recommending reform, and we have summarised (without commenting on) Government’s proposals for reform. We now explain how all those proposed reforms fit together.

1.70 It is important to look at existing and future home owners. Reform must cater for the needs of:

- (1) Leaseholders of existing homes: reform must cater for the needs of the leaseholders of existing houses and flats, as well as the future owners of those homes.⁶² It is estimated that there are at least 4.3 million leasehold homes in England alone.⁶³
- (2) Owners of future homes: reform must cater for the needs of the owners of houses and flats that are built in the future: 178,000 new-build properties were

⁶¹ Welsh Government, *Estate charges on housing developments: call for evidence* (February 2020), at <https://gov.wales/sites/default/files/consultations/2020-02/estate-charges-on-housing-developments.pdf>.

⁶² In addition, it is necessary to consider leasehold owners of future homes, to the extent that leases are still granted in the future.

⁶³ MHCLG, *Estimating the number of leasehold dwellings in England 2017-2018* (26 September 2019), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834057/Estimating_the_number_of_leasehold_dwellings_in_England__2017-18.pdf.

completed in England in 2019, of which 78% were houses and 22% were flats.⁶⁴

“The work of the Law Commission and of the Government brings onto the horizon an unprecedented level of reform of residential leasehold and commonhold. Lying at the heart of the work is an acknowledgement that leasehold home ownership has failed to deliver the benefits associated with being an owner, and that the systemic problems with leasehold mean that the tenure is ill-equipped to do so”.⁶⁵

Overall aim: fit-for-purpose home ownership

- 1.71 The aim of all the proposed reforms can be summarised as seeking to create fit-for-purpose home ownership.
- 1.72 There are two strands to that work:
- (1) paving the way for the future: laying the foundations for homes to be able to be owned as freehold; and
 - (2) essential reform of leasehold: addressing problems for leaseholders in the present.

(1) Paving the way for the future: laying the foundations for homes to be able to be owned as freehold

Owners of future homes

- 1.73 MHCLG’s proposed ban on *houses* being sold on a leasehold basis (see paragraph 1.63(1) above) will ensure that, in the future, houses will be sold on a freehold basis (subject to exceptions). Accordingly, houses that are built in the future will predominantly be owned on a freehold basis.
- 1.74 By implementing our recommendations for the creation of land obligations, there would no longer be any reason – from a legal point of view – for selling houses on a leasehold basis. That is because land obligations would allow for freehold owners to be subject to positive obligations. Land obligations would be a rational and controlled mechanism for requiring payments to be made.
- 1.75 Turning to future *flats*, as recorded in our Terms of Reference, Government wishes to reinvigorate commonhold as a workable alternative to leasehold. Our recommendations to reform the law of commonhold will overcome the defects in the current legal regime so that commonhold can be used with confidence.

⁶⁴ MHCLG, *House building; new build dwellings, England: December Quarter 2019* (26 March 2020), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875361/House_Building_Release_December_2019.pdf.

⁶⁵ *A Change is Gonna Come* (2019), 330.

- 1.76 In the future, the sale of all flats could be on a commonhold basis, rather than as leasehold (as is invariably the case currently).⁶⁶ The Law Commission's reforms will ensure that commonhold is workable and flexible enough to cater for the wide range of modern-day developments.

We urge the Government to ensure that commonhold becomes the primary model of ownership of flats in England and Wales, as it is in many other countries. ... there is no reason why the majority of residential buildings could not be held in commonhold; free from ground rents, lease extensions, and with greater control for residents over service charges and major works. We are unconvinced that professional freeholders provide a significantly higher level of service than that which could be provided by leaseholders themselves". Housing, Communities and Local Government Committee⁶⁷

- 1.77 If commonhold is not used (or if it is used only in some cases), the 40,000 or so flats built each year (or some of them) will continue to be sold on a leasehold basis, with the inherent limitations of leasehold.
- 1.78 Developers and other property-owners are currently incentivised to sell flats on a leasehold basis. As we explained in paragraph 1.19 above, the freehold is a valuable asset for the developer because it provides a steady income from ground rents, income from lease extension premiums, and other income from the leaseholders. Developers can therefore sell the flats that they build twice: they sell a long lease to the homeowner, and they can sell the freehold to an investor. By contrast, commonhold flats can only be sold once – to the homeowner. Developers therefore have no incentive to adopt commonhold. The restriction of ground rents to zero will remove one significant incentive to sell flats on a leasehold basis, since a developer will not receive (or be able to sell) a steady ground rent income. However, the freehold will continue to be valuable, because enfranchisement premiums might be paid and there may be additional income to be gained from owning the freehold. Accordingly, the incentive will remain to sell flats on a leasehold basis. Moreover, given the limited consumer awareness about commonhold, there may not be sufficient consumer demand to act as a catalyst for change. Even if such demand were to exist, the fact that demand for housing outstrips supply means that prospective homeowners do not have the bargaining power to demand commonhold flats.⁶⁸
- 1.79 We summarise in Appendix 3 to our Commonhold Report what consultees said about the steps that would be necessary to reinvigorate commonhold.
- 1.80 Based on the evidence that we have gathered during our projects, we have concluded that commonhold will not be used unless (a) it is made compulsory, or (b) adequate incentives are put in place to make it more attractive to developers than leasehold (or

⁶⁶ We refer to the sale of flats to cover (a) the sale, for the first time, of new-build flats, and (b) the sale of *existing* flats which are not already subject to a long lease, such as where a freehold owner splits a house into multiple flats and sells the individual flats.

⁶⁷ Housing, Communities and Local Government Committee, Leasehold Reform (2017-19) HC 1468, p 3.

⁶⁸ House of Commons Library Briefing Paper, *Tackling the under-supply of housing in England* (2020), <http://researchbriefings.files.parliament.uk/documents/CBP-7671/CBP-7671.pdf>; Welsh Government, *Delivering More Homes for Wales: Report of the Housing Supply Task Force* (2014), at <https://gov.wales/sites/default/files/publications/2019-04/delivering-more-homes-for-wales-recommendations.pdf>.

conversely that leasehold is disincentivised sufficiently to makes it less attractive than commonhold). Commonhold will not take root on its own. There is no reason why developers will start selling commonhold flats for so long as there is more money to be made by selling leasehold flats.

- 1.81 Developers have had the option of using commonhold or leasehold for over 15 years, but have almost invariably used leasehold. Commonhold was not pushed by Government. Unless it is encouraged, or mandated, there is no reason to believe that the outcome will be any different from when it was first introduced. But the consequences may be even graver. For those who object to commonhold, and prefer leasehold, a second apparent “failure” of the commonhold model is likely to be claimed to be a reason that commonhold cannot and will not work. That, in our view, would be a very unfortunate outcome, and would do a great disservice to current and future homeowners. Commonhold is used around the world; it can and does work. But for so long as there is more money to be made from leasehold, and unless initial impetus can be given to overcome inherent inertia and a lack of awareness, it is not going to take root on its own. Without Government intervention, commonhold simply cannot compete with leasehold.
- 1.82 Accordingly, while implementation of our recommendations on commonhold reform is necessary for the reinvigoration of commonhold, it will not be sufficient on its own to do so.
- 1.83 For houses, Government has decided to ban the use of leasehold, so that freehold ownership is used.⁶⁹ That policy can be pursued because the legal mechanisms for owning houses on a freehold basis already exist (subject, to some extent, to the creation of land obligations: see paragraph 1.63(11) above). It would be a logical extension of that policy to ban the use of leasehold for flats, so that commonhold (freehold) ownership is used instead – once a workable legal mechanism exists. Our recommendations to reform commonhold would create that workable legal mechanism, and so banning the use of leasehold for flats becomes a realistic possibility.
- 1.84 As well as the direct loss of income that developers would suffer by selling flats on a commonhold basis, they would also have to adapt to an unfamiliar ownership model. This was one of the other barriers to the success of commonhold noted in paragraph 1.38 above, alongside inertia amongst professionals, a lack of sector-wide and consumer awareness, and caution on the part of mortgage lenders. These barriers to the uptake of commonhold all require Government intervention if they are to be overcome.
- 1.85 Government must therefore decide:
- (1) whether there should be an equivalent of the leasehold house ban for flats, so that flats cannot be sold on a leasehold basis in the future but must instead be sold on a commonhold basis. Put another way, commonhold could be made compulsory; or

⁶⁹ Subject to exceptions.

- (2) whether developers and other property-owners should (as is currently the case) be left to choose between using leasehold or commonhold for the sale of flats, and if so:
 - (a) whether – and how – the sale of flats on a commonhold basis should be incentivised; and/or
 - (b) whether – and how – the sale of flats on a leasehold basis should be disincentivised; and
- (3) what measures it will adopt in order to overcome the other practical barriers to commonhold, in particular a lack of awareness, and caution and inertia amongst developers, lenders and professionals.

Leaseholders of existing homes

- 1.86 For leaseholders of existing houses,⁷⁰ our recommendations to reform the enfranchisement regime will provide improved rights to acquire the freehold (an “individual freehold acquisition”), and therefore move away from leasehold ownership to freehold ownership.
- 1.87 For leaseholders of existing flats,⁷¹ our recommendations to reform the enfranchisement regime will provide improved rights both to extend the lease and to acquire the freehold of the block – a “collective freehold acquisition”. In addition, our recommendations to reform the law of commonhold will allow leaseholders to then convert the block to commonhold, if they wish to do so. We recommend that leaseholders should have a choice whether (1) to undertake only a collective freehold acquisition, retaining the leasehold structure, or (2) replace the leasehold structure by converting to commonhold.
- 1.88 As commonhold becomes more prevalent, it is likely to be more desirable for leaseholders to convert to commonhold, rather than merely purchase the freehold by making a collective freehold acquisition claim. In time, Government might decide that leaseholders should only be able to convert to commonhold, rather than carry out a collective freehold acquisition claim and retain the leasehold structure.

Ensuring freehold ownership itself is fit-for-purpose

- 1.89 We have summarised above the measures that would pave the way to home ownership – of both houses and flats, and of both existing and future homes – to be freehold rather than leasehold.
- 1.90 That ambition does, however, rest on an assumption that freehold ownership is preferable to leasehold ownership. Generally speaking, for the reasons we set out in paragraphs 1.14 to 1.18 above, freehold ownership is preferable to leasehold ownership. Freehold ownership, however, is not without its own problems.

⁷⁰ Including leaseholders of any future houses that are sold on a leasehold basis.

⁷¹ Including leaseholders of any future flats that are sold on a leasehold basis.

- (1) Concerns have been expressed about some features of freehold ownership. For example, freehold house owners can be required to pay estate management charges,⁷² and there have been concerns about such charges being high or about difficulties challenging the charges. When sums are due under a “rentcharge”, any failure by the freeholder to pay the sums due can result in them losing the property.⁷³
 - (2) There has been growing concern that certain undesirable features of leasehold ownership have been replicated in freehold ownership. The term “fleecehold” has been used to describe this phenomenon. Examples include obligations imposed on freehold homeowners to pay permission fees to make alterations to their home and inappropriate charges for the upkeep of neighbouring land and facilities.⁷⁴
 - (3) As home ownership moves away from leasehold, the opportunity for developers and investors to make money from leasehold will evaporate. It is quite possible that they will look for ways to make money instead through freehold ownership. There is, therefore, a risk that the problems currently seen in leasehold may appear in freehold.
- 1.91 Put another way, moving from leasehold to freehold ownership is not a complete solution to the problems currently faced by homeowners, and nor does it guarantee that practices decried in the context of leasehold ownership will not also emerge as part of freehold ownership.
- 1.92 Certain reforms to freehold ownership are therefore necessary:
- (1) Government’s plans to extend certain rights currently enjoyed by leaseholders to freeholders will provide protections that do not currently exist (see paragraph 1.63(14) above); and
 - (2) the implementation of our recommendations on property law reform – including the creation of land obligations – will improve the operation of freehold ownership, and introduce a more streamlined, proportionate and controlled mechanism for homeowners to contribute towards maintenance costs: see paragraph 1.63(11) and 1.74 above.
- 1.93 As well as resolving existing problems with freehold ownership, it will be necessary to continue to monitor the way in which freehold ownership is working in practice in order

⁷² The legal position is that positive obligations cannot bind future owners of the land (see para 1.20 above). However, freehold land can be subject to a requirement to pay an “estate rentcharge”, and there are various “workarounds” which can be effective to bind future freehold owners such as a “chain of covenants” protected by a restriction at HM Land Registry.

⁷³ See *Roberts v Lawton* [2016] UKUT 395 (TCC), [2017] 1 P & CR 3, which featured the method of enforcing rentcharges implied by s 121(4) of the Law of Property Act 1925 whereby the holder of a rentcharge that is in arrears may grant a lease of the charged land to a trustee to raise money to discharge the outstanding debt. See MHCLG’s work on fees and charges (paras 1.63(14)(a) and (b) above) and the Welsh Government Call for Evidence (para 1.688 above).

⁷⁴ See, for example, BBC News, ‘*Fleecehold*’: *New homes hit by ‘hidden costs’* (20 March 2019), at <https://www.bbc.co.uk/news/uk-england-46279048>. See also MHCLG’s work on permission fees (para 1.63(14)(d) above).

to address any future problems as they arise. In particular, freehold is not free from the risk of abuse, and it is necessary to ensure that bad practices in leasehold do not creep back in under the disguise of freehold ownership.

1.94 In the case of commonhold, our recommendations for reform are designed to ensure that this form of freehold ownership is fit-for-purpose. There are various problems with the current commonhold model, and they would be resolved by our recommendations for reform. We have said that it is important that the practical operation of freehold ownership is monitored, and commonhold is no different. In our Commonhold Report, we conclude that the law of commonhold should be kept under review – just as it is in other countries which adopt a similar ownership model – in order to identify and resolve any problems as they emerge in the future.

Summary: reforms that lay the foundations for home ownership to be freehold

Laying the foundations for home ownership to be freehold	Existing homes	Future homes
Houses	<u>Improved enfranchisement rights</u> : existing leaseholders can buy the freehold	<u>Leasehold house ban</u> : new houses to be sold on a freehold basis
Flats	<u>Improved enfranchisement rights</u> : existing leaseholders can buy the freehold and convert to commonhold	<u>Commonhold is available</u> . Government to decide whether commonhold should be compulsory, incentivised, or optional.

(2) Essential reform of leasehold: addressing problems for leaseholders in the present

1.95 While there can be an ambition for freehold to be the basis of home ownership in the future, it is crucial to recognise that leasehold currently exists, and will continue to exist – certainly in the short term, and probably for many years to come.

- (1) There are millions of existing leaseholders of houses and flats. Even if those leaseholders transition to freehold (or commonhold) ownership, that process will be gradual.⁷⁵ Unless and until existing leaseholders become freeholders, they need suitable protection as leaseholders.

⁷⁵ Although we are recommending the expansion of enfranchisement rights, some leaseholders would remain unable to buy the freehold. For example, while we recommend increasing the threshold for commercial use from 25% to 50% (see para 1.12(2) above), leaseholders will not be able to buy the freehold to their block if more than 50% of the block is in commercial use.

- (2) Similarly, if and in so far as leasehold continues to be used in the future, there needs to be suitable protection for leaseholders.
 - (a) For owners of future houses, leasehold generally ought not be relevant, since Government proposes to ban leasehold houses (subject to exceptions).
 - (b) For owners of future flats, leasehold would not be relevant if commonhold becomes the norm, either because it is made compulsory or because it is sufficiently incentivised over leasehold (see paragraphs 1.75 to 1.85 above).

1.96 It is therefore necessary for various problems with leasehold ownership to be resolved. Of the various reforms discussed in Part B above,⁷⁶ those intended to improve the position of existing leaseholders and any future leaseholders include:

- (1) improving the enfranchisement regime, so that it is easier, quicker and cheaper for leaseholders to extend their lease or buy their freehold: see paragraphs 1.52 to 1.53. We recommend the creation of an improved right to a lease extension, and improved rights for leaseholders to acquire their freehold (either individually or with their neighbours). Exercising enfranchisement rights removes the ground rent in existing leases, whether the claim is for a lease extension or for the purchase of the freehold. We have already published our report on the options that are available to Government to reduce the premiums that leaseholders must pay in order to exercise enfranchisement rights;
- (2) improving the right to manage, so that it is easier, quicker and cheaper for leaseholders to take over control of the management of their block. We recommend improvements to the right to manage: see paragraphs 1.55 to 1.56;
- (3) (for leaseholders of future homes only) restricting ground rents to zero in future leases: see paragraph 1.63(2).⁷⁷ Having said that, houses built in the future will not generally be leasehold (as a result of the leasehold house ban) and flats built in the future would not be leasehold if commonhold is used in preference to leasehold.⁷⁸ Put another way, once the restriction on ground rents is effective, there might be very few leases to which it would apply – houses will generally be sold freehold, and flats could always be sold commonhold;
- (4) regulating property agents and requiring landlords who do not use managing agents to be members of a redress scheme: see paragraphs 1.63(3) and 1.63(12);

⁷⁶ See para 1.45 to 1.68 above.

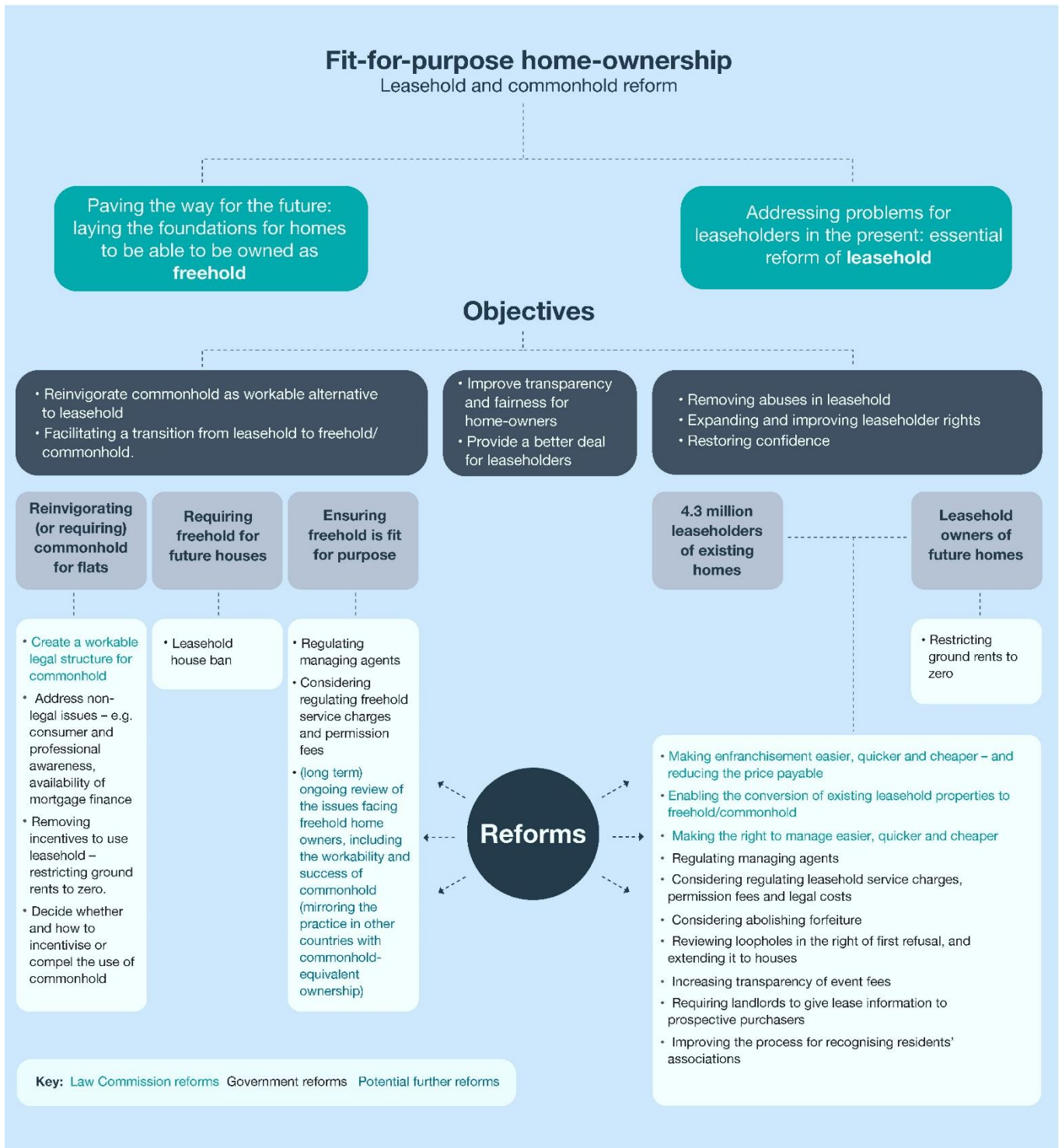
⁷⁷ The restriction on ground rents will not change the ground rents in existing leases, so this measure will only affect leaseholders of future homes. Removing ground rent in existing leases can be done through an enfranchisement claim: see para 1.96(1) above.

⁷⁸ Indeed the restriction of ground rents to zero is one of the measures that would remove the current incentive to use leasehold, and might therefore go some way to encourage the use of commonhold.

- (5) consideration of the reform of the regulation of service charges, permission fees, and legal costs: see paragraphs 1.63(4), 1.63(5) and 1.63(6);
- (6) reviewing our previous recommendations to abolish forfeiture in leasehold: see paragraphs 1.63(7) and 1.63(8);
- (7) reviewing loopholes in the “right of first refusal”: see paragraph 1.63(9);
- (8) reforming the regulation of event fees: see paragraph 1.63(10) above;
- (9) regulating the provision of information by landlords to prospective purchasers of leases: see paragraph 1.63(13); and
- (10) improving the process for recognising residents’ associations: see paragraph 1.64(1) above.

1.97 In the following diagram, we summarise how the various reforms fit together.

Figure 2: The big picture: how the various reform proposals fit together



Chapter 2: Introduction

- 2.1 In the previous chapter, we outlined the inherent problems with leasehold ownership and the criticisms made of its features and the way the leasehold market operates. We also outlined our three residential leasehold projects, and the broader set of reforms proposed by Government to address practices in the leasehold market which prejudice homeowners.
- 2.2 In this chapter, we provide a more thorough introduction to the subject of this Report: the right to manage (“RTM”), including a short summary the current law and its key deficiencies. We then give an overview of our work to date on the RTM, including the consultation on our provisional proposals for reform and how we analysed the responses to the Consultation Paper. We also provide a summary of the key changes we are recommending in respect of the RTM regime, and their intended benefits.
- 2.3 The purpose of our project is to review the existing RTM regime and recommend reforms to give leaseholders easier access to the RTM, and with fewer costs, while safeguarding the interests of landlords to the extent appropriate to protect their interest in the property.¹ This is in line with our Terms of Reference agreed with the Government.² In this Report, we set out recommendations for statutory reform.
- 2.4 This Report is accompanied by a shorter summary document, available on our website.³

WHAT IS THE RIGHT TO MANAGE?

- 2.5 Management of property is a significant ongoing cost associated with home ownership. Typical examples of property management include arranging for the structure and exterior of the building to be repaired or maintained, and obtaining insurance against damage by fire, flood and similar risks. In the case of leasehold property, the decisions about what needs to be done, and for what cost, are often made by the landlord, or a managing agent on the landlord’s behalf. Where the property is located on an estate, the landlord is usually responsible for managing communal areas such as gardens and car parks. These services are for the communal benefit of all the occupiers in the building or on the estate, and the costs are usually recoverable from each of the leaseholders by way of a service charge set out in the lease.

¹ We generally use the term “leaseholder” instead of “tenant” when describing those who enjoy RTM rights. We do so because “leaseholder” is typically used to denote those who own their property through a long lease, whereas “tenant” is generally used to refer to those who rent their property on a short lease (such as a one-year “assured shorthold tenancy”). However, the RTM legislation uses the word “tenant”, and, in some instances, we adopt that language when referring to the legislation – for example, when referring to a “qualifying tenant”.

² We set these out in full in Appendix 1. We discuss the Terms of Reference in more detail from para 2.18.

³ <https://www.lawcom.gov.uk/project/right-to-manage/>.

- 2.6 The relationship between the landlord and the leaseholder, and the rights and obligations in respect of the property, are determined by the terms of the lease. The lease often provides that the landlord also retains responsibility for wider management decisions affecting the building and the individual flats therein. Common examples include deciding which supplier should provide the utilities and, in the case of individual flats, the giving of consent before a leaseholder can make alterations or sub-let.
- 2.7 In many cases the arrangement works well, and leaves a central party responsible for making decisions and arranging for payment. But even if the building is well managed, leaseholders are separated from decision-making which affects their building and their bank balance. The RTM was created in 2002 to give leaseholders the opportunity to take over the management of their building in certain situations. It is sometimes described as a stepping stone on the way to enfranchisement (which allows leaseholders to purchase the freehold). However, it is a standalone option for leaseholders who may not be able to buy their freehold (for example, because they cannot afford the purchase price).

THE CURRENT LAW

- 2.8 The RTM was introduced by the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”). It gives leaseholders the right to acquire (“claim”) the “management functions” in respect of their building, these being functions relating to services, repairs, maintenance, improvements, insurance and management.⁴
- 2.9 It is a “no-fault” right, which leaseholders can exercise without the need to prove a complaint against their landlord or managing agent.⁵ The RTM can only be exercised by qualifying tenants, that is certain types of long leaseholder⁶ in relation to certain types of premises as provided in the 2002 Act.⁷ Notably, the RTM cannot currently be exercised over houses (as opposed to flats), or premises where more than 25% of the floor area of the building is non-residential.⁸
- 2.10 The 2002 Act provides that the leaseholders must first set up an RTM company, of which the leaseholders are members. The 2002 Act then sets out a detailed statutory procedure for the RTM company to follow to acquire the RTM from the landlord. This includes certain rights for the RTM company to request information from the landlord and a requirement on the RTM company to invite all other qualifying leaseholders in the building to become members. Provided that the RTM company meets certain minimum requirements for membership, it may then serve a claim notice on the landlord, to which the landlord may respond with a counter-notice.

⁴ Commonhold and Leasehold Reform Act 2002 (“CLRA 2002”), s 96(5).

⁵ Tanfield Chambers, *Service Charges and Management* (4th ed 2018), para 25-02.

⁶ CLRA 2002, s 75.

⁷ CLRA 2002, s 72.

⁸ CLRA 2002, sch 6, para 1.

2.11 The RTM company must pay the landlord's reasonable costs of dealing with the claim notice and of the transfer of management functions to the RTM company if the RTM is successfully acquired. The RTM company must also pay the landlord's litigation costs if the landlord successfully challenges the claim in the Tribunal.⁹

Why claim the RTM?

2.12 Although it is a no-fault right, it is clear that leaseholders who claim the RTM generally do so because of a dissatisfaction with the existing management. In the leaseholder survey, we asked leaseholders who had acquired the RTM why they decided to do so. Respondents provided a variety of reasons, including:

- (1) dissatisfaction with current management, and/or a desire to improve the quality of management, either of the landlord or managing agent;
- (2) that the building was in disrepair, or repair works had been poor;
- (3) that fees were excessive (for example, increasing service charges, high insurance premiums, contractors charging above market rates, and one-off charges), or there was a lack of transparency over service charge expenditure;
- (4) aggressive, hostile or uncommunicative behaviour by the landlord or managing agents;
- (5) failure on the part of landlord or managing agent to comply with health and safety requirements; and
- (6) a desire to unify management of the buildings on an estate.

2.13 Even where the leaseholders have investigated every other avenue and are very keen to claim the RTM, it is clear that it is not an easy process. Stakeholders who successfully claimed the RTM told us that the process took anywhere from a few weeks to four years, and that the cost of acquiring the RTM ranged between £1,000 to £15,000. Other stakeholders reported that their attempts to claim the RTM had been unsuccessful, or that they had not proceeded with the claim, for the following reasons:

- (1) the landlord raised procedural objections to the claim, or failed to communicate with the RTM company;
- (2) the premises did not qualify, for example because they were mixed-use, on an estate, or held on a shared ownership lease;
- (3) the RTM company could not recruit enough qualifying tenants, for example due to difficulties obtaining the names and addresses of leaseholders, or a large number of absentee leaseholders;
- (4) the claims process was complex or too expensive; or

⁹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

- (5) the claim was abandoned due to the costs of the claim and associated disputes. For example, one stakeholder said that they abandoned the claim when they were informed that legal fees in the Tribunal would cost £10,000.

PROBLEMS WITH THE CURRENT LAW

2.14 The “simple” RTM process envisaged in the original consultation which led to the 2002 Act¹⁰ has not come to pass. The requirement for strict compliance with the statutory procedures, such as the service of certain notices on particular parties, can be unforgiving to leaseholders. In many cases, small mistakes made by the RTM company have afforded landlords opportunities to frustrate or delay otherwise valid claims.¹¹ The Court of Appeal has noted that while the procedures “should be as simple as possible to reduce the potential for challenges by an obstructive landlord”, in fact they “contain traps for the unwary”.¹²

2.15 Stakeholders have told us about numerous problems with the existing RTM regime, including:

- (1) the impact of seemingly small errors, leading to lengthy technical arguments about whether the process has been carried out correctly, and wasted costs and failure of the process if not;
- (2) restrictive preconditions to exercising the right, such as the inability of an RTM company to manage multiple buildings on an estate, the maximum percentage of non-residential space permitted, and the exclusion of leasehold houses;
- (3) information about the building and management functions being provided to the RTM company too late in the process to allow them to manage effectively from the date that the RTM is acquired;
- (4) legislative provisions that put the landlord’s costs onto the RTM company, including the landlord’s litigation costs in some circumstances;
- (5) uncertainty as to the extent of the obligations that transfer to an RTM company, particularly in relation to appurtenant property (such as gardens and car parks) and services shared with other buildings; and
- (6) concerns about the adequacy and validity of the insurance taken out by RTM companies.

¹⁰ Department of the Environment, Transport and the Regions, *Commonhold and Leasehold Reform* (August 2000), section 3, ch 1, para 10.

¹¹ See the comments of Lewison LJ in *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [8], approving the comments of Martin Rodger QC (Deputy President of the Upper Tribunal (Lands Chamber)) in *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

¹² *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] by Lewison LJ.

OUR PROJECT

- 2.16 The Law Commission announced a project on residential leasehold and commonhold reform in December 2017, comprising leasehold enfranchisement and commonhold.¹³ The Government asked us to include RTM in this workstream in July 2018. Together, these three projects have the potential to improve the options available to leaseholders to gain more control over their properties.
- 2.17 The Law Commission's work on residential leasehold and commonhold is supported by Government, as required by our Protocol with Government.¹⁴

Terms of Reference

- 2.18 While we work independently from Government, our project is designed to pursue certain objectives, which have been identified by Government and which are set out in Terms of Reference that span all three residential leasehold projects. These Terms of Reference are not neutral.
- 2.19 The Government has identified the following general policy objectives for the Law Commission's recommended reforms to residential leasehold:
- (1) to promote transparency and fairness in the residential leasehold sector; and
 - (2) to provide a better deal for leaseholders as consumers.
- 2.20 These policy objectives apply equally to our review of the RTM.
- 2.21 In relation to the RTM in particular, we were asked to:
- (1) consider the use currently made of the RTM legislation and how far it meets the needs of users;
 - (2) consider the case to improve access to the RTM, including by modifying or abolishing existing qualification criteria; and
 - (3) make recommendations to render the RTM procedure simpler, quicker and more flexible, particularly for leaseholders.

¹³ 13th Programme of Law Reform (2017) Law Com No 377, <https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/>.

¹⁴ Protocol of 29 March 2010 between the Lord Chancellor (on behalf of the Government) and the Law Commission (Law Com No 321), <https://www.lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/>; Protocol of 10 July 2015 between the Welsh Ministers and the Law Commission, <https://www.lawcom.gov.uk/document/protocol-rhwng-gweinidogion-cymru-a-comisiwn-y-gyfraith-protocol-between-the-welsh-ministers-and-the-law-commission/>.

THE CONSULTATION PAPER AND CONSULTATION PROCESS

The Consultation Paper

2.22 We published a Consultation Paper on the RTM in January 2019 setting out our proposals for reform and asking for consultees' views.¹⁵ Alongside the Consultation Paper, we also published a Survey on Exercising the Right to Manage ("the leaseholder survey"), which asked individuals about their experiences of claiming, operating and terminating the RTM.

Consultation events

2.23 In the preparation of the Consultation Paper we spoke to stakeholders and also discussed issues with our expert advisory group, whose members were listed in the Consultation Paper.¹⁶

2.24 During the consultation period, we organised and attended a large number of events in England and Wales in order to explain our provisional proposals for reform, encourage discussion and debate about our proposals, gather attendees' views and encourage people to provide written responses to the Consultation Paper. We held consultation events in London, Manchester, Southampton, Newcastle, Cardiff and Birmingham, including symposia at the law faculty at University College, London and at Manchester Metropolitan University. We also attended several events and meetings hosted by other organisations. We heard from a wide range of stakeholders with diverse perspectives.

The consultation responses

2.25 We received 275 responses to the Consultation Paper, and a further 150 responses to the leaseholder survey.¹⁷ We received consultation responses from a wide range of consultees, including leaseholders, commercial freeholders, charity freeholders, social housing providers, developers, landlords, legal professionals, surveyors and professional representative bodies and trade associations.

2.26 In many instances, responses to our proposals were divided on clear lines between leaseholders and those representing leaseholder interests on the one hand, and landlords and their representatives on the other. As we noted in our Valuation Report,¹⁸ this reflects the perhaps inevitably oppositional nature of the landlord-leaseholder relationship in many instances, where a benefit to one represents a disadvantage or cost to the other. Consequently, some of our proposals in the Consultation Paper garnered no consensus.

¹⁵ Leasehold Home Ownership: Exercising the Right to Manage (2018) Law Commission Consultation Paper No 243 ("the Consultation Paper" or "CP").

¹⁶ CP, Appendix 1.

¹⁷ See Appendix 2.

¹⁸ Leasehold Home Ownership: Buying your Freehold or Extending your Lease: Report on Options to Reduce the Price Payable (2020) Law Com No 387 (the "Valuation Report").

Analysis of responses

- 2.27 Since our consultation closed in April 2019, we have been analysing the consultation responses as part of the process of developing our recommendations for reform.
- 2.28 In framing the recommendations made in this Report, we have considered all consultees' comments carefully and the reasons why they favoured or opposed a particular proposal, and weighed the arguments made. So, while the number of responses for or against a particular proposal was helpful in deciding whether to pursue a particular proposal, the level of support received was not the only factor in our decision making.
- 2.29 In this Report, we summarise the key themes from consultees' responses, and in some instances quote directly from their expanded answers. When attributing quotes to consultees in this Report, we often describe them as, for example, a leaseholder, landlord or legal professional. We do this to highlight how consultees with particular interests or expertise responded to the issues raised in the Consultation Paper, and to make clear the range of views held by different categories of stakeholders. In doing so, however, we do not wish to suggest that everyone within a given category would have a single opinion, or one that is necessarily different from those in other categories.

Inequality of arms

- 2.30 As we explained in the introduction to the Valuation Report,¹⁹ there is a systemic inequality between leaseholders (as a whole) and landlords (as a whole). This inequality of arms exhibited itself in the responses that we received to the Consultation Paper.
- 2.31 Landlords will have their own expertise acquired from their business experience, or may have been professionally advised in the preparation of their responses. Many of those best placed to respond to technical consultation questions are professionals; many of the professionals who responded to the Consultation Paper may be generally instructed on behalf of freeholders more than they are by leaseholders. Leaseholders who are not lawyers are not generally in a position to provide equally detailed and legally precise responses. Various organisations exist to coordinate and campaign for the interests of leaseholders but they are unable to match the resources that some landlords are able and willing to spend.
- 2.32 In carefully weighing all the information that has been provided to us, we have been mindful of this inequality of arms.

THIS REPORT AND OUR RECOMMENDATIONS

- 2.33 Consistent with our Terms of Reference, we have sought to develop recommendations designed to reform the RTM regime to the benefit of leaseholders. Some of our recommended changes are technical adjustments which may only apply in a small minority of cases; others are more radical and are designed to make the RTM significantly more attainable for leaseholders.

¹⁹ Valuation Report, paras 1.71 to 1.73.

2.34 Where appropriate, we have worked to ensure that our recommendations concerning the RTM are consistent with the recommendations set out in our Enfranchisement Report.²⁰ In some cases, different policy considerations apply for the RTM which may justify a different approach. We have also sought to be consistent with our Commonhold Report,²¹ although there are fewer areas of crossover between the RTM and commonhold.

Key recommendations and benefits

2.35 We are confident the recommendations that we are making will bring about significant benefits. We summarise below the key recommendations and expected benefits:

- (1) Requiring each party to bear its own costs of the RTM process, including of any Tribunal action. In many cases, leaseholders will seek to claim the RTM because they are not in a position to pay the premium required to enfranchise. Giving leaseholders significantly more control over the costs they will incur will make the costs of embarking on the RTM process more predictable, bringing the RTM within reach of more leaseholders.
- (2) Relaxing the qualifying criteria, so that leasehold houses, and buildings with up to 50% non-residential space, could qualify for the RTM. These changes would open up the RTM to more leaseholders in more properties.
- (3) Providing the Tribunal with discretion to allow the RTM to be acquired over self-contained parts of buildings which do not meet the qualifying criteria but which are nonetheless capable of being managed independently.
- (4) Permitting multi-building RTM. Particularly where buildings are already managed together, it makes sense that the leaseholders of those buildings should be able to act together to acquire the RTM over multiple buildings, provided that each building meets the participation and qualifying criteria in its own right.
- (5) Reducing the number of notices that leaseholders must serve in order to claim the RTM, and giving the Tribunal the power to waive procedural mistakes in claim notices. Our recommendations are designed to ensure that an RTM claim is not prevented due to technical, minor and inconsequential mistakes in the claim process followed by the RTM company.
- (6) Setting out clearer rules for the management of property which is not exclusive to the premises claiming the RTM. As a result of a Court of Appeal decision,²² the RTM company automatically acquires management of “non-exclusive appurtenant property”, which it must share with the party already managing that property. This can lead to duplication of management or no management at all, and uncertainty as to management responsibilities and the ability to claim

²⁰ Leasehold Home Ownership: Buying your Freehold or Extending Your Lease (2020) Law Com No 392 (the “Enfranchisement Report”), <https://www.lawcom.gov.uk/project/leasehold-enfranchisement/>.

²¹ Invigorating Commonhold: the Alternative to Leasehold Ownership (2020) Law Com No 394 (the “Commonhold Report”), <https://www.lawcom.gov.uk/project/commonhold/>.

²² *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372, [2013] 1 WLR 988.

payment for management services exercised. Our recommendations are designed to ensure that either the parties or the Tribunal will have set out how dual management will be carried out, if the RTM company is to acquire management functions in respect of it.

- (7) Simplifying the lease consents procedure after the RTM has been acquired so that the landlord's consent is only required (in addition to the RTM company's consent) in respect of certain types of request. This was a particularly difficult issue as both landlords and RTM companies have a legitimate interest in granting lease consents, but this can mean that leaseholders wait longer for the decision and may even be asked to pay two sets of consent fees.

Notable changes from our proposals in the Consultation Paper

2.36 In some instances, after careful consideration of the responses we received to the questions we asked in the Consultation Paper and our own further research, we concluded that our recommendations should take a different approach from that proposed in the Consultation Paper. We have changed our approach in a number of instances, including:

- (1) **Non-residential space:** We provisionally proposed that the exclusion of premises with more than 25% non-residential space should be abolished entirely. However, reflecting on consultees' responses about the difficulties that would beset the RTM where only a small proportion of the building is residential, we instead propose that the limit be increased to 50%. As we have concluded for enfranchisement, we believe that a building in which 50% of the floor space is residential can fairly be described as a "residential" building, and that the leaseholders of such buildings should be qualified to acquire the RTM in respect of it.
- (2) **Voting rights:** In the Consultation Paper, we did not propose any changes to the current system for allocating voting rights among RTM company members. However, the combined effect of our recommendations to change the qualifying criteria mean that, under the current voting rules, some leaseholders could be outvoted by the landlord in every instance. In this Report, we set out two options for reforming how voting rights are allocated to and exercised by members of an RTM company. Both options will ensure that if all qualifying tenants are members of the RTM company and agree on a special resolution, the landlord will not be able to block it.

ISSUES BEYOND THE SCOPE OF OUR PROJECT

2.37 Respondents to the consultation raised a wide variety of issues encompassing issues as varied as ground rents, the reasonableness of service charges and permission fees, provision of information by landlords and the rights of intermediate landlords in student accommodation. While closely related to this project and the work of the Law Commission on leasehold more generally, they are not within our Terms of Reference and cannot be addressed in the context of the RTM alone. In particular:

- (1) The RTM is a right for leaseholders. Although we are aware of calls for owners of freehold properties on estates to be given equivalent rights to take over

management of shared appurtenant property such as gardens and car parks, this is not within the scope of our project. Creating such rights would involve an entirely separate regime, with qualifying criteria not based on leasehold arrangements and a regime targeted only at shared appurtenant property.

- (2) Also beyond the scope of our project is any extension of the RTM to properties let directly by a local housing authority on long leases. Local authority leaseholders do not qualify for the RTM.²³ Long leaseholders and tenants of local housing authorities can establish a tenant management organisation and through that apply to take over the landlord's responsibility for managing housing services, such as repairs, caretaking, and security.

2.38 We hope that our enfranchisement, commonhold and right to manage projects will be the first step in realising a longer-term ambition for a comprehensive programme of leasehold reform, addressing other concerns raised with us by consultees in response to our Thirteenth Programme consultation, and culminating in a streamlining and consolidation project. We will keep in the forefront of our mind the importance of the legal regimes that support and give confidence to homeowners and occupiers and the residential property market as we research, develop, and liaise with Government about our future priorities for law reform.

THE IMPACT OF REFORM

2.39 The recommendations that we present would have financial and non-financial implications for a wide range of actors in the property market, including landlords and leaseholders, and for the wider property market.

2.40 We have had in mind the potential impact of our recommendations throughout their development. We are confident that our recommendations will address problems and inefficiencies in RTM's existing legal framework.

2.41 We have agreed with Government that it will carry out the formal impact assessments to ascertain the effects of implementing our reforms in the wider property sector and which accompany legislation as it passes through Parliament.

2.42 Throughout this Report, we have summarised evidence and data which may be of assistance in the preparation of those impact assessments.

THE LAW IN WALES

2.43 The extent of Welsh devolution in this area is unclear. "Housing" was expressly devolved to Wales in the Government of Wales Act 2006.²⁴ Following the Wales Act 2017, rather than expressly devolving competence in certain areas, competence is devolved unless expressly reserved. The Senedd Cymru (Welsh Parliament) cannot modify "the private law", which includes the law of property.²⁵ But that does not apply if

²³ 2002 Act, sch 6, para 4.

²⁴ Government of Wales Act 2006, sch 7, Pt I, para 11.

²⁵ Wales Act 2017, s 3 and sch 1 and 2 (and the new sch 7A and 7B).

the modification “has a purpose (other than modification of the private law) which does not relate to a reserved matter”.²⁶

- 2.44 Under the 2002 Act, certain powers in relation to the RTM are exercisable by the Welsh Ministers alongside the Secretary of State. An example is the power to prescribe the content and form of the articles of association of RTM companies.²⁷
- 2.45 Under our Protocol with the Welsh Ministers, the Law Commission will only undertake a project concerning a matter that is devolved to Wales if it has the support of the Welsh Ministers. To the extent that any of the matters in our Terms of Reference are devolved to Wales, the Welsh Ministers have indicated their support for the Law Commission undertaking this project.
- 2.46 Our project, therefore, is intended to cover both England and Wales, and to result, where reasonably possible, in a uniform set of recommendations that are suitable for both England and Wales.

NEXT STEPS

- 2.47 The recommendations we make in this Report will not directly change the law; rather, they will be considered by Government and a decision made as to whether to implement them.
- 2.48 Assuming that our recommendations are accepted, there are a number of a number of steps to take before our recommendations become law. One of the most important steps would be Parliament’s consideration of a draft Bill.
- 2.49 Unlike some of our work, there is no draft Bill attached to this Report. The process of drafting a Bill is valuable. It can assist in clarifying certain aspects of policy. That process may be particularly valuable in the case of our Reports on residential leasehold because, not only do our Reports interact, to a greater or lesser degree, with one another, they may also interact with work that Government is undertaking.²⁸
- 2.50 During the implementation process, including the drafting of the Bill, we will assist Government with any need for clarification of policy, or other matters relating to implementation, that may arise.

STRUCTURE OF THIS REPORT

- 2.51 Like the Consultation Paper, we have sought to structure this Report around the lifecycle of the RTM. In each chapter, we summarise the current law and the problems with it (a longer description of these is set out in the relevant chapters of the Consultation Paper). We describe the provisional proposals we set out in the Consultation Paper, and include a brief analysis of consultees’ responses to each proposal. We then explain our recommendations, and the reasons for them.

²⁶ Wales Act 2017, s 3 and sch 1 and 2 (and the new sch 7A and 7B).

²⁷ CLRA 2002, s 74(2).

²⁸ See Ch 1, from para 1.61 for further details of the work that Government is undertaking in respect of leasehold law.

- 2.52 Chapters 3 and 4 consider the qualification criteria for the RTM, which concern both the nature of the premises and the nature of the leaseholder's lease. We consider RTM for leasehold houses. In Chapter 5 we make recommendations to allow multi-building RTM.
- 2.53 In Chapter 6, we set out the requirements for the RTM company which leaseholders must set up in order to make an RTM claim. In Chapter 7, we focus on training for RTM company directors and prospective directors, and the appointment of managing agents.
- 2.54 We look at the process of claiming the RTM in Chapter 8, focussing on the notices that have to be served, on whom and at what address.
- 2.55 In Chapter 9, we discuss the sharing of management information, the date on which the RTM is acquired and the handover process.
- 2.56 Chapter 10 sets out the management functions which are transferred to the RTM company including in respect of appurtenant property, and Chapter 11 discusses other ancillary rights and obligations which are affected, such as the process for granting lease consents.
- 2.57 In Chapter 12, we discuss the costs of the RTM process. We also consider the disputes which may arise, and whether these should be heard by a court or Tribunal.
- 2.58 We finish this Report by considering, in Chapter 13, termination of the RTM, whether at the election of the leaseholders or forced by other events.
- 2.59 We include our recommendations within the text of each chapter. We have also produced a separate list of all of the recommendations in Chapter 14.
- 2.60 This Report includes three appendices. As indicated elsewhere in this chapter, the first appendix sets out our Terms of Reference in full, and the second lists the consultees who responded to our Consultation Paper. The third appendix contains diagrams which explain the current law, and possible options for reform, in respect of voting rights for members of the RTM company.²⁹

PUBLICATIONS ACCOMPANYING THIS REPORT

- 2.61 To accompany this Report, we will publish on our website:³⁰
- (1) a summary of our three residential leasehold and commonhold law reform projects;
 - (2) the responses to the Consultation Paper, which have been redacted to remove consultees' personal information, and to protect those who have provided their responses confidentially or anonymously;

²⁹ Our recommendations in respect of voting rights are discussed from para 6.44.

³⁰ <https://www.lawcom.gov.uk/project/right-to-manage/>.

- (3) a statistical summary of how consultees responded to the questions in the Consultation Paper; and
- (4) a summary of the responses received to the leaseholder survey.

ACKNOWLEDGEMENTS

- 2.62 We are very grateful to everyone who responded to the Consultation Paper, a list of whom appears in Appendix 2.
- 2.63 During the course of preparing the Consultation Paper and this Report, we have held a number of meetings with individuals and organisations. We are grateful to them all for giving generously of their time and expertise.
- 2.64 We are also grateful to all those who attended and contributed at all of the events that we hosted and attended, and to those who allowed us the use of their facilities.
- 2.65 In particular, we extend our thanks to the members of our advisory groups, whose details were listed in the Appendix to the Consultation Paper. We also extend our particular thanks to: Sir Peter Bottomley MP, Justin Madders MP, Sir Edward Davey MP (co-chairs of the All-Party Parliamentary Group on leasehold and commonhold reform) and Jim Fitzpatrick (who was co-chair before standing down from Parliament); the Leasehold Knowledge Partnership; and officials from the Ministry of Housing, Communities and Local Government and the Welsh Government.
- 2.66 Finally, we would like to acknowledge the assistance of Louie Burns and Professor James Driscoll, both of whom were members of advisory groups associated with our projects on residential leasehold and commonhold, and who sadly died prior to the publication of this Report.

THE TEAM WORKING ON THE REPORT

- 2.67 The Law Commission staff who have worked on this Report include: Alex Borwick, Tabitha Brown, Laura Burgoyne, Hugo Dupree, Emily Fitzpatrick, Tanith Horner, Eleftheria Potamoussi, Bridget Stark-Wills, and Hope Williams.³¹
- 2.68 We are also grateful to Justin Bates and Mari Knowles who have acted as occasional consultants on this project.

³¹ The list of contributors includes those who have worked on the project full- or part-time and includes past and present members of Law Commission staff.

Chapter 3: Qualifying criteria

INTRODUCTION

- 3.1 The 2002 Act sets out certain criteria which must be satisfied before the RTM can be acquired.
- 3.2 These criteria concern which premises may be subject to the RTM and which leaseholders may make an RTM claim (called “qualifying tenants”, in the 2002 Act). These matters are interlinked; for example, under the current law premises will only be qualifying premises if they contain a minimum number of qualifying tenants.
- 3.3 A qualifying tenant is a person who is tenant of a flat under a long lease.¹ The essential characteristic of long lease is that it “is granted for a term of years certain exceeding 21 years”.² A person is not a qualifying tenant, however, if the long lease in question is a business lease.³
- 3.4 Under the current law, the RTM can only be acquired in respect of premises if:
- (1) they consist of a self-contained building or part of a building (with or without appurtenant property);
 - (2) they contain two or more flats held by qualifying tenants; and
 - (3) two-thirds of the flats contained in the premises are held by qualifying tenants (we refer to this as the “qualification requirement”).
- 3.5 Certain premises are currently exempt from the RTM, for example premises with a certain proportion of non-residential floor space. In addition, a minimum number of qualifying tenants must participate as members of the RTM company when an RTM claim notice is served. We refer to this as the “participation requirement”.
- 3.6 In this chapter, we set out our recommendations for reforming the general criteria which must be met for premises to qualify for the RTM. In the next chapter, we discuss more specific rules and exclusions.

¹ Commonhold and Leasehold Reform Act 2002 (hereafter in footnotes “CLRA 2002”), s 75(2).

² CLRA 2002, s 76(2). Further specifications are made in the remainder of ss 76 and 77.

³ CLRA 2002, s 75(3). This excludes from the RTM any tenancy to which Pt 2 of the Landlord and Tenant Act 1954 applies – broadly business and professional tenants.

THE RTM FOR LEASEHOLD HOUSES

Current law and problems

- 3.7 Under the 2002 Act, leasehold houses are excluded from the RTM regime because the 2002 Act applies only to a building which contains two or more “flats”.⁴ Long leaseholders of single houses (which have not been converted into flats) cannot acquire the RTM.
- 3.8 In the Consultation Paper,⁵ we explained that we could not find any principled reason for this exclusion. Rather, it was a consequence of the RTM criteria being transposed from the Leasehold Reform, Housing and Urban Development Act 1993 (“the 1993 Act”), which concerned only flats.⁶ We therefore proposed that the RTM should be made exercisable in respect of leasehold houses as well as premises containing leasehold flats.

Consultees’ views

- 3.9 Almost all consultees supported this proposal. The responses echoed the justifications we put forward in the Consultation Paper. There was a clear view across the spectrum of consultee groups that this proposal is justified both in principle and in practice.
- 3.10 No coherent argument was put forward against this proposal.

Discussion and recommendation

- 3.11 Some consultees pointed out that leases over standalone houses often assign the management functions to the leaseholder anyway. We acknowledged this point in the Consultation Paper.⁷ In our view, this is not a reason to exclude houses from the RTM scheme. Extending the RTM to houses will benefit any leaseholders of houses who do not already have management rights, and allow them to participate in an RTM claim in relation to property used in common with occupiers of other premises (such as gardens on an estate).⁸

Recommendation 1.

- 3.12 We recommend that the RTM should be exercisable in respect of leasehold houses as well as flats.

⁴ CLRA 2002, s 72(1).

⁵ CP, para 2.6.

⁶ CP, para 2.7.

⁷ CP, para 2.8.

⁸ In Ch 10, we recommend that RTM companies should in certain circumstances be able to acquire the RTM in respect of appurtenant property which is used in common with occupiers of other premises; see from para 10.19.

Should leaseholders in houses have to follow the same process for claiming the RTM?

3.13 In the Consultation Paper, we proposed that the process for claiming the RTM should be the same for houses as it is for other premises.⁹ Although we recognised that requiring individual leaseholders in houses to set up a company might be considered overly burdensome, we considered that it would be sensible to adopt a single process for both houses and flats for the following reasons:

- (1) the company structure provides certain advantages, such as limited liability, and would keep the regime for houses aligned with the existing one for flats. This would in turn facilitate the ability of leaseholders of houses to participate in the RTM on estates;¹⁰
- (2) we proposed to refer to both houses and flats using the single concept of a “residential unit”; and
- (3) it is relatively inexpensive to set up an RTM company.

Consultees’ views

3.14 This proposal was well supported. Consultees who agreed with this proposal described it in terms such as “sensible and proportionate”,¹¹ and argued that to do otherwise would cause confusion.

3.15 Damian Greenish, a solicitor, agreed in principle but pointed out that “it might appear to be rather ‘over the top’ to suggest that the leaseholder of a single house should be required to go through this procedure”. The Residential Landlords Association disagreed with our proposal for similar reasons, arguing that “for single houses this could be considered an overzealous and burdensome process”.

Discussion and recommendations

3.16 The concern raised by consultees that this procedure could potentially be over-burdensome is worth considering, and indeed we acknowledged it in the Consultation Paper.¹² However, it is our view that the following benefits of having a single system outweigh the concerns raised:

- (1) the RTM company provides the leaseholder with limited liability;
- (2) the RTM regime is designed so that management functions are exercised by a legal entity separate from the leaseholder(s). To deviate from this in the case of leasehold houses could require the implementation of a parallel RTM system designed solely for situations in which there is only one leaseholder.

⁹ CP, paras 2.13 to 2.16.

¹⁰ In Ch 5, we recommend that RTM companies should in certain circumstances be able to acquire the RTM in respect of multiple buildings through a single claim.

¹¹ Notting Hill Genesis.

¹² CP, para 2.13.

- (3) Many of the RTM company’s functions are set out in the prescribed model articles.¹³ If single leaseholder claims are not required to be made through the company structure, they will not be governed by the rules set out in those model articles.
 - (4) If a single leaseholder were permitted to claim the RTM without the company structure, there would be no legal mechanism by which the landlord could monitor the exercise of the management functions by the leaseholder (because there would not be an RTM company for the landlord to join).
- 3.17 Setting up a company is a relatively simple process, and the claim process itself will be simpler as a matter of practice in the single house case, because the leaseholder will not be required to engage and reach consensus with other leaseholders. In addition, the management functions acquired through the RTM will almost always be simpler for a single house than for a block of flats.
- 3.18 Leaseholders must weigh up whether the potential benefits of claiming the RTM in their particular circumstances are worth the costs. This assessment is likely to be easier for the average leaseholder if there is one process for all, rather than multiple processes for different classes of property.

Recommendation 2.

3.19 We recommend that leaseholders of houses should follow the same process as leaseholders of flats in order to acquire the RTM.

A NEW FOUNDATIONAL CONCEPT: RESIDENTIAL UNIT INSTEAD OF FLAT

Current law and problems

- 3.20 As explained above at paragraph 3.7, the current RTM regime deals only with “flats”. In order to bring houses within the ambit of the RTM and capture both houses and flats in a single concept, we proposed in the Consultation Paper that both should be considered a “residential unit”. We proposed the same change in the Enfranchisement Consultation Paper.¹⁴
- 3.21 In the Consultation Paper, we suggested that to be a “unit”, premises:
- (1) must be a separate, independent set of premises; and
 - (2) must either constitute a building, or form part of a building.

¹³ The RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767); The RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680). We discuss the model articles in more detail in Ch 6, from para 6.38.

¹⁴ Leasehold Home Ownership: Buying your Freehold or Extending your Lease (2018) Law Commission Consultation Paper No 238 (“Enfranchisement CP”), paras 8.37 to 8.56.

- 3.22 The “unit” would always be the smallest set of premises which meets the definition (for example, each flat in a building would be a unit; the building itself would not be a unit).
- 3.23 Under our proposals, a residential unit would be a unit “constructed or adapted for use as a dwelling”.¹⁵ As we discuss below from paragraph 3.32, this is regardless of whether its use as a dwelling is exclusive or in addition to other uses.
- 3.24 We acknowledged that there will always be a certain number of difficult, fact-dependent cases, such as where there is a question over whether a unit is a “separate, independent set of premises” or where there is doubt as to whether premises were intended as a “dwelling”. However, we felt that overall the new umbrella term “residential unit” would lead to a reduction in litigation over definitional issues.
- 3.25 We asked whether consultees agreed that we should align our recommendations with those we make in respect of enfranchisement.

Consultees’ views

- 3.26 A significant majority of consultees supported this proposal, including stakeholders representing landlords, leaseholders and professionals. Only five consultees disagreed.
- 3.27 Consultees’ comments emphasised the need for consistency across different types of properties, and the simplifying effect that this proposal would have on the RTM regime. The Law Society pointed out that the basic qualifying criteria for the RTM should align with those for enfranchisement wherever possible, as “often RTM may be a precursor to enfranchisement”. Many consultees echoed the benefits of consistency with the enfranchisement regime in this regard.
- 3.28 The Cadogan Group, a landlord, agreed with the proposal but emphasised that the definition should not include structures such as garages or cycle sheds, “unless they would be left behind and unmanaged”. Similarly, Damian Greenish asked whether gyms and storage rooms would individually be “units”. He queried the basis for our choice of vocabulary:

The requirement that the unit must be constructed or adapted for the purpose of a dwelling uses the definition from the 1993 Act, as opposed to designed or adapted for living in as used in the [Leasehold Reform Act 1967]. Is there a reason for preferring one to the other? Do they mean the same? There has been more guidance from the courts on the meaning of “living in”, although its exact meaning remains undecided.

- 3.29 On the other hand, several consultees emphasised that “live/work” units should be captured by the definition so they could be the subject of RTM claims. We discuss live/work units and other multi-purpose buildings in more detail below.¹⁶

¹⁵ CP, para 2.33; see also Enfranchisement CP, para 8.46.

¹⁶ From para 3.33.

- 3.30 The Right to Manage Federation disagreed with the proposed move to “residential unit”, arguing that the definition of a flat is well understood and that distinguishing between flats and houses had not been an issue in their experience.

Discussion and recommendations

- 3.31 We remain of the opinion that there is no need, either in the enfranchisement¹⁷ or RTM process, to distinguish between houses and flats, and avoiding this definitional distinction will prevent disputes about which category particular premises fall into. We note, however, that the term ultimately used in statute may differ following the legislative drafting process. In the remainder of this Report, we refer to “residential units” in our discussions and recommendations; this should not be interpreted as a recommendation that only that particular phrase can cover the concept.
- 3.32 Areas such as gyms and cycle sheds, which are not adapted for the purposes of a dwelling, will not fall into the category of “residential unit”. As we explained in the Enfranchisement Consultation Paper, under our new regime of qualifying criteria, the relevant classification of a unit will be either “residential” or “non-residential”. A live/work unit, for example, will satisfy the definition of a residential unit because the leaseholder is expected to live there and it is configured accordingly; it is therefore constructed or adapted for the purposes of a dwelling.¹⁸ This is a prior, separate qualification requirement which must be satisfied before questions such as use covenants are relevant.
- 3.33 One issue that has previously arisen with live/work leases is determining whether the floor space occupied by the workspace of the flat should be included when calculating the proportion of non-residential floor space of the premises which are the subject of a proposed RTM claim.¹⁹ Both Boodle Hatfield LLP, a firm of solicitors, and Damian Greenish raised similar queries about the situation where a largely commercial building contains a small element of residential accommodation, such as a single flat. They were concerned that, if the flat was not entirely separate, the whole building could be considered a residential unit.
- 3.34 We think that this situation is unlikely to arise in practice, because it would require the residential accommodation to be fully integrated with the commercial building. For example, a flat above an office block would be likely to constitute a residential unit on its own if it had, for example, a lockable door.
- 3.35 However, we accept that this situation could arise in some rare circumstances. Consider, for example, sleeping pods on a factory floor to facilitate constant supervision of machinery, or a loft-style flat not separated by a door from a start-up office space. We do not think that the residential accommodation in these examples would lead to the commercial building being classified as a residential unit. Despite the presence of a degree of residential accommodation, we do not think that the

¹⁷ See Enfranchisement Report, from para 6.10.

¹⁸ Enfranchisement CP, paras 8.48 to 8.49.

¹⁹ This was the issue in *KW RTM Co Ltd v Lemonland (Kings Wharf) Ltd* (16 April 2007) LON/00AM/LEE/2006/0003 Leasehold Valuation Tribunal (unreported).

building as a whole would be considered to be “constructed or adapted for use as a dwelling”, as its substantial or predominant purpose is clearly commercial usage.

- 3.36 The rest of the recommendations in this Report assume the replacement of the term “flat” with the term “residential unit”. In the remainder of this Report, the current law is explained by reference to “flats” but our recommendations are concerned with “residential units”.

Recommendation 3.

- 3.37 We recommend that the RTM should be exercisable in respect of any residential unit, drawing no distinction between a “flat” and a “house”.

THE PHYSICAL SCOPE OF THE PREMISES WHICH QUALIFY FOR THE RTM

Current law and problems

- 3.38 The 2002 Act provides that the RTM can only be exercised in relation to premises which consist of “a self-contained building or part of a building”.²⁰ The right to collective enfranchisement under the 1993 Act is likewise exercisable only in relation to those types of premises.²¹ Whether a structure is a building or part of a building, and whether that building or part is self-contained, are therefore questions which are crucial to identifying which premises qualify for the RTM and collective enfranchisement.
- 3.39 Currently, there is no definition of a “building” in the 2002 Act. The judicial meaning given to this expression is one of “common sense” and “objective judgment”,²² so that “a cave, movable caravan, houseboat or boathouse would not be included” but “a well-equipped beach-hut probably is”.²³
- 3.40 For something to be a “building” there must be a built structure or erection²⁴ which can be “said to form part of the realty and to change the physical character of the land”²⁵ taking into account its “degree of permanence ... size and composition by components”.²⁶

²⁰ CLRA 2002, s 72(1).

²¹ 1993 Act, s 3.

²² *R v Swansea City Council (ex parte Elitestone Ltd)* (1993) 66 PCR 422, 429 (Mann LJ).

²³ A Radevsky and D Greenish, *Hague on Leasehold enfranchisement* (6th ed 2017), para 2-03.

²⁴ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013; Town and Country Planning Act 1990, s 119(1).

²⁵ A Radevsky and D Greenish, *Hague on Leasehold enfranchisement* (6th ed 2017) para 2-03, referring to *Cheshire County Council v Woodward* [1962] 1 All ER 517 which discusses the definition of “building” in the context of the Town and Country Planning Act 1990, s 336.

²⁶ *R v Swansea City Council ex parte Elitestone Ltd* (1993) 66 PCR 422, 429.

- 3.41 The same structure may be regarded as a single building or several buildings, as in the case of a terrace of houses.²⁷
- 3.42 A “self-contained” building is one which is “structurally detached”.²⁸ This is a question of degree and type of attachment. The building may either be entirely detached from any other structure, or attached to another building in non-structural ways only.²⁹ If two buildings are structurally attached it may be possible to claim the RTM over the combined structure provided the two buildings, when considered as one entity, do not have any structural attachments to any other buildings.
- 3.43 If the premises are not a self-contained building, they may still be a self-contained *part* of a building. To be considered self-contained, the part of the building must:³⁰
- (1) be vertically divided from the rest of the building (and no deviations, other than minimal ones, are permitted);³¹
 - (2) be capable of being redeveloped independently; and
 - (3) have independent services or be capable of being provided with independent services without significant interruption to the provision of services to the rest of the building.
- 3.44 In the Consultation Paper, we explained that the current law as to what constitutes a self-contained building or part of a building has been the focal point of much of the litigation and frustration for would-be RTM acquisition.³² For example, expensive expert evidence can be required to determine whether or not some connection between the building or part of a building and another structure means the building is not “self-contained”. Two apparently separate blocks may be structurally connected by, for example, an underground carpark.³³
- 3.45 In addition, some of the criteria do not appear to be suitable for the RTM; they appear to have been transposed from the collective enfranchisement legislation, despite the fact that different policy considerations apply to enfranchisement and to the RTM.³⁴ For example, the requirement for a self-contained part of a building to have a “vertical division” is used in collective enfranchisement to protect freehold title and avoid “flying

²⁷ A Radevsky and D Greenish, *Hague on Leasehold enfranchisement* (6th ed 2017) para 2-03; referring to *Malekshad v Howard de Walden Estates Ltd* [2003] 1 AC 1013.

²⁸ CLRA 2002, s 72(2).

²⁹ *No. 1 Deansgate (Residential) Ltd v No. 1 Deansgate RTM Co Ltd* [2013] UKUT 580 (LC) at [30].

³⁰ CLRA 2002, s 72(3).

³¹ *Re Holding and Management (Solitaire) Ltd v 1-16 Finland St RTM Co Ltd* [2008] 1 Estates Gazette Law Reports 107.

³² CP, paras 2.70 to 2.71.

³³ *Albion Residential Ltd v Albion Riverside Residents RTM Company Ltd* [2014] UKUT 6 (Lands Chamber); see also the detailed discussion of the “structurally detached” requirement in *CQN RTM Company Ltd v Broad Quay North Block Freehold Ltd* [2018] UKUT 183 (Lands Chamber).

³⁴ CP, paras 2.38 to 2.71.

freeholds”.³⁵ This is not a concern in the context of the RTM. The requirement that a part of a building be capable of being redeveloped independently is understandable in the context of enfranchisement, in which it is important that all parties have certainty as to precisely what title is to be transferred. But it seems unnecessary in the RTM context, given that an RTM company would not acquire the authority to redevelop the part in any case. The same criticism can be levelled at the requirement for services to be capable of being separated.

Our proposals

The Consultation Paper

3.46 In the Consultation Paper, we argued that it would be desirable and justifiable to take a more inclusive approach to the types of structures which should qualify for the RTM as long as management functions could be divided between the relevant parties responsible for them.

3.47 We proposed that the RTM should be exercisable in respect of any “building” without further qualification. We suggested that “building” should be defined in line with the existing case law as:³⁶

a structure which forms part of the land, changes the physical character of the land and has a degree of permanence.

3.48 We said that we would expect the courts to take a common sense approach to whether a structure fell within this definition. We thought a building would need to run from the ground to the roof so that separate flats or floors would not themselves be a building.³⁷ We said that a structure might be regarded as a building or several buildings and that leaseholders should have the flexibility to claim the RTM over whichever part of a structure might in itself be regarded as a building.³⁸

3.49 There would therefore be no need to determine whether a structure was self-contained. It would be enough to show that it was a building. We noted that this more flexible approach would come with a degree of uncertainty as it might not be immediately clear which premises now fell within scope of the RTM and unique or non-standard cases would still have to be reviewed by the Tribunal.³⁹ We had also been told by some stakeholders that the issues caused by the legislation did not justify doing away entirely with the requirement that buildings or parts should be self-contained.

3.50 We therefore asked whether, as an alternative, consultees would prefer to retain the existing qualifying criteria, but with an additional judicial discretion to allow the RTM to be acquired where those criteria are not met. This alternative approach was closer to

³⁵ See explanation in the Enfranchisement Report, para 4.11.

³⁶ CP, para 2.83.

³⁷ CP, para 2.86.

³⁸ CP, para 2.88 and 2.89.

³⁹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

the proposals and suggestions in the Enfranchisement Consultation Paper for collective freehold acquisition.

Enfranchisement Consultation Paper

- 3.51 It is important to note the divergence in position between our proposals in the RTM Consultation Paper and the Enfranchisement Consultation Paper. In the Enfranchisement Consultation Paper, our approach to the physical scope of the premises that should qualify for that right depended on whether the leaseholder was extending their lease or entering into an arrangement for collective freehold acquisition.⁴⁰
- 3.52 For lease extensions, we proposed that any residential unit which was part of a building should be eligible in principle for a lease extension. We proposed that “building” should be defined widely, in accordance with current case law, to be:
- a built structure with a significant degree of permanence which can be said to change the physical character of the land.⁴¹
- 3.53 For freehold acquisitions, we suggested that the current tests for a self-contained building and part of a building, as described above, should be maintained. However, we invited consultees’ views on whether the Tribunal should be given a narrowly defined discretion to allow freehold acquisition where the premises are not self-contained but where “the proposed freehold acquisition is not reasonably expected to cause any particular practical problems for any interested party”.⁴²
- 3.54 We argued that there were good reasons to maintain the law for freehold acquisitions, not least because of the need to ensure that there is no “underhang” or “overhang” with other premises. These are not, however, issues which would arise in the RTM, as the structure and extent of the freehold title is not affected by the acquisition of the RTM.
- 3.55 In the RTM Consultation Paper, published after the Enfranchisement Consultation Paper, we asked consultees whether they accepted the need for some divergence in policy between the RTM and enfranchisement in this regard.

Consultees’ views

Proposal that any building should qualify for the RTM

- 3.56 The majority of consultees agreed with our proposal that the RTM should be exercisable in relation to any “building”.
- 3.57 A large majority of consultees agreed with the motivation of the proposal (to avoid overly technical disputes concerning whether premises qualify). However, some were concerned that the manner in which the current law focuses on building structure

⁴⁰ Enfranchisement CP, Ch 8.

⁴¹ Enfranchisement CP, para 8.105.

⁴² Enfranchisement CP, para 8.107.

rather than management functions, which we criticised in the Consultation Paper, was not adequately addressed by our proposals.

- 3.58 Both leaseholders and institutional consultees were supportive of the idea that the focus of definitional criteria for the RTM should be on management functions and service charges, rather than the physical nature of the building. Several consultees who were otherwise supportive of the proposal in principle had misgivings about the residual focus on the structural nature of the premises. For example, Damian Greenish said:

[p]art of the problem is that, despite making the proposition that the emphasis should be more on management rather than physical structures, that proposition is not borne out by many of the proposals in this paper where the emphasis continues to be on buildings (however defined).

- 3.59 In their joint response, Long Harbour and HomeGround, a landlord and an asset manager, agreed in principle but argued that:

simplifying or changing the building definition is not of itself sufficient, and needs to be accompanied by a mechanism for splitting or determining management of significant shared services.

- 3.60 Many consultees who disagreed with the proposal or responded “Other” did so on the basis that they preferred our alternative option (that is, giving the Tribunal a discretion to waive the requirements regarding the premises in appropriate circumstances). We discuss the response to this alternative in more detail below.

- 3.61 The Right to Manage Federation strongly objected to broadening the scope of the premises to which the RTM applies to cover any “building” without further qualification. They argued that the focus should be changed or shifted from structural severability to services severability. They were also strongly against the proposed removal of the distinction between “building” and “part of a building”. The Church Commissioners for England disagreed with the proposal on the grounds that our suggested definition was too uncertain and would lead to confusion.

Alternative option – broad Tribunal discretion

- 3.62 As an alternative, we asked whether we should retain the existing tests for a self-contained building or part of a building, but introduce a discretion for the Tribunal to waive the requirements in suitable cases. The reception to this suggestion was lukewarm. It was not always clear which of the two options consultees preferred, or if they supported a combination of both.
- 3.63 Many leaseholders who agreed with the proposal did so out of a general desire to reduce the likelihood that landlords might successfully challenge RTM applications on technical grounds.
- 3.64 Consultees in both the “Other” and “No” categories (and indeed some in the “Yes” category) were hesitant about adopting the approach because it could provide another avenue by which the RTM claim may end up in the Tribunal, implying extra costs and delay. For example, Professor Anthony J. Naldrett, a leaseholder, explained:

I am rather hesitant about this answer, because it will probably lead to the First Tier Tribunal being involved more frequently, with resultant increase in cost, but, on balance, I think it is a wiser approach.

- 3.65 The Cadogan Group, who disagreed with this alternative approach, made a similar argument that “judicial discretion is too subjective, time-consuming and costly”.
- 3.66 Many of those who provided extended responses flagged the issue that this proposal would neither remove the *threat* of a claim being taken to the Tribunal, nor provide any additional certainty for RTM companies prior to a Tribunal case.

A divergent approach between the RTM and enfranchisement

3.67 In the Consultation Paper we asked whether, in considering how premises should be defined, the different underlying considerations for enfranchisement and the RTM justified a difference between the approaches to defining premises for the purposes of the RTM as opposed to enfranchisement. A significant majority of consultees agreed that differing definitional criteria were warranted.

3.68 Those who agreed with the proposal and gave reasons for their answer agreed principally for the following reasons:

- (1) the importance of distinguishing between transfer of ownership interest (enfranchisement) and transfer of management interests (the RTM); and
- (2) the differing magnitudes of capital investment required for enfranchisement and the RTM.

3.69 In a comment typical of those supporting the the differentiation, Church & Co Chartered Accountants said:

RTM is a process that can be undone or changed over time, enfranchisement is a one off process that will then exist forever. RTM has limited costs involved for the participants, enfranchisement has significant costs for the participants. They are very different and can therefore have different qualifying criteria.

3.70 Of the consultees who answered “no”, many argued that the criteria for the RTM and collective enfranchisement should be the same so as to avoid causing confusion and/or to reflect the fact that the RTM may be a stepping stone to enfranchisement. For example, LEASE said:

We consider the criteria for collective enfranchisement and for right to manage should be the same; because it is often the case that the right to manage may be a precursor to collective enfranchisement. Having different qualifying requirements may lead to confusion for both leaseholders and professionals.

3.71 Some others who disagreed argued for more radical changes to the leasehold system, for both the RTM and enfranchisement. Those who responded “other” were overwhelmingly leaseholders concerned with the 25% non-residential rule, which is considered later in this chapter.

3.72 The response to this question is a clear indication from a wide range of stakeholders that the different characteristics of the RTM and enfranchisement justify some divergence in the criteria for defining premises as between the RTM and enfranchisement.

Discussion and recommendations

3.73 We have sympathy with consultees' concerns that involving the Tribunal in many more cases would be a recipe for more litigation, costs, delays and uncertainty. The aim of our proposals in this area was not only to provide clearer and broader criteria for acquiring the RTM, but to reduce the threat of Tribunal proceedings discouraging leaseholders from claiming the RTM. After considering consultees' responses on this issue, we are of the view that the existing tests and definitions should be retained. However, we think that some flexibility should be introduced to ensure that the RTM can be claimed over buildings or parts of buildings which do not meet the current strict tests, but which are nonetheless reasonably capable of being managed separately by an RTM company.

3.74 In the course of developing these recommendations, it has been important to bear in mind recommendations concerning analogous criteria in the context of collective freehold acquisition. Although most consultees agreed that policy divergence in this area between the RTM and enfranchisement could be justified because of the different considerations at play, we are mindful that differences could be confusing, and only recommend them in cases where divergence is clearly necessary or appropriate.

“Building” or “part of a building”

3.75 We recommend that it should continue be the case that the RTM can only be exercisable over buildings or parts of a buildings. This will ensure that the RTM can only be acquired in respect of permanent structures such as houses or blocks of flats (or parts of those structures).

3.76 By “building”, we mean the concept as defined in existing case law,⁴³ which applies equally in the enfranchisement context.⁴⁴ It is intended to capture any structure which forms part of the land, changes the physical character of the land and has a degree of permanence. We do not intend to change the current law in this respect.

3.77 In the Consultation Paper, we suggested that it might be enough to rely on this broad definition of “building” to define the type of premises in respect of which the RTM can be acquired. We said that we would expect a common sense approach to be taken by the courts. However, on reflection we do not think it would be desirable to provide that the RTM is to be exercisable in respect of any structure that could be regarded as a “building” without further qualification.

3.78 Whilst we remain of the view that the current “self-containment” tests are rigid and may lead to arbitrary outcomes in difficult cases, they do at least go some way to

⁴³ *Malekshad v Howard de Walden Estates Ltd* [2002] UKHL 49; *R v Swansea City Council, ex parte Elitestone Ltd* (1993) 66 PCR 422, 429-430. See also A Radevsky and D Greenish, *Hague on Leasehold Enfranchisement* (6th ed 2014), para 2-03.

⁴⁴ See Enfranchisement Report, from para 6.187.

ensuring that the RTM can only be exercised in relation to premises which can be managed separately. In most cases, a building or part of a building which is self-contained will be easier to manage separately than one which is not. We do not think it is desirable to entirely do away with the requirement for self-containment as that would mean that the Tribunal has no obvious way of identifying whether a building can be appropriately managed on its own. We do not on reflection think it is enough to leave the Tribunal to take a common sense approach based solely on whether a structure can be regarded as a “building”. We are concerned that this would result in significant uncertainty and disputes.

- 3.79 We are also concerned that our proposal in the Consultation Paper might have the unintended consequence of restricting the types of premises in respect of which the RTM can be acquired. The RTM is currently exercisable in respect of self-contained parts of a building but under our proposal a self-contained part of a building would only qualify for the RTM if it could itself be regarded as a “building”. This might mean that leaseholders are prevented from claiming the RTM over parts of a building which are currently eligible for the RTM.
- 3.80 We have therefore concluded that the current tests should be retained but with greater flexibility introduced to avoid arbitrary outcomes and to focus more on whether the building or part of the building is capable of being managed independently. We recommend two changes to the current law:
- (1) the self-contained part of a building test should be changed so that the vertical division requirement is applied less strictly; and
 - (2) a third test for eligible premises should be introduced, enabling the RTM to be acquired in relation to a building or part of a building which does not meet the other tests, but which is reasonably capable of being managed independently.
- 3.81 We explain each of these recommended changes in further detail below.

Relaxing the “vertical division” requirement

- 3.82 As set out above, the “vertical division” requirement is one of the tests which must be satisfied for a part of a building to be self-contained.⁴⁵ As we explained in both the RTM and Enfranchisement Consultation Papers, the vertical division requirement appears to have been introduced largely to prevent flying freeholds in enfranchisement. But in the RTM context, it has caused highly technical disputes.⁴⁶ The requirement for verticality is unqualified except for minor deviations which may be overlooked. A deviation comprising 2% of the floor area was held not to be minimal,⁴⁷ although it would seem that such a deviation would have no impact on an RTM company’s ability to manage the premises.

⁴⁵ CLRA 2002, s 72(3)(a).

⁴⁶ CP, paras 2.51 to 2.52; but see the stricter, clearer application of the rule by President George Bartlett QC in the Lands Tribunal case *Re 1–16 Finland Street* LRX/138/2006.

⁴⁷ *Holding and Management (Solitaire) Ltd v 1-16 Finland St RTM Co Ltd* [2008] 1 Estates Gazette Law Reports 107.

- 3.83 For this reason, we considered whether the vertical division requirement should be removed altogether in the context of the RTM. However, having thought through various examples, we think that the requirement for a vertical division from ground (or indeed below ground) to roof level does have some relevance in the RTM context. For example, as discussed above, an individual floor or a collection of floors of an apartment building is less likely to be capable of being managed independently from the rest of a building than a vertical division of a building (for example, a single house in a row of terraced houses).
- 3.84 However, we consider that the vertical division requirement should be relaxed to allow a greater degree of deviation than under the current law. We make the same recommendation in the Enfranchisement Report. As several consultees suggested, this might be achieved by adopting the approach to deviation taken in the Leasehold Reform Act 1967 (perhaps by clarifying that a part of a building would not satisfy the vertical division requirement where a material part of it lies above or below another part of the structure).

Buildings or parts which are reasonably capable of being managed independently

- 3.85 We explain above that leaseholders should continue to be able to acquire the RTM over self-contained buildings or self-contained parts of buildings. We consider that leaseholders in premises which clearly meet these tests will benefit from knowing that the RTM will continue to be available in respect of those types of premises. However, we think that a further change is needed to ensure that premises which are reasonably capable of being managed independently are not excluded from the RTM because they fail to satisfy the existing strict criteria for self-containment.
- 3.86 We recommend that premises should be eligible for the RTM if they are a building or part which is reasonably capable of being managed independently. This means that if leaseholders cannot demonstrate that their premises are either a self-contained building or self-contained part of a building, the RTM will still be available if the premises are nevertheless a building or part which is reasonably capable of being managed independently. This might be straightforwardly demonstrated where parts of a building are already subject to separate management arrangements.
- 3.87 We consider that this approach offers more certainty than our alternative proposal which would rely on the exercise of the Tribunal's undefined discretion to decide whether the RTM should be exercisable in respect of premises which are not self-contained.
- 3.88 We are of the view that our new approach will significantly reduce the incentive for landlords to challenge an RTM claim based on technical arguments as to whether the existing "self-containment" tests are satisfied. Leaseholders will now have the fall-back option of being able to demonstrate that premises which are not self-contained are nevertheless eligible for the RTM on the grounds that they are reasonably capable of being managed separately. We think this will lead to fewer Tribunal cases and where there are still disputes the focus will instead switch to whether the premises can properly be managed autonomously, rather than their physical attributes.
- 3.89 Our recommendations therefore mean that the RTM will be exercisable in relation to premises which consist of:

- (1) a self-contained building;
- (2) a self-contained part of a building (with a more relaxed version of the vertical division test); or
- (3) any other building or part of a building which is reasonably capable of being managed independently.

3.90 We emphasise that these categories are not mutually exclusive, and that it is our intention that RTM companies be able to cite different categories in the alternative in any claim form or dispute that may arise as to whether the premises are of a kind which qualifies for the RTM.

Recommendation 4.

3.91 We recommend that the meaning of “building” should, in line with current case law, be a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land.

Recommendation 5.

3.92 We recommend that the RTM should be exercisable in relation to premises which consist of:

- (1) a self-contained building;
- (2) a self-contained part of a building; or
- (3) any building or part of a building which is reasonably capable of being managed independently.

Recommendation 6.

3.93 We recommend that the existing definition of “self-contained part of a building” should be retained but with a relaxation of the vertical division condition.

THE NON-RESIDENTIAL LIMIT

Current law and problems

3.94 Premises are completely excluded from the RTM if the non-residential parts exceed 25% of the total internal floor area (we refer to this rule as the “non-residential limit”).⁴⁸

⁴⁸ CLRA 2002, sch 6, para 1.

“Non-residential parts” are defined as any part of the premises that is neither comprised in common parts of the premises, nor occupied or intended to be occupied for residential purposes.⁴⁹ The non-residential parts include business premises and other non-residential areas like storage rooms retained by the landlord.

- 3.95 The RTM is therefore exercisable over mixed-use premises, which contain residential and non-residential tenants, provided the non-residential parts comprise 25% or less of the total internal floor area. The RTM company acquires management functions under any lease of such premises but will not acquire functions which relate solely to any unit which is not held by a qualifying tenant.⁵⁰ It follows that the RTM company will not acquire management functions which relate solely to non-residential units held by the landlord or a commercial tenant. The RTM company will however acquire management functions over communal areas and any appurtenant property (such as shared gardens and car parks).⁵¹
- 3.96 As we explained in the Consultation Paper,⁵² this rule has caused significant challenges in practice and has led to considerable litigation.⁵³ Landlords appear to have been willing to build or re-build their premises to avoid the non-residential limit. We were told by stakeholders that the current limit operates arbitrarily and excludes long leaseholders in buildings with majority residential use from being able to claim the RTM.
- 3.97 On the other hand, in “mixed-use” premises, there must be a balance between the interests of the residential leaseholders, and the impact that their management of the building may have on the interests of other occupiers. The RTM company may take decisions which have significant consequences for the interests of landlords or other tenants (for example, the frontage of a building may be of critical importance to the image that a commercial tenant of a shop wants to present to potential customers).

Our proposals

The RTM

- 3.98 Our provisional proposal was to remove the non-residential limit altogether. However, to safeguard and balance the interests of those in non-residential parts we suggested that the RTM company should have to instruct professional managing agents if more than 25% of the internal floor area was commercial. We used the word “commercial”, as opposed to “non-residential”, in an attempt to ensure that spaces such as a non-

⁴⁹ CLRA 2002, sch 6, para 1(2).

⁵⁰ CLRA 2002, s 96(6)(a).

⁵¹ In Ch 10, we recommend that the RTM company should only acquire management functions in respect of appurtenant property in certain circumstances; see from para 10.119.

⁵² See CP, paras 2.132 to 2.134.

⁵³ See for example *Connaught Court RTM Co Ltd v Abouzaki Holdings Ltd* [2008] 3 Estates Gazette Law Reports 175, (10 November 2008) LRX/115/2007 (Lands Tribunal); *1 Palace Gate RTM Co Ltd v Winchester Park Ltd* (22 October 2012) LON/OOAW/LRM/2012/0021 Leasehold Valuation Tribunal (London Rent Assessment Panel) (unreported); and *Canute Castle RTM Co Ltd v Keystone Property Co Ltd* (27 June 2008) CHI/00MS/LRM/2009/0002 Leasehold Valuation Tribunal (Southern Rent Assessment Panel) (unreported).

demised garage did not count against leaseholders in the assessment of internal floor space.⁵⁴

Enfranchisement

3.99 We took a different provisional approach in the context of enfranchisement. In the Enfranchisement Consultation Paper, we provisionally proposed that the analogous non-residential limit for freehold acquisition claims in leasehold enfranchisement should be retained.⁵⁵ In our view, this divergence was justified by the different policy considerations that applied in enfranchisement.⁵⁶

Consultees' views

3.100 The proposal to remove the non-residential limit was well supported. It provoked some of the strongest responses (on both sides) to the questions in the Consultation Paper. We received a large number of detailed criticisms of this rule from leaseholders for whom the existing rule has caused great difficulty. There were also a number of very strongly worded responses in opposition to our proposed change from landlords and professionals in the sector.

3.101 Consultees who agreed with the proposal highlighted the arbitrary nature of this limit, and pointed out the rise in mixed-use development in recent times. NAEA Propertymark gave an example of the rule in action:

One particularly concerning example of the impact this exemption has, is of a leaseholder whose freehold was sold on, and the service charge increased from around £500 a year to £7,682. The homeowner could not ... [acquire the RTM] due to over 25 per cent of the building being non-residential. The result of this was that the homeowner, and other leaseholders in the building fell into service charge arrears. If a leaseholder defaults on service charges, they are at risk of the freeholder taking them to Court with the potential of losing their home under forfeiture of lease.

3.102 A leaseholder, Alice Brown, explained that:

For the five leaseholders in our building this is the most important question in the consultation for us. We are currently prevented from converting to the RTM or collectively enfranchising because there is a shop on the ground floor that is greater than 25% of the building's floor area.

3.103 The National Leasehold Campaign also supported the proposal, citing their belief that developers are currently exploiting the 25% non-residential rule to avoid collective enfranchisement and the RTM. Investment Technology Ltd t/a Canonbury Management, a management company, agreed that the 25% non-residential limit "is the biggest bar to [RTM] claims at present in our experience".

⁵⁴ CP, para 2.145.

⁵⁵ Enfranchisement CP, paras 8.110 to 8.118.

⁵⁶ Compare CP, paras 2.139 to 2.141 with Enfranchisement CP, paras 8.110 to 8.118.

3.104 Those who responded “Other” and provided an extended response largely agreed that the 25% non-residential limit was an unsatisfactory policy. Some consultees made their agreement conditional upon the requirement to appoint a manager in cases where premises exceed the limit, or wanted a different safeguard or threshold.

3.105 Some consultees appeared to misconceive our proposal as allowing an RTM company to exercise management functions relating to units which are not held by qualifying tenants. Church & Co Chartered Accountants, for example, argued that:

it should not be possible for a group of flat owners to take over the management of large ... and potentially complex commercial space. If one imagines a tower block with offices and hotel in the lower half and residential units in the upper half, the flats should not be able to take over the building management of the hotel.

3.106 Under both the current law and our recommendations, the RTM company will only ever exercise management functions which relate to residential units, common parts, and in some cases appurtenant property. In no circumstances will an RTM company be engaged in managing parts of the premises which are held by commercial tenants (for example, a hotel).

3.107 One property investment firm agreed that the 25% non-residential limit precludes too many buildings with majority residential use from acquiring the RTM, but suggested that a higher limit would better balance the interests of residential and commercial leaseholders than removing it entirely.

3.108 Some consultees suggested that commercial leaseholders might actually benefit from our proposals in some cases. Gary Gallagher, a leaseholder, said:

All occupants of our building, residential and commercial, seek to acquire RTM to escape a predatory management company. This appears to be the only option we have, but is blocked by the 25% rule.

3.109 By contrast, consultees who disagreed with the proposal included The Wellcome Trust, a charity landlord, which argued that “this proposal ... will unfairly prejudice freeholders where the bulk of its interest and value are vested in the commercial/non-residential parts within a mixed use building”.

3.110 Boodle Hatfield LLP argued that:

Tenants will not realise or appropriately perform the responsibilities which come with an RTM claim and in taking over the management of a building, including in particular matters such as health and safety (cf Grenfell inquiry and Hackitt report) [sic].

3.111 The Portman Estate was concerned that abolishing the limit entirely would allow a scenario in which “a building that is predominantly commercial could potentially be subject to RTM, even by a single leaseholder”. It emphasised the “significant adverse effect on the value of our commercial portfolio. For us, management control of our commercial portfolio ... is vital”. It went on to explain:

If your proposals are adopted, we could potentially lose the management functions over the roof and structural parts of the buildings as well as the common parts and other areas and services common to the residential and non-residential units which fall outside a 'flat' or 'other unit'. To suggest, as you do in para 2.139 [of the Consultation Paper] that 'the RTM does not interfere with a landlord's property rights' is incorrect.

- 3.112 The Cadogan Estate made much the same point, emphasising that it did not think that the RTM should apply to anything other than buildings which are exclusively residential, but "reluctantly accept the existing 25% threshold".
- 3.113 Damian Greenish spoke for many of the consultees opposed to this proposal when he said "[t]he loss of this management control [over external structures and common parts] will have a significant impact on the value of the landlord's investment for which he is not compensated".
- 3.114 The British Property Federation strongly objected to the proposal, even if it were subject to the requirement to appoint a managing agent as we provisionally proposed.

Discussion and recommendation

- 3.115 The responses of consultees indicate a tension between two fundamental concerns in relation to this issue.
- 3.116 The first is that the majority of consultees (not just those representing leaseholder interests) agreed that the current limit is an unwarranted impediment to the RTM, given that it can prevent premises which are mostly residential from qualifying. The endorsement of the views and arguments in the Consultation Paper by a variety of consultees suggests that we should indeed recommend reform of this limit.
- 3.117 The second is a genuine concern as to how management by residential leaseholders might affect or prejudice commercial leaseholders and the landlord's interest in the common and non-residential areas. There is a clear argument that removing the limit entirely would impinge too severely on these legitimate interests.
- 3.118 We do not think the current law strikes the right balance. However, we have decided against pursuing the options suggested in the Consultation Paper. We consider that abolishing the non-residential limit entirely would unfairly prejudice the interests of landlords and commercial tenants. As was pointed out by some consultees, it could lead to extreme cases such as leaseholders of a flat above a large department store being able to claim the RTM. In this example, the RTM company would not get management of the department store itself, but would take over management of the common parts (which may, depending on the nature of the leases, include the roof and external walls of the building). This problem was described by Church & Co Chartered Accountants as follows:

If you imagine The Shard, the 30 leaseholders could take over the management of an area 300 times the size of the area they have an interest in. This is neither fair or sensible.

- 3.119 In the Consultation Paper, we suggested in the alternative that leaseholders should be able to acquire the RTM over premises with more than 25% non-residential space but

only if they appoint a managing agent. However, later in this Report we conclude that the RTM company should never be under a legal duty to appoint a managing agent.⁵⁷

- 3.120 We have concluded that a fairer balance would be struck by raising the non-residential limit so that a higher proportion of non-residential floor area is required before premises are excluded from the RTM. Such an approach was suggested by a number of consultees in response to both the Consultation Paper and the Enfranchisement Consultation Paper.⁵⁸
- 3.121 Many consultees suggested that the non-residential limit should be retained but set at a level which ensures that premises with a majority of residential floor area are in principle eligible for the RTM or enfranchisement. We think it is right that leaseholders should be entitled to manage premises which are for the most part used or intended to be used for residential purposes. We think it is unprincipled to prevent leaseholders of premises which are more residential than not from being able to claim the RTM. We are therefore of the view that the non-residential limit should be raised, so that the RTM cannot be claimed in relation to premises in which the total internal floor area of all non-residential parts exceeds 50% of the total internal floor area of the premises.
- 3.122 We gave some consideration to whether there might be a better metric for the residential nature of the building (for example, a comparison between the values of the residential and non-residential parts). We recommend the continued reliance on floor space as a metric, however, due to the legal certainty it provides. It provides an objective and ascertainable measure of comparison between residential and non-residential parts and in all but the most complex cases will not require a great deal of expertise and cost to determine. Inevitably, there will be some marginal or ambiguous cases which fall very close to the limit, but given the increase in the limit we believe these cases will be rare.
- 3.123 We are aware of the comments made by some consultees that leaseholders do not have the inclination or necessary expertise to manage a building containing commercial elements. Even though the RTM company only acquires management functions under residential leases relating to residential units and common parts, the exercise of those functions may affect the commercial leaseholders. We are of the view, however, that it should not be presumed that leaseholders are not equipped to manage their premises. The responses of leaseholders from across England and Wales indicate that leaseholders are prepared to shoulder these responsibilities. The training we recommend in Chapter 7 will mean that leaseholders are better equipped to understand and undertake their management responsibilities if they choose to pursue an RTM claim.⁵⁹
- 3.124 In large or complex premises or in other cases where the day-to-day reality of management is beyond the time and expertise of leaseholders acting as directors of the RTM company, it is likely that they will appoint professional directors with building management experience, or appoint a managing agent. The important point is that,

⁵⁷ See reasons set out from para 7.54.

⁵⁸ See Enfranchisement Report, paras 6.323 to 6.324.

⁵⁹ See from para 7.3, and especially para 7.39.

when the RTM is acquired, the RTM company has control of this process and the managing agent is answerable to the leaseholders (via the RTM company) rather than the landlord.

3.125 As noted in paragraph 3.98 above, we had proposed to change the application of this limit from “non-residential” parts to “commercial”, implying a stricter definition.⁶⁰ After considering this point further in light of consultee responses, we have decided to eschew this change as we believe it would introduce added complexity and uncertainty into the RTM process. We consider that raising the non-residential limit will sufficiently ensure that leaseholders are not unfairly prevented from claiming the RTM in respect of buildings with parts that are neither residential nor commercial (for example, storage cupboards or car parks).

Recommendation 7.

3.126 We recommend that the non-residential limit be increased to 50%, such that the RTM cannot be claimed in relation to premises in which the internal floor area of any non-residential part (or where there is more than one such part, all of those parts taken together) exceeds 50% of the total internal floor area of the premises.

ONE QUALIFYING TENANT ONLY

Current law

3.127 Currently, at least two flats in a building (or part of a building) must be held by qualifying tenants in order for that building (or part of a building) to qualify for the RTM.⁶¹ This requirement excludes from the RTM:

- (1) a house held by a long leaseholder;
- (2) buildings containing two flats of which only one is held by a qualifying tenant; and
- (3) buildings containing only one flat held by a qualifying tenant.

Our proposals

3.128 In the Consultation Paper, we proposed the removal of this requirement. As explained above, we consider that leasehold houses should be included in the RTM regime if they are held by a qualifying tenant. In order to do so without constructing a separate RTM regime for leasehold houses, the minimum requirement of two qualifying tenants must be removed. We do not see any reason why a qualifying tenant should in principle be denied the opportunity to claim the RTM in respect of a building where there are no other residential units held by long leaseholders.

⁶⁰ This would perhaps have relied upon the definition of business tenancy used elsewhere in this Report: that is, a lease which is subject to Part II of the Landlord and Tenant Act 1954.

⁶¹ CLRA 2002, s 72(1)(b).

Consultees' views

3.129 This proposal was well supported by a variety of consultees. The general tenor of the responses was that this proposal was a necessary consequence of updating the RTM regime to include houses and that there was no principled argument against removing the exemption.

3.130 The response of the Residential Landlords Association typified those agreeing with the proposal:

We are supportive of broadening the appeal of RTM. Accordingly, we cannot see any reason why a single residential premise should be prohibited from claiming RTM in the circumstances where there are no other residential premises or qualifying tenants.

3.131 London Borough of Tower Hamlets provided qualified agreement subject to protections for social housing tenants who do not qualify (without which an RTM claim “could undermine provision of services for social housing tenants – for example, through the acquisition of an estate’s community centre by leaseholders and its conversion to another purpose”). This concern is addressed by our recommendations on shared appurtenant property, set out in Chapter 10.⁶²

3.132 The concern of almost all consultees opposed to or uncertain about this proposal was that one leaseholder could, as a minority interest, dominate the management of a large building. The Right to Manage Federation (responding “Other”) said that “it must depend on size of building and ratio of residential to non-residential. We tend to think this is a step too far”. The British Property Federation expressed a similar concern, arguing “that RTM should be limited to wholly or preponderantly residential buildings held by long leaseholders”. Long Harbour and HomeGround said that “a single leaseholder determining the management of a building where their interest may be a minor proportion of the whole is inappropriate”.

3.133 The reasons put forward by Boodle Hatfield LLP for disagreeing with the proposal made clear that much of this concern was generated by the combined effect of this proposal and our provisional proposal to abolish the non-residential limit:

this could result in one residential tenant taking over management against the will of one or more commercial tenants. It is a general issue, but would apply in particular if the 25% area rule is abolished.

3.134 Damian Greenish pointed out that this proposal was inconsistent with our provisional proposal to retain the exception for two-unit buildings. Referencing our provisional proposal to retain the two-unit participation exception, he argued that in a building with two flats but only one qualifying tenant:

the qualifying tenant would be able to acquire RTM [according to our single leaseholder proposal] ... This is not consistent with the approach taken [to] ... two-unit building with two qualifying tenants where, for wholly cogent reasons, it is proposed that both qualifying tenants would need to participate. Why don't exactly

⁶² From para 10.130.

the same arguments apply to a two-unit building with only one qualifying tenant? Would not the freeholder simply ensure that he grants to “himself” a lease of the other unit and thus bring himself within the “two qualifying tenants” rule?

Discussion and recommendations

- 3.135 The fundamental reasons of principle and policy which motivated our provisional proposal in the Consultation Paper remain strong arguments for adopting it as a recommendation. In particular, it is necessary to remove the absolute bar on single leaseholders claiming the RTM in order to allow for the RTM in respect of leasehold houses.
- 3.136 Several consultees expressed concern that our proposal would enable the management of large mixed-use developments by one leaseholder. This concern was exacerbated when considered alongside our proposal to abolish the non-residential threshold. As discussed above, however, we have changed our position in that regard, and now recommend the retention of a non-residential limit, albeit at an increased level. The concern about one leaseholder being able to control management functions over a predominantly commercial building therefore falls away.
- 3.137 Concerns were also raised by Damian Greenish that the proposal was inconsistent with our proposal to retain the requirement that both leaseholders in a two-unit building must participate in an RTM claim. We recognise this inconsistency, which was one of the reasons we have reversed our position regarding leaseholder participation in RTM claims in respect of two-unit buildings.⁶³
- 3.138 We consider therefore that consultees’ key concerns are addressed, and recommend the removal of the requirement that at least two flats in a building (or part of a building) must be held by qualifying tenants in order for that building (or part of a building) to qualify for the RTM. For clarity, we would emphasise that this policy will not displace the other RTM qualifying criteria, which would still need to be satisfied by the leaseholder.

Recommendation 8.

- 3.139 We recommend that the RTM should be exercisable in respect of premises which comprise or contain at least one residential unit held by a qualifying tenant.

PROPORTION OF RESIDENTIAL UNITS HELD BY QUALIFYING TENANTS

Current law

- 3.140 To qualify for the RTM, qualifying tenants must hold at least two-thirds of the total number of flats in the building (or part of the building) over which the RTM is claimed.⁶⁴ So, for example, in a block of 12 flats, at least eight of them must be held

⁶³ See the discussion preceding Recommendation 10 below.

⁶⁴ CLRA 2002, s 72(1)(c).

by qualifying tenants on long leases. An analogous requirement exists in the context of leasehold enfranchisement. In the Enfranchisement Report, we refer to this requirement as a “potential participation requirement”.⁶⁵

Our proposals

3.141 In the Consultation Paper, we proposed to reduce the threshold in the qualification requirement so that the number of residential units held by qualifying tenants must represent at least half of the total number of residential units in the building. In the above example, this would mean that the premises could qualify if only six of the flats were held by qualifying tenants.

3.142 As we explained in the Consultation Paper, this proposal differed from the Enfranchisement Consultation Paper in which we proposed to keep the threshold at two-thirds.⁶⁶ In our view, this distinction was warranted because the RTM represents a less significant interference with the landlord’s property rights than enfranchisement, justifying a lower threshold for the qualification requirement.

Consultees’ views

3.143 There was strong agreement from the vast majority of private leaseholders, but significant dissent from industry and professional bodies.

3.144 Consultees who agreed with this proposal liked the fact that the proposal would mean that more premises would be eligible for the RTM. A good example of the arguments against the existing two-thirds rule was that articulated by a leaseholder, Richard Tydeman:

Setting the requirement at a 'supermajority' of two thirds implies that the default – landlord / managing agent managing a property – is the safer option. In my experience this is emphatically not the case. Because the costs of landlord / managing agent failings or negligence are charged back to the leaseholders in any event, the freeholder actually has little or no incentive to do their job properly, on time or – sometimes, in our experience – at all.

3.145 Some leaseholders responded “Other” because in their view the threshold should be reduced below 50%. On the other hand, London Borough of Tower Hamlets, answering “Other”, was concerned about the impact on social housing tenants:⁶⁷

Unless safeguards are introduced to protect the interests of social housing tenants, we do not agree 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%. We are concerned that this could ignore interests of social housing tenants. This is a

⁶⁵ Enfranchisement Report, para 6.237.

⁶⁶ Enfranchisement CP, paras 8.135 to 8.142.

⁶⁷ Although Tower Hamlets’ concerns are understandable, we are of the view that they are addressed sufficiently in the current legislation. Sch 6, para 4 of the 2002 Act prevents RTM claims if a local housing authority is the immediate landlord of any of the qualifying tenants of flats contained in the premises, regardless of how many long leaseholders there are.

particular concern because qualifying leaseholders will in many cases be non-resident. We believe there is a need to protect majority tenure.

3.146 Consultees who disagreed with the proposal included The Cadogan Group, which responded that “there must be a majority on the grounds of fairness. The will of 50% against an RTM is just as valid as 50% for”. This focus on participation and support rather than the nature of the premises was echoed by ARMA. Boodle Hatfield LLP disagreed on the basis that “the current requirement ensures that only buildings which are substantially held by residential tenants with a substantial interest qualify for RTM”.

3.147 McCarthy & Stone, a developer and manager of retirement communities, opposed the proposal for the following reason:

We believe RTM should be allowed where there is a strong show of support from the leaseholders to legitimise taking away management from the landlord. We would therefore request that the current position of at least two-thirds is maintained.

Discussion and recommendation

3.148 There does seem to be a natural minimum value at which this threshold could be set. In order for the premises to be sufficiently “leasehold” in character, it is logical that at least half of the units in the premises ought to be held on long leases. On this basis, we proposed in the Consultation Paper that the threshold be reduced to 50%, to ensure maximum access to the RTM in a principled way.

3.149 After further reflection, however, we have concluded that allowing the RTM to be acquired when only half of the residential units are held by qualifying tenants would not strike a fair balance between the interests of long leaseholders and other occupiers of residential units in the building. In situations where there are an equal proportion of residential units held by qualifying tenants and other tenants it does not seem appropriate to allow the former to have a decisive influence over how the building is managed by exercising the RTM.

3.150 We are also mindful that in the Enfranchisement Report, we recommend that the threshold for the qualification requirement remains at two-thirds. Although it is possible to argue the contrary, as we did in the Consultation Paper, ultimately we do not consider that there is strong justification to take a different approach for the RTM.

3.151 Furthermore, we have considered the effects of our proposed reduction of the qualification threshold in combination with our other recommendations, in particular in relation to voting rights in RTM companies. The difficulties and recommendations relating to voting rights are discussed in detail in Chapter 6 below.⁶⁸ For present purposes, it is necessary only to explain that the combined effect of an increased non-residential limit and a relaxed qualification requirement would be that in some premises, the landlords would be able to exercise a voting majority in the RTM company. This outcome would render an RTM acquisition process pointless. We are

⁶⁸ See from para 6.44.

of the view that it could be counter-productive to recommend both changes, and have prioritised the recommended increase to the non-residential limit.

3.152 For these reasons outlined above, we recommend that the qualification requirement be maintained at its current level, so that at least two-thirds of residential units in the premises in question must be held on long leases.

3.153 We note that this requirement means it is unlikely that any premises which have converted to commonhold could be the subject of an RTM claim, because there would not be enough qualifying tenants (who must be leaseholders, rather than commonhold unit owners).⁶⁹ However, in the Commonhold Report,⁷⁰ we also specifically recommend that that it should not be possible to make an RTM claim in respect of commonhold premises. To permit an RTM claim in such circumstances would be to undermine fundamentally the commonhold management structure, whereby the commonhold association owns and manages the common parts, and unit owners can make collective decisions about management through their membership of the association.

Recommendation 9.

3.154 We recommend the retention of the current rule that at least two-thirds of the residential units in the premises must be held by qualifying tenants in order to qualify for the RTM.

LEASEHOLDER PARTICIPATION IN AN RTM COMPANY

3.155 On the date the claim notice is served, qualifying tenants of at least half of the total number of flats in the premises must be members of the RTM company (we refer to this as the “participation requirement”).⁷¹ In the Consultation Paper,⁷² we explained that for reasons of basic democratic legitimacy amongst leaseholders, we did not think this requirement should be changed. We said that the participation requirement:

provides necessary protection for both landlords and non-participating leaseholders from the control of management rights by minority interests. In addition, it ensures a critical mass of participation in the RTM, providing the RTM company with legitimacy amongst residents within the building.⁷³

⁶⁹ Under one of our two recommended models for conversion to commonhold, non-participating leaseholders could retain their leases and remain as leaseholders rather than becoming commonhold-unit owners: see Commonhold Report, from para 5.5.

⁷⁰ Commonhold Report, paras 5.33 to 5.36.

⁷¹ CLRA 2002, s 79(5).

⁷² CP, para 2.117.

⁷³ CP, para 2.117.

3.156 Our view in this regard remains unchanged and we do not recommend any changes to the participation requirement.

PREMISES WITH ONLY TWO RESIDENTIAL UNITS

Current law and problems

3.157 The current law contains an exception to the participation requirement which applies in the case where there are only two qualifying tenants of flats contained in the premises. In such cases, both qualifying tenants must be members of the RTM company on the date the claim notice is served.⁷⁴ We refer to this requirement as the “dual participation requirement”.

3.158 This exception does not distinguish between premises comprised of only two flats (for example, a converted maisonette), and premises where there are not only two flats on long leases but also commercial tenants or other flats not held by qualifying tenants. For the sake of brevity, we refer in this section to a “two-unit” building; that term should be read as encompassing all the various arrangements of premises to which the existing exception applies.

3.159 The dual participation requirement means that, in a two-unit building, a qualifying tenant who is motivated to take over management may be frustrated by the apathy or unavailability of the other (for example, a buy-to-let landlord who is difficult to get hold of). However, it also has an obvious purpose: it prevents one qualifying tenant claiming the RTM against the express wishes of the other, who then joins the RTM company and frustrates the intentions of the first by creating deadlock.

Our proposals

3.160 In the Consultation Paper, we acknowledged that the arguments for and against retaining the dual participation requirement were finely balanced, but provisionally proposed that it should be retained. We were particularly concerned about the possibility of deadlock in premises with only two qualifying tenants.⁷⁵

Consultees’ views

3.161 There was general support for this proposal. Those who agreed with the proposal did so chiefly for the reasons cited in the Consultation Paper, including the heightened risk of dispute and deadlock in two-unit scenarios. The Property Bar Association said this “will not be resolved by introducing a further stick for one to beat the other with, which does not resolve their underlying dispute”.

3.162 Disagreeing, The National Leasehold Campaign said:

we are aware of a number of leaseholders who have lived in a two-unit building where the other building is occupied by the freeholder and they have experienced huge abuses of power from the freeholder. Reform needs to ensure that this cannot

⁷⁴ CLRA 2002, s 79(4).

⁷⁵ CP, paras 2.121 to 2.124.

continue to happen and thus we believe that the 50% rule should apply in a two-unit building.

- 3.163 There was a great deal of concern about the two-unit case in which one residential unit is occupied by a resident landlord, effectively nullifying the effect of acquiring the RTM.⁷⁶
- 3.164 A few consultees, including Damian Greenish, pointed out the potential for inconsistencies between our proposal in this regard and our proposal to allow a single qualifying tenant to acquire the RTM (see Recommendation 8 below).

Discussion and recommendations

- 3.165 This issue is finely balanced and reasonable arguments can be made for either preserving or removing the requirement. After some consideration, we have decided to reverse the position we took in the Consultation Paper. We recommend that the dual participation requirement should be removed, so that one qualifying tenant in a two-unit building can claim the RTM without the participation of the second qualifying tenant. In order to explain fully this decision, we first consider the availability of the RTM in a two-unit building with two qualifying tenants when only one participates in the claim; we then consider premises where there is only one qualifying tenant.
- 3.166 As a preliminary remark, we note that the current law exempts from the RTM converted houses (but not purpose-built apartment blocks) with fewer than five flats if the landlord (or family member) resides in one of the flats.⁷⁷ This is broader than the corresponding exemption in enfranchisement, which is only for freeholders who themselves have converted the property.⁷⁸ In Chapter 4, we recommend the removal of this “resident landlord” exemption, so the RTM will be possible in such scenarios.⁷⁹ For the purposes of this discussion, therefore, the presence of a resident landlord in premises has no legal significance.

Two residential units with two qualifying tenants

- 3.167 In the Consultation Paper, we argued tentatively that relaxing the dual participation requirement was not justifiable due to particular concerns about the possibility of deadlock in premises with only two qualifying tenants. In light of consultee responses though, we revisited the arguments in favour of removing it. Broadly, these are:
- (1) An active leaseholder who wishes to claim the RTM due to perceived poor management is currently hamstrung by an absent second leaseholder. If a leaseholder of one flat in a maisonette wishes to acquire the management functions from a neglectful landlord, and the other leaseholder of the maisonette is ambivalent, we consider that the willing leaseholder may be the best person to manage the premises.

⁷⁶ We make specific recommendations regarding resident landlords in Ch 4.

⁷⁷ CLRA 2002, sch 6, para 3.

⁷⁸ 1993 Act, s 10.

⁷⁹ See from para 4.26.

- (2) The retention of the dual participation requirement is arguably inconsistent with our recommendation to allow a leaseholder in a building with a single residential unit to acquire the RTM.⁸⁰ This recommendation is necessary for expanding the RTM regime to cover houses.
- (3) Given our Terms of Reference, we should be looking to liberalise the availability of the RTM. We trust that our reforms to the RTM acquisition process⁸¹ and the introduction of the information notice procedure⁸² and director training⁸³ will mean that RTM companies exercise their rights and duties responsibly and efficiently. In relation to issues such as this, therefore, in which the arguments are finely balanced, we should err towards the position which promotes greater access to the RTM.

3.168 We were persuaded by the combination of these arguments that the course of action which better aligns with our Terms of Reference, as well as our other recommendations, is to remove the dual participation requirement for buildings with only two residential units.

3.169 We note though that in two-unit premises where one of the leases is held by an entity related to the landlord, the landlord will be able to control the RTM company if both it and the related leaseholder become members of the RTM company. In this situation, the RTM will be available but, in practice, acquiring the RTM will be of little use. Although this may seem an invidious position for the other (unrelated) leaseholder, we consider that in circumstances where the landlord also controls one of the leaseholders, there is not a strong argument that the landlord should be deprived of management functions. We do not therefore make any policy recommendations specific to this situation.

Two residential units with only one qualifying tenant

3.170 The decision referred to above also bears relevance to premises with two residential units but only one qualifying tenant. Such a situation might arise if, for example, one flat in a converted maisonette is held on a long lease but the other is let on an assured shorthold tenancy ("AST").⁸⁴

3.171 In the Consultation Paper, we suggested that the RTM might be available in such cases. Our final view, however, is that this policy outcome is undesirable.

3.172 Under our recommended reforms to the RTM qualifying criteria, the general rules which apply to all premises are that the RTM is only available if:

- (1) there is at least one residential unit held by a qualifying tenant;

⁸⁰ See Recommendation 8 above and comments of Damian Greenish at para 3.137.

⁸¹ See Ch 8.

⁸² See Ch 9.

⁸³ See from para 7.3.

⁸⁴ An AST is the most common type of agreement used by landlords to let residential properties to private tenants on short leases. ASTs are typically given for a period of between six to 12 months.

- (2) at least two-thirds of the residential units are held by qualifying tenants (the qualification requirement);
- (3) non-residential parts of the premises occupy no more than 50% of the total internal floor area; and
- (4) qualifying tenants of at least half of the total number of residential units in the premises are members of the RTM company when the claim notice is served (the participation requirement).

3.173 The difference between these general rules and the scheme set out in the Consultation Paper is that in the latter, we proposed that the qualification requirement should be waived in premises with two residential units. This was proposed in order to allow RTM claims in two-unit premises where only one residential unit was let on a long lease.⁸⁵

3.174 We are now of the view that the RTM should not be available in such circumstances. Two categories of problem would arise if it were to be available. First, it would result in practical difficulties in exercising the management functions, as the leaseholder could in many circumstances be outvoted by the freeholder in any RTM company meeting. Second, such a position would represent an unjustifiable inconsistency between our recommendations for the RTM rules and the framework we recommend in enfranchisement (discussed immediately below).

3.175 As explained in Chapter 4, the resident landlord exception can be removed because it does no real work in determining whether the RTM is available in premises with two residential units and a resident landlord.⁸⁶ The decisive general rule in two-unit scenarios is actually the qualification requirement (at least two-thirds of residential units must be held on long leases). This is because if both residential units are held on long leases, the premises meet the qualification requirement and the RTM is available; but if only one of the two residential units is held on a long lease, the qualification requirement is not met and the RTM is unavailable.

3.176 The general qualification requirement as applied to premises with two residential units therefore produces the desired policy outcomes and has the advantage of not requiring any exemptions; the general criteria outlined above will apply to all premises. This is a significant simplification of the RTM regime.

Comparison with recommendations in Enfranchisement Report

3.177 In the Enfranchisement Report, we make recommendations for these types of premises in the context of collective freehold acquisitions. A summary of the policy outcomes for several kinds of premises with two residential units are given in the table below:

⁸⁵ The other residential unit could be occupied by a resident landlord, let on an AST, or be left vacant.

⁸⁶ See from para 4.45.

Scenario	Is the RTM possible?	Is a collective freehold acquisition possible?
Two leaseholders; both participate in the claim	Yes	Yes
Two leaseholders; only one participates in the claim	Yes	No
One leaseholder and a resident landlord (landlord-occupied flat is not subject to a lease)	No	No
One leaseholder; other flat vacant and not subject to a lease	No	No
One leaseholder; the other flat only subject to AST	No	No

3.178 The table above makes clear that the policy outcomes in enfranchisement and the RTM are the same, with the notable exception of an RTM claim with only one participant. In the Enfranchisement Consultation Paper, we proposed that a qualifying tenant in a two-unit building should be able to instigate a freehold acquisition without the initial participation of the other qualifying tenant. This position was premised on the proposed introduction of a “right to participate” at a later stage.

3.179 However, as outlined in the Enfranchisement Report, the right to participate could not be introduced at this stage.⁸⁷ In light of this, it was no longer desirable to remove the requirement that both qualifying tenants participate in an enfranchisement claim, because to do so without a right to participate would allow a better-advised (or perhaps wealthier) leaseholder to acquire the freehold to the exclusion of the other. In the context of the RTM, by contrast, there is a right to participate at any time after the formation of the RTM company; a qualifying tenant has the right to become a company member at any time.⁸⁸ It therefore makes sense that we allow a single qualifying tenant in a two-unit building to claim the RTM, as a fall-back position for qualifying tenants who are excluded from enfranchisement.

3.180 There is an additional, related justification for this policy distinction. Part of the reason we recommend the retention of the dual participation requirement in the context of leasehold enfranchisement, is that its absence could lead to what is known as the “ping-pong” problem. This arises where one faction of leaseholders (in this case, one leaseholder) successfully exercises the right to enfranchise, only for another faction

⁸⁷ Enfranchisement Report, paras 5.242 to 5.246.

⁸⁸ CLRA 2002, s 74(1); see also The RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767); The RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), art 26.

(in this case, the second leaseholder) to do so immediately thereafter, with the result that the freehold and management move back and forth between them – potentially repeatedly. This problem cannot arise in the RTM, as an RTM claim cannot be made over premises already being managed by an RTM company.⁸⁹ Instead, the leaseholder who did not participate in the RTM claim has only two options: either join the RTM company set up by their neighbour and participate, or not.

Summary of final position

- 3.181 We therefore recommend the removal of the dual participation requirement in relation to premises with only two residential units that both qualifying tenants must participate in the claim.
- 3.182 The qualification requirement – that at least two-thirds of the residential units in the premises must be held on long leases – should apply without modification to premises with only two residential units.

Recommendation 10.

- 3.183 We recommend the removal of the current rule requiring the participation of both qualifying tenants in premises with only two residential units.

⁸⁹ CLRA 2002, sch 6, para 5(1)(a).

Chapter 4: Qualifying criteria: specific cases

INTRODUCTION

- 4.1 In Chapter 3, we discussed the criteria which must be satisfied in respect of the premises in order for the RTM to be exercised. In this chapter, we look at qualifications and exemptions to the general criteria, and types of property or landlord for which there are specific provisions.
- 4.2 We make recommendations to broaden the circumstances in which leaseholders will qualify for the RTM, including recommending the abolition of some current exemptions which prohibit the acquisition of the RTM in specified circumstances irrespective of whether the other qualifying criteria are met.
- 4.3 Our recommendations are intended to apply to existing premises as well as new premises. For example, they are not limited to future conversions (in the case of a resident landlord) or future developments where there are multiple landlords.

TYPES OF QUALIFYING TENANT

- 4.4 A qualifying tenant under the 2002 Act can be an individual or a corporate entity.¹ However, there can only be one qualifying tenant per flat.² As a result, where the lease is held by joint leaseholders they are together regarded as the qualifying tenant of the flat.³ The RTM company's articles of association make provision for joint leaseholders to choose who is recorded first in the register of members and can exercise voting rights.⁴
- 4.5 Sometimes the person living in the flat may have a long lease from another leaseholder, who may in turn have one from another leaseholder, and so on. We refer to the leaseholders in between the freeholder and the last leaseholder in a chain of leases as "intermediate landlords".⁵ Where there is a chain of leases of the same property, only the leaseholder who has not in turn granted a long lease can be a qualifying tenant.⁶ For example, if the freeholder grants a 125-year lease to A, who then grants a 99-year lease to B, who then lets it out on a one-year tenancy to C, only B qualifies for the RTM. Intermediate landlords can also be qualifying tenants in respect of flats which they do not sub-let on long leases.

¹ The term "qualifying tenant" is explained at para 3.3 above.

² CLRA 2002, s 75(5).

³ CLRA 2002, s 75(7).

⁴ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, arts 26(4) to (5), 33(4); RTM Companies (Model Articles) (Wales) Regulations (SI 2011 No 2680), sch 1, arts 26(4) to (5), 33(4).

⁵ See also Glossary for definition of "intermediate landlord".

⁶ CLRA 2002, s 75(6).

- 4.6 Where a mortgagee takes possession of a qualifying tenant's flat or appoints receivers, this does not change the qualifying tenant. The qualifying tenant remains the person registered as the leaseholder of the flat on the Land Register.⁷ As a result, a notice served on the leaseholder is valid, even if the flat has been repossessed by the mortgagee or a receiver. However, as we explained in more detail in the Consultation Paper,⁸ the position is different if the leaseholder dies or becomes bankrupt. In these cases, the lease vests by statute in the party who takes over the administration of the estate, even though the registered proprietor does not necessarily change.
- 4.7 We understand that the current provisions work well in respect of determining who the relevant qualifying tenants are and, as in the Consultation Paper, we do not recommend any changes to the general rules. However, we did consider the specific example of shared ownership leaseholders.

SHARED OWNERSHIP

Current law and problems

- 4.8 A shared ownership lease is defined in the 2002 Act as a lease:⁹
- (1) granted on payment of a premium calculated by reference to a percentage of the value of the dwelling or of the cost of providing it; or
 - (2) under which the tenant will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the dwelling.
- 4.9 Shared ownership is often described as “part-buy, part-rent” and is intended to make home ownership more affordable.¹⁰ It is often marketed as enabling a purchaser to buy a “share” of a house or flat (usually between 25% and 75%), allowing the purchaser to take out a smaller mortgage, whilst paying rent on the remainder of the property.
- 4.10 It is not actually the case, however, that the seller and purchaser “share” ownership of the property. There is no jointly-owned asset. Instead, the provider of the property grants the purchaser a long lease of the property, similar to a normal leasehold arrangement. The key difference between an ordinary long lease and a shared ownership lease is that the shared ownership lease will contain various provisions that reflect the fact that the purchaser paid less than the full market value of the leasehold interest. These include payment of a market rent in respect of the seller's “share” of

⁷ CP, paras 3.30 to 3.33; *Orchard Court RTM Co Ltd v Singh* (11 December 2014) LON/00BH/LRM/2014/0023 First-tier Tribunal Property Chamber (Residential Property) (unreported) discussing mortgagees; *Choumert Road RTM Co Ltd v Assethold Ltd* (10 September 2012) LON/00BE/LRM/2012/0017 Leasehold Valuation Tribunal (unreported) discussing receivers.

⁸ CP, from para 3.34.

⁹ CLRA 2002, s 76(3).

¹⁰ See, eg, Mayor of London, City Hall Blog, ‘How to buy your first home with shared ownership’ (31 July 2018), <https://www.london.gov.uk/city-hall-blog/buy-your-first-home-shared-ownership>. We discuss the structure and operation of shared ownership in more detail in the Enfranchisement Report, from para 7.6.

the property, and a mechanism by which the purchaser may make subsequent additional payments to increase their “share” and reduce their rent payments accordingly. This mechanism is known as “staircasing”. Only when the purchaser has staircased to 100% do they own their property in the same way as any other freeholder (in the case of a house)¹¹ or leaseholder (in the case of a flat).¹² In practice it is rare for purchasers to staircase to 100%;¹³ though it is usually permissible for them to do so. In some cases, such as in designated protected areas,¹⁴ staircasing to 100% is not permitted.

- 4.11 In a shared ownership lease, the buyer is usually liable for full service charges in relation to the property and common parts.
- 4.12 The current right of shared ownership leaseholders to claim the RTM is unclear. The 2002 Act provides that a “long lease” for the purposes of qualifying for the RTM includes “a shared ownership lease...where the tenant’s total share is 100 per cent”.¹⁵ This seems to imply that a shared ownership lease for which the leaseholder has *not* staircased to 100% is *not* a long lease for the purposes of the 2002 Act. However, the 2002 Act also provides that a long lease includes “a lease granted for a term exceeding 21 years”, which would cover most shared ownership leases. There is conflicting case law as to whether a shared ownership lease where the leaseholder has not staircased to 100% can qualify for the RTM on this basis.¹⁶

Our proposals

- 4.13 We provisionally proposed that the law should be clarified to ensure that shared ownership leaseholders with long leases are qualifying tenants for the purposes of the RTM, regardless of whether they have staircased to 100%.¹⁷

Consultees’ views

- 4.14 A significant majority of consultees agreed with our provisional proposal. For example, the Residential Landlords Association said:

We support the proposal to include long leaseholders who are in a shared ownership scheme to be eligible for RTM regardless of whether they have

¹¹ In the case of a shared ownership house, the lease will usually provide that the freehold is transferred to the purchaser when they staircase to 100%.

¹² A more detailed explanation of the legal structure of shared ownership leases is given in the Enfranchisement Report, para 7.6.

¹³ The Times has reported that fewer than 5% of leaseholders staircase every year. The Sunday Times, “The Scandal of Shared Ownership Schemes” (30 September 2018), <https://www.thetimes.co.uk/article/shared-ownership-scandal-dbl3bfj8f>.

¹⁴ See Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order, SI 2009 No 2098.

¹⁵ CLRA 2002, s 76(2)(e).

¹⁶ CP, para 3.15. See *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB), [2005] 1 WLR 3934 at [15]; *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC). On the other hand, see *Richardson v Midland Heart Ltd* [2008] Landlord and Tenant Reports 31 at [19].

¹⁷ CP, para 3.22 and 3.25.

staircased to 100% of ownership. We do not believe that RTM would interfere with the staircasing agreement in place anyway.

- 4.15 The Residential Landlords Association also argued that the provider of the shared ownership lease should have the right to participate in the RTM company as a landlord.
- 4.16 The Law Society and Damian Greenish, a solicitor, agreed with our provisional proposal, provided that the leaseholder is liable to pay any service charge under the shared ownership lease.
- 4.17 Only two consultees disagreed. Neither of them, nor the consultees who answered “Other”, made any substantive arguments against our proposal, although one commented that the position should be clarified in light of the case law.

Discussion and recommendations

- 4.18 In our view, there is no justification for treating shared ownership leaseholders differently depending on whether they have staircased to 100%. In practice, a leaseholder who has not staircased to 100% has as much of an interest in how the building is managed as any other long leaseholder.
- 4.19 We have considered whether the RTM should only be available to shared ownership leaseholders who have not staircased to 100% if their lease requires them to pay service charges. However, contribution to the service charge is not a precondition for any other leaseholder’s entitlement to participate in an RTM company. We think that if the leaseholder holds a long lease then, regardless of the leaseholder’s share, the leaseholder has a sufficiently important interest in the management of the property to justify being a qualifying tenant for the purposes of the RTM.
- 4.20 We consider that the shared ownership leaseholder alone should be the qualifying tenant for the purposes the RTM. The provider of the shared ownership lease would not be a qualifying tenant; rather, they would in general have a right to become a member of the RTM company as the landlord once the RTM has been acquired.

Recommendation 11.

- 4.21 We recommend that shared ownership leases granted for more than 21 years should be long leases for the purpose of the RTM legislation, regardless of whether the particular leaseholder has staircased to 100%.

TYPES OF LANDLORD

- 4.22 The 2002 Act does not provide for any qualifying criteria in respect of landlords: in general, if the leaseholders and the premises qualify, then the RTM may be exercised.

This includes where the property belongs to the Crown or where the Crown has an interest.¹⁸

4.23 However, there are specific rules or exemptions in respect of certain categories of landlords. In the Consultation Paper, we made proposals for reform in cases where:

- (1) there is a resident landlord;
- (2) there are multiple landlords of the same building; or
- (3) the landlord is the National Trust.

4.24 We consider each of these categories in detail below.

4.25 In the Consultation Paper, we explained that leaseholders of flats let directly by a local housing authority on long leases do not qualify for the RTM.¹⁹ Instead, the long leaseholders and tenants of local housing authorities are able to set up a tenant management organisation (often referred to as a TMO) and apply to take over responsibility for certain housing services.²⁰ However, housing associations do not fall within the definition of a local housing authority²¹ and consequently are subject to the RTM legislation in the same way as any other landlord. We did not propose any changes regarding these particular categories of landlord.

RESIDENT LANDLORD

Current law

4.26 Premises are exempt from the RTM regime when all of the following criteria are satisfied:

- (1) the building has four or fewer flats;²²
- (2) the building is not a purpose-built block of flats;²³ and
- (3) the landlord or an adult member of the landlord's family has:
 - (a) occupied one of the qualifying flats²⁴ as their sole or principal home for the past 12 months; or

¹⁸ CLRA 2002, s 108(1). The Crown is treated in most respects as any other landlord; the exceptions to this are stipulated in CLRA 2002, ss 108(3) to (4).

¹⁹ CP, para 3.64; CLRA 2002, sch 6, para 4.

²⁰ Housing Act 1985, s 27AB. The Housing (Right to Manage) (England) Regulations 2012 (SI 2012 No 1821) governs this process: see CP, para 3.64 onwards.

²¹ Housing Act 1985, s 1.

²² CLRA 2002, sch 6, para 3(1).

²³ CLRA 2002, sch 6, para 3(2)(a).

²⁴ CLRA 2002, sch 6, para 3(6).

- (b) (where the building was purchased from a resident landlord) entered into occupation of the flat within 28 days of purchasing it from a resident landlord, and has occupied the unit as their sole or principal home ever since.²⁵

4.27 We refer to this rule as the “resident landlord exemption”.

4.28 As we explained in the Consultation Paper, we think that this exemption was introduced to encourage the conversion of houses into a small number of units let on long leases to increase housing stock.²⁶ However, most of these conversions were undertaken many years ago, meaning this exemption is less relevant today.

Our proposals

4.29 In the Consultation Paper, we provisionally proposed that the resident landlord exemption should be removed to allow leaseholders to qualify for the RTM in premises with a resident landlord.²⁷ It was our view that this would facilitate and encourage the RTM in smaller buildings.

4.30 We asked consultees whether they had experience of being prevented from exercising the RTM by the resident landlord exemption. We also asked whether they thought that removing this exemption would deter landlords from converting part of their property into a leasehold flat or flats.

Consultees’ views

4.31 The vast majority of consultees agreed with our provisional proposal. The proposal was supported by a wide variety of consultees including both leaseholders and landlords. Consultees who supported this proposal thought that the current exemption was an unfair barrier to the RTM in smaller premises and considered the ability of the landlord to participate in the decision-making of the RTM company satisfactory. For example, NAEA Propertymark commented:

This exemption inhibits leaseholders from exercising rights enjoyed by other flat leaseholders and can mean that they have little protection in way of contesting decisions made by the resident freeholder... The landlord will be entitled to membership of an RTM company should it take over management... Even where the RTM is successful, the resident landlord will still have influence in voting on decisions...

4.32 The Residential Landlords Association agreed with our proposal and told us that, in any case, the resident landlord exemption would only be relevant in rare cases:

In the first instance, we believe that the number of cases of resident landlords will be low as a starting point with many having sold on the lease. Where the small few

²⁵ CLRA 2002, sch 6, paras 3(2)(b) and 3(3)-3(5).

²⁶ CP, para 3.47.

²⁷ CP, para 3.53.

remain, we believe that it would be unjust to deprive leaseholders' access to RTM and subsequently the right to have a say in the management of the unit they own.

4.33 One leaseholder highlighted the unsatisfactory nature of the current position:

Resident freeholders wield too much power in the existing set up and can make life and finances extremely difficult for the leaseholder.

4.34 The National Leasehold Campaign reported that they were:

aware of a number of leaseholders who have lived in a two-unit building where the other building is occupied by the freeholder and they have experienced huge abuses of power from the freeholder. Reform needs to ensure that this cannot continue to happen and thus we believe that the 50% rule should apply in a two-unit building.

4.35 Some individual leaseholders were concerned about the impact of our proposal in a two-unit building. One leaseholder who did not wish to be named suggested that the resident landlord should only be entitled to one vote where they own the freehold and one of the leases as this would otherwise frustrate the RTM where there is only one other leaseholder in the premises.

4.36 The Property Bar Association opposed our proposal on the basis that, where the RTM is acquired in premises containing a resident landlord, there is unlikely to be a harmonious relationship. They considered that the current exemption had a "sound basis" from a management and policy perspective. They added:

... an owner-occupier who remains living in their converted house may be more likely to be motivated by necessity than financial gain, unlike more commercial developers.

4.37 Long Harbour and HomeGround, a landlord and an asset manager, and one individual disagreed with our proposal and considered alternative remedies where there is a resident landlord, such as the appointment of a manager on the fault-based grounds under section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act").

Consultees' experience

4.38 Some consultees reported experience of an RTM claim being prevented because of the resident landlord exemption. Consultees who reported this experience included managing agents, leaseholders' associations and individual leaseholders. However, it was not always clear that the resident landlord exemption, as opposed to other qualifying criteria, was the main reason some of these consultees were prevented from exercising the RTM.

4.39 The Right to Manage Federation told us that they had advised one leaseholder who was unable to acquire the RTM because of this exemption. Similarly, Urang Property Management Limited, a managing agent, knew of at least four buildings which were affected.

4.40 Investment Technology Ltd t/a Canonbury Management, a managing agent, said:

The number of such cases are very small but the implications for the affected leaseholders can be considerable where the resident freeholder is acting in their own self interest as can often be the case.

Would this change deter homeowners from converting part of their property into leasehold flats?

4.41 We asked consultees whether our provisional proposal would be likely to deter homeowners from converting part of their property into leasehold flats. Over half of consultees who responded to this question did not think that our proposal would deter homeowners from converting their property but a significant minority considered that our proposal would act as a deterrent.

4.42 Consultees who thought that our proposal would deter homeowners from undertaking conversions noted that the homeowner would lose the ability to manage their own home if the RTM was acquired. For example, the British Property Federation said:

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.

Similarly, the Association of Residential Managing Agents commented:

Yes – although the chance for an owner to make some development income will be attractive, effectively ceding control of part of their property may deter them.

4.43 Garness Jones Limited, a managing agent, told us that this would only affect a “relatively small percentage of cases”. This view was shared by the Society of Licensed Conveyancers who commented that this would not deter homeowners “in significant enough numbers to affect the housing market to such an extent it would outweigh the benefit to many units that would now be eligible”.

4.44 Other consultees told us that the homeowner would be more influenced by the potential financial gains of a conversion, and that the risk of an RTM claim being made would be of less importance. One individual said:

It's possible. But do people really convert houses into flats so that they can keep ownership? I'd imagine most are done for the money, which is often significant.

Discussion and recommendations

4.45 As a preliminary remark, we note that in their responses to our proposal, some consultees had concerns about situations in which a resident landlord had in effect leased a flat back to themselves. This arrangement, commonly known as a “leaseback”, is usually conducted by the natural person who owns the freehold vesting the freehold in a wholly-owned corporate entity, and that corporate entity granting the natural person a long lease. A legal person cannot be both party and counter-party to a lease.²⁸ This scenario, therefore, would not qualify for the resident landlord exemption, as the freeholder company and natural person leaseholder are different

²⁸ See for example *Rye v Rye* [1962] AC 496, 513.

legal personalities. “Leaseback” scenarios are therefore generally not relevant to the resident landlord exemption.

- 4.46 It is useful to consider the application of this exemption to premises with two, three, and four residential units separately.
- 4.47 First, the scenario of a premises with only two residential units, one of which is occupied by a resident landlord. Some leaseholders were concerned that permitting the RTM in premises with a resident landlord would be illusory in this situation, because the RTM company would be deadlocked if the landlord joined the company and opposed the leaseholder. This would render the acquisition of the RTM pointless.
- 4.48 Further, application of the resident landlord exemption to premises with two residential units is less relevant given our recommended retention of the qualification requirement that at least two-thirds of the residential units in premises must be held by qualifying tenants.²⁹ Unless the resident landlord has granted themselves a lease-back, only one of the two residential units in the premises will be held on a long lease, which means the premises falls short of the qualification requirement.
- 4.49 Second, we consider the application of the residential landlord exemption in premises with three or four residential units. In these cases, the qualification requirement will be satisfied if all other flats (apart from that occupied by the landlord) are leasehold, and the general rule regarding participation will apply. In these cases, we remain of the view that the continued residence of the landlord in a converted property is not sufficient justification for preventing the majority of leaseholders who otherwise qualify for the RTM from exercising the right to manage the premises. We do not think that leaseholders who have purchased a lease from a resident landlord should have fewer rights than other leaseholders to take control of the management of their homes.
- 4.50 We are satisfied that the risk of an RTM claim being made is unlikely to have a significant impact on a homeowner’s decision as to whether to convert their property, given the potential for significant financial gains when selling leasehold flats.
- 4.51 We therefore recommend the removal of the resident landlord exemption.³⁰

Recommendation 12.

- 4.52 We recommend that the current exclusion from the RTM of premises with a resident landlord and no more than four units should be abolished.

²⁹ See from para 3.140.

³⁰ See equivalent policy discussion and recommendation in the Enfranchisement Report, paras 6.350 to 6.354.

MULTIPLE FREEHOLDERS OF THE SAME BUILDING

Removing the exclusion from the RTM

Current law and problems

4.53 Under the current law, the RTM may not be acquired over premises which are in “split freehold” ownership. This means that leaseholders cannot claim the RTM over premises that would otherwise qualify for the RTM if:

- (1) different persons own the freehold of different parts of premises; and
- (2) any of those parts is a self-contained part of a building (as discussed above in Chapter 3).³¹

4.54 If there are no self-contained parts of the building, leaseholders can still acquire the RTM over the whole building, irrespective of the split freehold.³² Further, leaseholders can still acquire the RTM over individual self-contained parts of the building.³³

4.55 We noted in the Consultation Paper that stakeholders had not suggested any reason why a co-ordinated handover of management functions for a building with multiple freeholders would not be possible.³⁴ We were also told by stakeholders that a co-ordinated approach to management of such buildings would be preferable, rather than management by separate freeholders.³⁵

Our proposals

4.56 In the Consultation Paper, we asked consultees whether an RTM company should be able to acquire the RTM over a whole building in cases where the freehold is split.³⁶ We explained that this would be in addition to the leaseholders’ current right to acquire the RTM over a self-contained part of the building.³⁷ Leaseholders would be able to choose whether to claim the RTM over the whole building or over a self-contained part where the building is held in split freehold ownership (as, indeed, they can where the building is held in single freehold ownership).

4.57 Additionally, we asked consultees whether they had experience of the RTM in relation to a building owned by different freeholders.

³¹ CLRA 2002, sch 6, para 2.

³² See *Pembroke Lodge RTM Co Ltd v Avon Ground Rents Ltd* (25 October 2018) LON/00AY/LRM/2018/0018 First-tier Tribunal Property Chamber (Residential Property) (unreported) for an example of where the tribunal has held that an RTM company was entitled to acquire the RTM over the whole premises where a block of flats was in split freehold ownership.

³³ Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 25-12.

³⁴ CP, para 3.57.

³⁵ CP, para 3.57.

³⁶ CP, para 3.61.

³⁷ CP, para 3.57.

Consultees' views

- 4.58 A clear majority of consultees considered that an RTM company should be able to acquire the RTM over a whole building held on a split freehold basis. Very few consultees disagreed.
- 4.59 Generally, consultees who were in favour of abolishing this exception thought that the additional flexibility would simplify the management of the whole building and encourage more leaseholders to acquire the RTM. Two leaseholders and a member of an RTM company who supported our proposal suggested that failure to address this problem would encourage more split freehold ownerships, presumably to prevent or complicate RTM claims. One leaseholder said that for split freehold ownership to be a barrier to RTM claims would be “a massive loophole and decrease the value of this bill”.
- 4.60 Notting Hill Genesis, a housing association, was in favour of abolishing the exception, provided that the prescribed notices would be served on both landlords. We agree that this would be necessary. We discuss our recommendations for the service of notices in Chapter 8.
- 4.61 The Berkeley Group Holdings plc, a developer, and the joint response from Long Harbour and HomeGround both noted that this would make sense where the split freehold premises were already in effect managed as one. Long Harbour and HomeGround did not think that this right should apply where “the management structure of the different parts was separate from the start”.
- 4.62 The Right to Manage Federation thought the current law should be retained, so that RTM companies should have to claim the RTM over each self-contained part separately if the parts of the building are owned by different freeholders. They suggested that the RTM companies could work together and appoint the same manager over the whole building.

Consultees' experience

- 4.63 Only a few consultees reported having experience of the RTM where the building is owned by different freeholders. These consultees were leaseholders' associations or individual leaseholders.
- 4.64 Shula Rich (Brighton Hove and District Leaseholders Association and FPRA) told us that in such circumstances they had served two claim notices. The Right to Manage Federation reported experience of a freeholder transferring part of the building into separate ownership in an (unsuccessful) attempt to avoid an RTM claim.
- 4.65 Mark Chick, a solicitor, did not report experience of this but commented:

I suspect that this is quite rare in practice, but it may be worth an amendment to work around any “avoidance” schemes that may otherwise be created.

Discussion and recommendations

- 4.66 In light of consultee responses, we are of the view that leaseholders in buildings with different self-contained parts held by different freeholders should have the flexibility to claim the RTM over the whole building. They should not be restricted to claiming the

RTM over their individual self-contained part, particularly as it may make sense for the building to be managed as one premises.

- 4.67 While it is already possible for separate RTM companies to claim the RTM over separate self-contained parts and then work together to manage the building, this requires separate companies and separate claims procedures, meaning additional costs and potentially delays. A change in the law would prevent the need for that, or for leaseholders to bring a multi-building RTM claim in accordance with our recommendations in Chapter 5.
- 4.68 Furthermore, as noted by a number of our consultees, leaving this exception in the legislation would provide a loophole through which freeholders of larger premises could exempt their property from the entire RTM regime if it contained self-contained parts, simply by assigning the freehold of the self-contained part to a related entity. It is essential that this potential loophole be closed.
- 4.69 The qualification and participation requirements discussed in Chapter 3 will be assessed in relation to the premises over which the RTM is being claimed. If the RTM is being claimed over the building as a whole, compliance with the qualification and participation requirements will be assessed across that whole building. If the RTM is being claimed over an individual self-contained part, then the relevant criteria will be applied to that part only.
- 4.70 This approach is consistent with our approach to other kinds of premises in this Report. In Chapter 5, we recommend that leaseholders of different buildings (or different self-contained parts of buildings) should be able to claim the RTM through a single RTM company, regardless of whether those buildings are owned by the same or different freeholders. As part of that significant change, we recommend that each building should have to satisfy the qualification and participation criteria separately.³⁸ This means that leaseholders in buildings which comprise different self-contained parts will have a choice if they want to acquire the RTM over the whole building. They could bring a “single-building” RTM claim over the building as a whole, with the qualification and participation criteria likewise applying to the building as a whole. Alternatively, they could bring a “multi-building” RTM claim over the different self-contained parts of the building, with each part having to satisfy the relevant criteria.

Recommendation 13.

- 4.71 We recommend that an RTM company should be able to acquire the RTM over a building containing different self-contained parts held by different freeholders.

Multiple freeholders – conflicting covenants

Current law

- 4.72 An RTM company may have difficulty managing premises if different leases of the premises contain conflicting covenants regarding how management functions are to

³⁸ See from para 5.36 below.

be exercised. For example, the leases in one part of the premises may require the landlord to paint the outside of the building every five years, whereas the leases in another part may require this every two years.

- 4.73 It is already possible for the RTM to be acquired over premises with leases containing conflicting covenants. However, we are concerned that some of our recommendations, including that it should be possible to acquire the RTM over premises comprising different self-contained parts with different freeholders, may mean that this problem is more obvious in the future. Before the acquisition of the RTM, this matter may have been dealt with informally between the different freeholders of those self-contained parts of the buildings. However, once the RTM is acquired the situation may come to a head because the RTM company will be responsible for managing those parts together.
- 4.74 Part 4 of the 1987 Act enables a party to a lease (and post-acquisition, the RTM company) to apply to the Tribunal³⁹ on the ground that it fails to make satisfactory provision as to various specified matters including the maintenance and repair of the premises, the insurance of the building or the computation of the service charge. However, a term of a lease will not be regarded as having failed to make satisfactory provision in relation to a particular matter if the term is clear and workable.⁴⁰ It is therefore unclear whether the Tribunal could vary a term of a lease which was of itself clear and workable, but which conflicted with a term imposed under a different lease of the same building. Our view is that the provisions of the 1987 Act may be insufficient in the RTM context.

Our proposals

- 4.75 We provisionally proposed that the Tribunal should have a power to reconcile conflicting covenants in different leases in cases with different freeholders where the parties cannot agree how to reconcile them.

Consultees' views

- 4.76 Almost all consultees considered that the Tribunal should have the power to reconcile any conflicting covenants in the leases with different freeholders where the parties cannot agree between themselves how to reconcile them.
- 4.77 Consultees who thought the Tribunal should have a power to reconcile conflicting covenants told us that the Tribunal was best placed to provide an independent review and had the requisite expertise. Mark Routley said:

This seems an obvious area where the Tribunal is well suited to sorting out any complexities and making the scheme work in default of agreement.

- 4.78 The Property Bar Association suggested that the variations imposed by the Tribunal should only exist for as long as the RTM company continues to manage the premises.

³⁹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

⁴⁰ *Camden LBC v Morath* [2019] UKUT 193 at [16].

- 4.79 A few consultees suggested that where the Tribunal is unable satisfactorily to resolve the conflicting covenants, it should be able to determine that the RTM cannot be acquired over the premises.

Discussion and recommendations

- 4.80 We think that parties to a lease or an RTM company ought to be able to apply to the Tribunal to resolve conflicts between covenants in leases in circumstances where the parties are unable to resolve things informally. We consider, however, that rather than recommending a specific power for this instance, this issue is better addressed through a more general power to vary leases to resolve problems arising when the RTM is claimed. We discuss this in detail in Chapter 10.⁴¹ In the absence of such a mechanism, there is a risk that the RTM company will not be able to manage the premises effectively and in accordance with the terms of the different leases.

THE NATIONAL TRUST

Current law

- 4.81 The National Trust is a registered charity with a statutory basis. Its purpose is to preserve land and buildings of national, architectural or historic interest, and places of natural interest or beauty, for the benefit of the nation, forever.⁴²
- 4.82 Much of the National Trust's land is "inalienable", meaning that it cannot be sold or mortgaged by the Trust, or compulsorily acquired against the Trust's wishes without special parliamentary procedure.⁴³ In essence, land held in this way by the National Trust will be held on that basis in perpetuity.
- 4.83 Inalienable National Trust land is exempt from collective enfranchisement claims,⁴⁴ but no National Trust property is exempt from the RTM under the 2002 Act. We were told by the National Trust that, in practice, the flats they let on long leases form part of buildings which do not qualify for the RTM. This was said to be the reason why the National Trust had not sought an exemption from the RTM when the legislation was enacted.⁴⁵ We are not aware of any leaseholders having successfully claimed the RTM over National Trust property so far.

⁴¹ See from para 10.154.

⁴² See the National Trust Act 1907, s 4(1) and the National Trust Act 1937, s 3.

⁴³ By s 21(1) and sch 1 of the National Trust Act 1907, certain National Trust properties are expressly stated to be inalienable. The National Trust also has power, under s 21(2) of the 1907 Act, to determine by resolution that other land or properties which it owns are inalienable. Further, properties granted to the Trust pursuant to the National Trust Act 1939 are inalienable, by reason of s 8 of that Act. In total, around 95% of National Trust land is inalienable.

⁴⁴ Leasehold Reform, Housing and Urban Development Act 1993, s 95; see also Leasehold Reform Act 1967, s 32. For the current law and our recommendations in relation to National Trust property and enfranchisement rights, see Enfranchisement Report, paras 7.94 to 7.101.

⁴⁵ CP, para 3.69.

Our proposals

- 4.84 Our recommended extension of the RTM to include leasehold houses⁴⁶ would likely mean that more National Trust leasehold properties would qualify for the RTM.
- 4.85 We were told by the National Trust that most long leaseholders of National Trust houses already have management functions in respect of their houses under their leases.⁴⁷ There would therefore be no need for them to claim the RTM to acquire this control. However, the Trust was concerned that acquisition of the RTM would also allow leaseholders to become responsible for the management of appurtenant property which has specialist management and conservation considerations. To meet its statutory purposes, it is important that the National Trust retains the ability to control how repair and maintenance works are carried out to land and buildings of national interest or importance, whether this is carried out by the National Trust or the leaseholder.
- 4.86 In the Consultation Paper, we therefore provisionally proposed that National Trust properties should be excluded from the RTM.⁴⁸ We explained that the nature and character of National Trust property means that management involves special considerations and more burdensome liabilities.⁴⁹

Consultees' views

- 4.87 Just over half of consultees agreed with our provisional proposal to exclude National Trust properties from the RTM. A significant minority opposed it. Our proposal was supported by professional organisations in the property industry and legal professionals, as well as leaseholders. Consultees who supported our proposal generally agreed that the nature of the land owned by the National Trust and the unique management considerations justified an exemption. For example, Catherine Wilson of the National Leasehold Campaign commented:

I believe that it would be extremely difficult to allow RTM on all National Trust properties due to the size of the estates involved and the complex responsibilities involved...

Similarly, a member of an RTM company said:

National Trust properties must be managed using particular knowledge and experience and should not be included.

- 4.88 NAEA Propertymark noted that introducing an exemption for National Trust properties in the RTM would reflect "other leasehold practice policy recommendations where National Trust properties have been exempted due to the property being held inalienably".

⁴⁶ See from para 3.12.

⁴⁷ CP, para 3.71.

⁴⁸ CP, paras 3.72 and 3.73.

⁴⁹ CP, para 3.71.

4.89 Consultees who opposed our proposal were mainly individual leaseholders and managing agents. Some suggested that it was sufficient that the National Trust would be able to influence decision-making by becoming a member of the RTM company as landlord. Urang Property Management Limited suggested that the National Trust should receive weighted votes in the RTM company:

I think the overall aims of the Trust could be preserved by giving say 40% of the votes in an RTM company so they could keep guiding the leaseholders, rather than refusing the right altogether.

4.90 Investment Technology Ltd t/a Canonbury Management said that there was “no logical basis” for an exemption. This view was also echoed by a couple of leaseholders who considered our proposed exemption unnecessary.

4.91 Several leaseholders who agreed with our proposal nonetheless suggested that the service charges levied by the National Trust should be subject to greater controls and disclosure or transparency requirements.

Discussion and recommendations

4.92 We have carefully considered the justification for introducing an exemption for National Trust property, being particularly mindful of the fact that no exemption currently exists. We are also conscious that our Terms of Reference require us to consider improving access to the RTM for leaseholders by modifying the qualifying criteria, rather than restricting it. We have concluded that the case for an exemption from the RTM has not been made out.

4.93 As set out above, our recommendations in Chapter 3 are likely to cause more properties, and potentially more National Trust properties, to qualify for the RTM. However, we do not consider that this is likely to lead to the RTM being acquired over the kinds of property about which the National Trust was concerned.

4.94 The National Trust explained that, of the property it holds subject to residential long leases, most of these leases are of “dwelling houses” which are exclusively occupied by the leaseholders as a home. However, some are leases of a flat within parts of a historic house, other parts of which (and surrounding grounds) may be open to the public. Some of the houses which are leased are well-known historic houses, including significant grade I listed historic properties such as 16th and 18th century mansions with associated parkland.

4.95 In the case of leasehold houses, the National Trust told us that leaseholders tend to have management obligations in respect of these in any case (although the lease will give the Trust some control over things such as timing of repairs and materials to be used). The RTM is not therefore relevant to these properties. A leaseholder of a leasehold house might still make an RTM claim in an attempt to acquire management of shared gardens and parklands. However, our recommendations in respect of non-exclusive appurtenant property⁵⁰ mean that they are unlikely to be successful. The National Trust, as landlord, would presumably object, and it is unlikely that the Tribunal would make an order allowing the RTM company to acquire management

⁵⁰ See from para 10.130.

functions over significant Trust land. As under the current law, apartments within historic houses are unlikely to meet the qualifying criteria.

- 4.96 In situations where National Trust properties do qualify for the RTM, we consider that our recommendations in respect of non-exclusive appurtenant property, together with the landlord's right to join the RTM company, will mean that National Trust properties have adequate protection.
- 4.97 We do not therefore make any recommendation in respect of National Trust properties. However, there is a case for keeping this under review to see how our recommendations, if implemented, affect National Trust properties in practice.
- 4.98 The service charges levied by the National Trust, the cost of management fees, ground rents, and the transparency and disclosure requirements on the National Trust are not within the scope of this project.

Recommendations regarding enfranchisement

- 4.99 As we explained above, inalienable National Trust properties are currently exempt from collective enfranchisement.⁵¹ Leaseholders of houses can obtain one lease extension of 50 years but there is no equivalent right for leaseholders of flats.⁵² In our Enfranchisement Report, we recommend that most National Trust leaseholders should have the same right to a lease extension as all other leaseholders.⁵³ However, leaseholders will remain unable to acquire the freehold of the properties.⁵⁴ Freehold acquisition in this case directly contradicts the purpose of the National Trust holding land inalienably, whereas lease extensions and the RTM do not.

An exemption for other organisations?

- 4.100 Some consultees suggested that the exemption we proposed for the National Trust might be equally applicable to other charities on the same policy grounds. Although we have ultimately decided not to recommend a National Trust exemption, we briefly consider whether other properties held by other organisations should be exempted.
- 4.101 Our provisional proposal that National Trust properties might require an exclusion from the RTM was not based on the National Trust's charitable status. Rather, it was because of the exceptional nature of the property held by the National Trust and its statutory obligation to preserve land and buildings for the benefit of the nation and for conservation purposes.⁵⁵
- 4.102 We have considered whether any other landlords or premises might fall into a similar category. In particular, we considered whether to exempt Crown land and particularly

⁵¹ Leasehold Reform, Housing and Urban Development Act 1993, s 95; Leasehold Reform Act 1967, s 32.

⁵² See Leasehold Home Ownership: Buying your Freehold or Extending your Lease (2018) Law Commission CP No 238 ("Enfranchisement CP"), para 9.51.

⁵³ Subject to a "right to buy back" in favour of the National Trust; see Enfranchisement Report, paras 7.141 to 7.145.

⁵⁴ Enfranchisement Report, para 7.145.

⁵⁵ See National Trust Act 1907, s 4(1).

premises forming part of the “excepted areas” owned by the Crown bodies.⁵⁶ The excepted areas comprise a variety of properties, most of which are houses subject to long leases (although there are a limited number of blocks of flats). We understand that some leaseholders of flats within the excepted areas have already exercised the RTM.

4.103 We accept that there may be sensitivities around alterations to historic houses associated with Crown bodies. However, the acquisition of the RTM is not currently prohibited where the premises include listed buildings and neither do we recommend this. We think that issues arising from alterations are addressed by our recommendations to reform the current consent procedure in Chapter 11.⁵⁷

4.104 We also note that the Crown bodies would have the opportunity to object to the transfer of non-exclusive appurtenant property to the RTM property, using the procedure outlined in Chapter 10.⁵⁸ In line with our reasoning for National Trust property, we think that the Tribunal would be unlikely to exercise its discretion to transfer these functions to the RTM company in cases where the property required complex upkeep and preservation, or where there were security considerations involved.

4.105 As for the National Trust, there is a case for keeping the position of Crown property under review, but we do not make any recommendations concerning Crown property as part of this Report.

BUSINESS TENANCIES

Current law and problems

4.106 In Chapter 3, we recommend that the RTM should only be exercisable in respect of premises which contain at least one residential unit held by a qualifying tenant, and where at least two-thirds of the total number of residential units in the premises are held by qualifying tenants.⁵⁹ Only qualifying tenants of residential units are entitled to be members of an RTM company – the vehicle used to acquire the RTM – before the RTM is acquired.⁶⁰ The concept of a “qualifying tenant” is therefore important for

⁵⁶ Enfranchisement rights shall not, generally speaking, apply to any lease of land in which there is a superior interest belonging to the Crown (i.e. the Crown Estate, the Duchy of Cornwall, the Duchy of Lancaster or a Government department). However, the Crown has given an undertaking to Parliament that, in most cases, it will act “by analogy” with the provisions of the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993. The undertaking does not apply in certain cases, known as the “excepted areas”: see the Enfranchisement Report at paras 7.151 and 7.152. In these cases, the Crown is free to act as it wishes, although we understand that two of the Crown bodies named above have adopted voluntary policies in respect of properties located in these areas: see for example <https://www.thecrownestate.co.uk/media/2836/excepted-areas-guide.pdf>.

⁵⁷ See from para 11.36.

⁵⁸ See from para 10.130.

⁵⁹ See definition of qualifying tenant at para 3.3 above.

⁶⁰ CLRA 2002, s 74(1). Once the RTM is acquired, landlords can also become members of the RTM company. We discuss the membership of the RTM company from para 6.21.

determining both whether premises are eligible for the RTM, and whether leaseholders can participate in the acquisition and exercise of the RTM.

- 4.107 The definition of a “qualifying tenant” excludes leaseholders with a business tenancy to which Part 2 of the Landlord and Tenant Act 1954 (“the 1954 Act”) applies (“the business tenancy exclusion”).⁶¹ Part 2 of the 1954 Act applies to the lease of any premises which are occupied by the leaseholder for the purposes of a business carried on by them.⁶²
- 4.108 For the business tenancy exclusion to apply there must therefore be occupation by the leaseholder (for example, the premises cannot be left vacant), and that occupation must be for business purposes.⁶³ The business tenancy exclusion will apply in the case of premises which are occupied for both business and other purposes,⁶⁴ for example where a person takes a lease of a flat with a view to using one room for their physiotherapy practice. The business tenancy exclusion does not, however, apply if the premises are being occupied for the purposes of a business in breach of a covenant in the lease.⁶⁵
- 4.109 We consider that there are two problems with the business tenancy exclusion.
- 4.110 First, it excludes from being a qualifying tenant those with leases of premises occupied for both residential and business purposes. Leaseholders will not be qualifying tenants if they occupy their homes for the purpose of carrying out a business (such as ‘live/work’ units). It is potentially unfair to exclude such leaseholders from being qualifying tenants for the RTM purely because their premises are in part being occupied for business purposes.
- 4.111 Secondly, it does not always exclude those with leases which only permit occupation for business purposes from being a qualifying tenant. The business tenancy exclusion does not apply if the premises are not occupied by the leaseholder (or a company controlled by the leaseholder) for the purposes of carrying out a business. It would not therefore apply if the premises were left vacant or if they were sublet to a relative who used them for the purpose of carrying out a business. It is therefore possible for long leaseholders to be qualifying tenants even though their lease only allows the premises to be occupied for business purposes.

Our proposals

- 4.112 In the Consultation Paper, we provisionally proposed that only those with leases which prohibit residential use should be excluded from being qualifying tenants.⁶⁶ It was

⁶¹ CLRA 2002, s 75(3).

⁶² Landlord and Tenant Act 1954, s 23(1).

⁶³ Occupation, or the carrying on of a business, by a company in which the leaseholder has a controlling interest is treated as occupation, or the carrying on of a business, by the leaseholder: Landlord and Tenant Act 1954, s 23(1A).

⁶⁴ *Cheryl Investments Ltd v Saldanha* [1978] 1 WLR 1329.

⁶⁵ Landlord and Tenant Act 1954, s 23(4).

⁶⁶ CP, paras 3.80 to 3.82.

intended that long leaseholders would be qualifying tenants if they occupied their premises for both residential and business purposes unless the lease only permitted business use. We acknowledged that this would mean that those with a long lease with no restrictions on use would be qualifying tenants even where the premises were used solely for business purposes.⁶⁷

4.113 We asked consultees for their views on our provisional proposal. Since our proposal aligned with a similar proposal in the Enfranchisement Consultation Paper⁶⁸ (although, as we note below, it was differently worded), we also asked whether there was any justification for adopting a different position for the RTM.⁶⁹ Additionally, we asked consultees if they had experience of leaseholders being unable to exercise the RTM by reason of the exclusion of business leases under the current law.⁷⁰

Consultees' views

4.114 A sizeable majority of consultees agreed with our provisional proposal. Our proposal was supported by leaseholders, managing agents and legal professionals. Consultees who supported our proposal generally agreed that where a leaseholder is permitted to live in the premises the RTM should be capable of being acquired, especially where the premises are live/work or other mixed-use units. One leaseholder said:

Specifically live/work. This would massively help the residents of our block and quite a few others near by.

4.115 Another leaseholder noted that it was reasonable to have a mixed-use residential property that is also used to run a business such as therapy or freelance writing. They concluded that "if someone lives in a property, it should be included in [the] scope of the RTM".

4.116 Notting Hill Genesis told us that our proposal would "reduce the number of arbitrary restrictions" on the exercise of the RTM. The Residential Landlords Association also echoed this view:

We should be mindful that there could be examples of people who live in their places of work and that as long as residential use is one of the permitted uses of the property, the leaseholder should not be disqualified from the RTM. This we believe would reduce another layer of bureaucracy in determining residential use.

4.117 Consultees who opposed our proposal were mainly landlord-representative stakeholders. Some consultees were concerned that our proposal would not effectively exclude commercial leaseholders from being qualifying tenants for the purposes of the RTM. For example, Damian Greenish noted that under our proposal, a house which is let on a lease permitting use for business purposes but not prohibiting residential use (for example, a house which is being used as office space) could be subject to an RTM claim despite there being no actual residential use or

⁶⁷ CP, para 3.81.

⁶⁸ Enfranchisement CP, paras 8.52 to 8.53.

⁶⁹ CP, para 3.83.

⁷⁰ CP, para 3.84.

intention to use the house for such purposes. He suggested that instead, our proposal considered in the Enfranchisement Consultation Paper should be adopted. We discuss this further below.

- 4.118 The British Property Federation, Astrea Asset Management, a managing agent, and Cadogan Group Limited, a landlord, also opposed our proposal, on the basis that the RTM was not designed for, and they did not consider it relevant to, leaseholders of commercial premises. Astrea Asset Management told us that leaseholders of commercial premises may attempt to change the use of their premises under the lease to include residential purposes in order to acquire the RTM:

If the lease allows for both residential and non-residential use, then the RTM right should not be allowed because commercial tenants could change use to residential to take advantage of the RTM right and then change the use back to commercial. The right should be for residential tenants where the lease allows residential use only.

- 4.119 Most consultees did not comment on whether there was justification for a different approach in RTM and enfranchisement. Some considered that the RTM and enfranchisement regimes should follow the same approach. Mark Chick considered that “there should be harmony with the proposed amendments to the enfranchisement regime”. On the other hand, law firm Boodle Hatfield LLP highlighted the fact that in the RTM the landlord retains an interest in the property as a differentiating factor.

Consultees’ experience

- 4.120 Some consultees reported that they had experience of being prevented from acquiring the RTM because of the exclusion of business leases under the current law. However, most of these consultees did not provide further details.
- 4.121 One leaseholder told us that their building included six live/work units. They had been advised by solicitors that pursuing the RTM would be expensive and would have an “uncertain outcome”. Similarly, another leaseholder reported attempting to claim the RTM where the premises contained live/work units. Whilst this in itself did not prevent the RTM claim, we were told that this “cast doubt on the viability of the whole exercise from the perspective of the leaseholders”.

Discussion and recommendations

- 4.122 Although a majority of consultees agreed with our provisional proposal, we consider that other consultees were right to raise concerns that leaseholders could be qualifying tenants for the RTM despite using their premises solely for business purposes. Similar concerns were expressed in relation to our corresponding proposal in the Enfranchisement Consultation Paper, where a number of consultees pointed out that there are many leases which contain wide user covenants permitting a variety of uses. We do not think that those who are using their premises solely for business purposes should be qualifying tenants for the RTM merely because the lease does not prohibit such use.
- 4.123 We have considered again the alternative approach to the exclusion of business leases canvassed (but not proposed) in the Enfranchisement Consultation Paper. In

that Paper,⁷¹ we suggested that the current law (which, as with the RTM, excludes business tenancies to which Part 2 of the 1954 Act applies) could be broadly maintained but with modifications to address premises which are sublet for business purposes or which are left vacant.

4.124 A number of consultees responding to the Enfranchisement Consultation Paper supported this alternative approach.⁷² However, this approach excludes from being a qualifying tenant those who occupy their premises for business and residential purposes. As we also explain in the Enfranchisement Report, we do not think this is the right outcome either.⁷³ There will be a small but significant number of leaseholders of residential units which are occupied for residential and business purposes (for example, a physiotherapist who has a consulting room in their flat).

4.125 We consider that to determine whether a long leaseholder is a qualifying tenant, it is necessary to take into account both the purposes for which the lease allows the premises to be occupied, and whether and how the premises are in fact occupied. This has led us to the following positions.⁷⁴

4.126 First, a leaseholder should not be a qualifying tenant for the purposes of the RTM regime if the lease does not permit the premises to be occupied for residential purposes. This will be the case regardless of the purposes for which the premises are in fact occupied (or whether they are occupied at all). In such cases, the premises are clearly intended to be occupied only for business purposes and not for residential purposes. In our view, a leaseholder should not be a qualifying tenant for the RTM by reason of having occupied the premises for purposes which are in breach of a covenant in their lease.

4.127 Second, a leaseholder should be a qualifying tenant for the purposes of the RTM if the lease only allows the premises to be occupied for residential purposes. This will again be the case regardless of the purposes for which the premises are in fact occupied (or whether they are occupied at all).⁷⁵ In such cases, the premises are clearly intended to be occupied for residential purposes, and the RTM is intended to benefit residential leaseholders. We have considered whether a leaseholder should still be a qualifying tenant if they occupy their premises for business purposes despite their lease permitting only residential use. However, in our view, excluding such leaseholders from being qualifying tenants for the RTM is unnecessarily restrictive. It is open to the landlord to take action to require a leaseholder to cease non-residential use in

⁷¹ See Enfranchisement CP, para 8.52(1).

⁷² Enfranchisement Report, paras 6.54 to 6.56.

⁷³ Enfranchisement Report, para 6.60.

⁷⁴ We recommend that the same principles apply in the context of leaseholders having enfranchisement rights; Enfranchisement Report, paras 6.61 to 6.68.

⁷⁵ Of course, the lease and the premises over which the claim is made must also meet all of the other qualifying criteria which we recommend in this chapter and in Ch 3. For example, the premises as a whole might be exempt from the RTM if the floorspace containing the non-residential parts exceeded the non-residential limit. We note that "permitting" residential use would include a landlord giving consent, waiving a covenant against other use, or waiving/acquiescing in a breach of a user covenant.

accordance with their lease and so prevent them from being a qualifying tenant for the RTM.

4.128 Finally, a leaseholder should be a qualifying tenant for the RTM if their lease permits both residential and non-residential use, save where the premises are in fact occupied solely for business purposes. The leaseholder should therefore be a qualifying tenant if the premises are left unoccupied, or are occupied solely for residential purposes or for mixed purposes. For example, someone with a lease of premises comprising a shop and a flat which permitted mixed-use would not be a qualifying tenant if both the flat and shop were used solely for business purposes. On the other hand, the leaseholder would be a qualifying tenant if the flat was occupied for residential and business purposes.

4.129 It will be possible for a leaseholder to move between these three general categories. For example, take a lease which states that the premises are to be used for business purposes, but use can be changed to residential with the consent of the landlord (not to be unreasonably withheld). The leaseholder will not initially be a qualifying tenant, because the lease does not permit residential use. However, if the leaseholder obtains the consent of the landlord to change the use of the premises to residential use, that leaseholder will become a qualifying tenant.

Recommendation 14.

4.130 We recommend that:

- (1) where a lease does not permit residential use, the leaseholder should not be a qualifying tenant for the purposes of the RTM;
- (2) where a lease permits only residential use, the leaseholder should be a qualifying tenant for the purposes of the RTM; and
- (3) where a lease permits both residential and non-residential use, the leaseholder should be a qualifying tenant for the purposes of the RTM unless the premises are occupied solely for business purposes.

Chapter 5: The right to manage multiple buildings

INTRODUCTION

- 5.1 It is relatively common for a landlord to own multiple buildings and to manage them together. Buildings which are managed together may sometimes be described as forming an “estate”.
- 5.2 It is not currently possible to acquire the RTM in respect of more than one building at a time, even where it might make sense for different buildings to be managed together. In this chapter, we recommend that long leaseholders of different premises should be able to acquire the RTM together by forming one RTM company and acquiring the RTM in respect of the buildings in a single claim. We then make further recommendations as to how this new right should work. Our recommendations in this chapter are similar to those made in relation to the collective freehold acquisition of multiple buildings in Chapter 5 of the Enfranchisement Report.

A NEW RIGHT TO ACQUIRE THE RTM IN RESPECT OF MULTIPLE BUILDINGS

Current law and problems

- 5.3 At present an RTM company can only acquire the right to manage a single self-contained building or part of a building. This was the outcome of the Court of Appeal's decision in *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* (“*Triplerose*”).¹ This is the case even where the buildings have been managed together historically by a single landlord or managing agent, and where leaseholders of those buildings would prefer to manage their buildings together.
- 5.4 Stakeholders told us in the pre-consultation phase that to get around this restriction, leaseholders of different buildings sometimes acquire the RTM through separate RTM companies and then take a co-ordinated approach to management. However, this may result in additional time and expense because of the need to set up multiple RTM companies, with each having to go through the claim process separately.²

Our proposals

- 5.5 We provisionally proposed that leaseholders should be able to acquire the right to manage in respect of more than one set of premises by making a single RTM claim through a single RTM company.

Consultees' views

- 5.6 Our provisional proposal was supported by the vast majority of consultees. Consultees said that our proposal had a number of practical benefits. It was pointed out that only one RTM company would need to be formed, and that it was more

¹ [2015] EWCA Civ 282, [2016] 1 WLR 275.

² We discussed the problems with multiple RTM companies on a single estate in further detail in the CP, paras 4.19 to 4.23.

straightforward to have a single RTM company managing multiple premises if they share common areas or services.

- 5.7 A few consultees commented that our proposal gave leaseholders of different buildings greater flexibility as to how the RTM is exercised. Another consultee said that our proposal would help smaller blocks who might otherwise struggle to exercise management functions by themselves and may find it easier to do so as part of a multi-building RTM company.
- 5.8 Settlers Court RTM Company Limited said that there was:
- ...no logical reason why a single company should not be able to acquire RTM in respect of more than one block... . Past RTM experience (prior to the *Triplerose* case) suggests that tenants of more than one block are content to do so... .
- 5.9 The Property Bar Association agreed with our proposal subject to the RTM company not acquiring property used in common with other buildings. With this proviso, they said there would be “no more principled reason for objection than there is to allowing a single block on a larger estate to acquire RTM”.
- 5.10 Some consultees, particularly from the retirement sector, thought that where the RTM was being claimed over a building on an estate it should be compulsory to acquire the RTM in respect of every building on that estate. It was said that this would help to avoid management of an estate being fragmented. Some consultees said that greater clarity would be needed as to the definition of an estate, while others highlighted the difficulties which might arise in trying to draft a definition.³
- 5.11 A small number of consultees suggested that the multi-building RTM right should be restricted to buildings on certain types of estates, and were concerned about the unintended consequences and far-reaching impact of the proposals.⁴
- 5.12 Some consultees who opposed our provisional proposal were concerned that individual leaseholders in a building might find decisions being dominated by leaseholders in other buildings with more flats.

Discussion and recommendation

- 5.13 We remain of the view that it ought to be possible for leaseholders to acquire the RTM in respect of more than one building via a single RTM company and a single claim. Leaseholders of different buildings who wish to manage those buildings together will no longer have to incur the time and cost of forming and running multiple RTM companies and bringing an RTM claim in respect of each of those buildings. This might encourage leaseholders in different buildings to manage those buildings together where this is considered beneficial.

³ See also Enfranchisement Report, from para 5.73.

⁴ The examples given by two consultees (Damian Greenish, a solicitor and The Portman Estate, a landlord) were modern housing estates where houses have been sold on a leasehold basis and the freehold sold to institutional ground rent investors, and estates comprising multiple blocks of flats using common facilities.

- 5.14 Where a building has already been the subject of an RTM claim in its own right, we think it should still be able to join in a new multi-building RTM claim, or to join a multi-building RTM at a later date. We do not think there should be any requirement to wait a specific length of time after the original claim.⁵
- 5.15 The concerns raised by consultees with our proposal tended to relate to the qualification requirements which will need to be met before the RTM could be acquired over more than one set of premises, or the manner in which decision-making will work in an RTM company in this situation. We deal with these issues in more detail below.

Recommendation 15.

- 5.16 We recommend that it should be possible for a single RTM company to acquire the RTM in respect of more than one building in a single RTM claim.

CLAIMING THE RTM IN RESPECT OF A SINGLE BUILDING ON AN ESTATE

Current law

- 5.17 There is nothing to prevent the RTM being acquired in respect of a single building which has until that point been managed alongside other buildings on an estate. Practical difficulties may sometimes arise in such cases – it may not always be straightforward to separate out management functions which are provided across the different buildings.⁶ As we discuss in Chapter 10, particular difficulties may arise in relation to appurtenant property such as gardens or car parks which are used in common with other buildings.⁷

Our proposals

- 5.18 It was previously suggested to us by some stakeholders that if a building is part of an estate it should only be possible to acquire the RTM if every building on the estate is included within the claim. We were told that allowing leaseholders in single buildings on an estate (or limited parts of an estate) to acquire the RTM would result in the management of the estate becoming overly complex.
- 5.19 We acknowledged these practical difficulties in the Consultation Paper, but concluded that to remove the right for leaseholders of single buildings to acquire the RTM in respect of their building alone would significantly reduce the availability of the RTM.

⁵ In Ch 13, we discuss the existing restriction on new RTM claims within four years of a previous RTM terminating (CLRA 2002, sch 6, para 5(1)(b)). We recommend that this should be reduced to two years and take the form of a defence rather than a ban. However, we recommend that the restriction should not apply where the RTM has terminated in respect of a single building, but it is proposed that that building should be included in a new multi-building claim less than two year after the termination. See from para 13.217, and in particular para 13.239.

⁶ CP, paras 4.7 and 4.8.

⁷ See from para 10.119.

We thought that an “all or nothing approach” – where every building on an estate would need to be included in the RTM claim – was unduly restrictive. There may be difficulties in achieving the necessary levels of participation by qualifying tenants when more than one building is involved, and leaseholders may not want to have to take on the management of other buildings.

- 5.20 We therefore proposed that leaseholders should continue to be able to acquire the RTM in respect of a single building, regardless of whether that building forms part of an estate.⁸

Consultees' views

- 5.21 The vast majority of consultees agreed with our provisional proposal, including representatives of both leaseholder and landlord interests.
- 5.22 A number of consultees reiterated the arguments that we made in the Consultation Paper in favour of this approach. Several consultees pointed to the potential difficulty of achieving the participation requirements for RTM across the whole estate as a reason for supporting the provisional proposal.
- 5.23 Some consultees acknowledged the practical difficulties which may arise when buildings have shared property or services but did not think this was sufficient justification for preventing a building, or part of a building, from being subject to an RTM claim in such circumstances. For example, the Property Litigation Association Law Reform Committee said:

We agree that the complications associated with the exercise of an RTM over a single block on an estate do not justify depriving the tenants of the option of exercising the RTM in a way that they can under the current regime. This is especially true given that there are complications also in relation to the administration of an RTM in relation to a wider estate.

- 5.24 Those who disagreed with our provisional proposal tended to do so because they considered that the practical difficulties which arise from fracturing the management of an estate justified a more restrictive approach.⁹

Discussion

- 5.25 We remain of the view that leaseholders of a building which forms part of an estate should continue to be able to acquire the RTM over just that single building. We do not consider it necessary to make any recommendation to this effect because this merely reflects the current law. Below, we explain that we think leaseholders on an estate should have flexibility as to which building or buildings to include in an RTM claim.
- 5.26 There may be some initial difficulties in separating shared services on an estate if the RTM is acquired in relation to a single building. However, we do not think that the practical difficulties which may arise in this situation justify limiting or removing leaseholders' existing right to acquire the RTM in respect of their premises.

⁸ CP, para 4.49.

⁹ We acknowledged a similar point at CP, para 4.8.

5.27 Our recommendations in Chapter 10 on appurtenant property should resolve some of the practical difficulties which arise when the RTM is claimed in respect of additional property, such as gardens or carparks, which is used in common with occupiers of other buildings.¹⁰

REQUIREMENTS FOR BRINGING A MULTI-BUILDING RTM CLAIM

Qualifying and participation criteria applying to a multi-building RTM claim

Current law

5.28 Under the current law, leaseholders of different buildings must necessarily form separate RTM companies and bring separate RTM claims if they wish to acquire the RTM. The qualifying and participation criteria for acquiring the RTM must therefore be met in respect of each of the buildings.¹¹

Our proposals

5.29 We provisionally proposed that the qualifying and participation criteria for acquiring the RTM should have to be met in respect of each building that is subject to a multi-building RTM claim. We thought that it should not be possible to apply those criteria across the buildings as a whole for the following reasons:¹²

- (1) it would potentially allow the inclusion of buildings which were far from satisfying the qualifying and participation criteria in their own right;
- (2) a building could potentially be included within the RTM claim without the consent of any qualifying tenants in those buildings;
- (3) individual buildings might subsequently be taken out of the RTM (as discussed below), potentially creating a situation where the RTM company does not enjoy the same democratic legitimacy as when it was first formed; and
- (4) if the qualifying tenants of buildings on an estate are to have the flexibility to decide whether or not to claim the RTM together, it is reasonable to expect that each building should have to satisfy the qualification and participation criteria if they decide to do so.

Consultees' views

5.30 A sizeable majority of consultees agreed with this proposal. Many consultees were in favour of the proposal for one or more of the reasons outlined in the Consultation Paper. A few consultees thought that our proposal had the benefit of simplicity. The Right to Manage Federation commented that this was the position before *Triplerose*, and that it worked well before.

¹⁰ See from para 10.119.

¹¹ See Ch 3 for our recommendations on the qualification and participation criteria which should apply in relation to premises.

¹² CP, para 4.67.

- 5.31 A leaseholder in retirement accommodation found it fair not to insist on a building being part of an RTM if insufficient qualifying tenants do not wish it, noting that it could cause considerable bad feeling if they were forced to join.
- 5.32 Many of the consultees who were opposed to this proposal were individuals, residents' associations or RTM companies. Most consultees who were against the proposal appeared to prefer the idea of qualifying and participation criteria being applied across all of the buildings within the multi-building RTM claim. It was pointed out that our proposals would mean that certain buildings on an estate might be excluded from the multi-building RTM claim because they did not themselves have a sufficient proportion of qualifying tenants. Some consultees commented that, where units in a building are empty or held by buy-to-let investors, the leaseholders of those units may be less interested or available and therefore less likely to join the RTM company, making it harder for a building to satisfy the participation criteria.

Discussion and recommendation

- 5.33 We remain of the view that the qualifying and participation criteria should have to be satisfied in respect of each building included within a multi-building RTM claim. We do not think it should be possible to acquire the RTM in relation to premises which fail to satisfy those criteria in their own right.
- 5.34 The qualifying and participation criteria ensure that the RTM can only be acquired over premises which have a sufficient proportion of residential units held by qualifying tenants (who are able to participate in the RTM as members). They also ensure that a sufficient proportion of qualifying tenants are participating as members of the RTM company when the claim process is started. The effect of diluting these requirements by applying them across multiple buildings may lead to situations where the RTM company does not fairly represent the interests of leaseholders in each of the buildings it is managing.
- 5.35 While the qualifying and participation criteria will need to be met by each building in order to be included in a multi-building RTM claim, we have made various recommendations in Chapter 3 which will make it easier for individual premises to satisfy those criteria. We consider that this achieves the right balance between making it easier for leaseholders of multiple buildings to take collective control of management, and ensuring that the RTM company fairly represents the interests of leaseholders within each building.

Recommendation 16.

- 5.36 We recommend that the qualifying and participation criteria should have to be met in relation to each building that is included in a multi-building RTM claim.

What “link” should be required between buildings in a multi-building RTM claim?

Our proposals

- 5.37 In the Consultation Paper, we considered the link that should be required between buildings in order for them to be included in a multi-building RTM claim. We provisionally proposed that a multi-building RTM should be available where:
- (1) the buildings share appurtenant property; or
 - (2) the qualifying tenants in the relevant buildings contribute to a common service charge.
- 5.38 We thought that either might indicate that the buildings could sensibly be managed together.

Consultees’ views

- 5.39 The vast majority of consultees were in favour of this proposal, representing both leaseholder and landlord interests. A number of consultees commented that one or both criteria would be met in their circumstances.
- 5.40 Some consultees argued that only one of the criteria should have to be satisfied to bring a multi-building RTM claim. A couple of consultees suggested that the criteria for bringing a multi-building RTM claim should depend on the extent of the shared appurtenant property or degree to which there is a shared service charge.
- 5.41 A few consultees were concerned that the proposal would bring estates such as mews, London estates, or buildings around a common garden square within the scope of the RTM regime. It was suggested that the RTM regime should not apply to these types of estates because of the need to maintain common areas to a high standard.
- 5.42 Y&Y Management Ltd, a managing agent, suggested that the proposal would create additional cost and confusion. Rothesay Life plc, an investor, was sceptical as to the relevance of these criteria in demonstrating that buildings are capable of being managed together:
- ...the existence of appurtenant property or contribution to a common service charge does not necessarily mean that there is a ‘synergy’ between the properties that will lead to an ability to make smooth decisions as one collective property... .

Discussion and recommendation

- 5.43 We have concluded that there should be no need to establish any link between buildings included within a multi-building RTM claim. We consider that requiring that each building to meet the qualifying and participation criteria will ensure that the RTM company fairly represents the leaseholders of each building it is managing. We are concerned that the introduction of additional criteria may deter leaseholders of different buildings from using the new right to claim the RTM over their buildings together.
- 5.44 We also consider that it is likely to be very difficult to specify the link required between different buildings for them to be included in a multi-building RTM claim. In the

Consultation Paper, we suggested that the buildings ought to be linked by shared appurtenant property or a common service charge. However, on further consideration, we think that there are likely to be many groups of buildings which meet one or other of these criteria, but which one would not ordinarily describe as forming an estate. Equally, there may be cases in which neither of these factors are present, but it is still desirable for qualifying tenants of the different buildings to claim the RTM together.

- 5.45 As mentioned above, leaseholders of different buildings are already able to manage their buildings together by bringing separate claims and entering into a joint management agreement, regardless of whether there is any link between the buildings. We are simply providing a more streamlined method of doing that by recommending that this could be done by a single RTM company through a single RTM claim. We think that qualifying tenants of each building will be best placed to assess whether in their circumstances it makes sense to bring an RTM claim over just their building or in conjunction with leaseholders of other buildings.
- 5.46 We acknowledge that this means, at least in theory, that the leaseholders of buildings situated in different locations could apply for multi-building RTM together. However, we think this is highly unlikely to happen in practice. The participation thresholds will have to be satisfied by each building, meaning that a majority of qualifying tenants in each building will have to support the proposed multi-building RTM. It is unlikely to make sense to attempt such a claim in most cases, and leaseholders are unlikely to support doing so. However, if leaseholders do wish to do so, we do not think it is necessary or desirable to prevent that outcome.
- 5.47 In short, we do not think there is a need to create a difficult-to-define test which could lead to litigation in itself, when it is unlikely to be required in practice because leaseholders are unlikely to claim the RTM in respect of unconnected buildings. In the rare event that enough leaseholders in unconnected buildings wanted to be managed together, they could get around any requirement for defined links by making separate RTM claims and then appointing the same directors.
- 5.48 We do not consider that exceptions ought to be introduced for buildings on certain types of estate, for example those which have a common garden square. There is no exclusion for buildings or parts of buildings situated on particular types of estates under the current RTM regime or, for example, for listed buildings or those in conservation areas. As long as the qualifying and participation criteria are met, the RTM could already be claimed over a building or part of a building regardless of the estate on which it is situated. Our recommendations as to the circumstances in which an RTM company should be able to acquire management of appurtenant property¹³ are likely to reduce the risk of shared appurtenant property falling under the management of an RTM company unless it is acquiring the RTM in respect of all of the relevant buildings.

¹³ See from para 10.119.

Recommendation 17.

- 5.49 We recommend that there should be no requirement for any link to exist between the buildings to be included in a multi-building RTM claim.

JOINING AND LEAVING A MULTI-BUILDING RTM

Joining an existing RTM

Our proposals

- 5.50 In the Consultation Paper, we suggested that a group of leaseholders in a building which qualifies for the RTM should not have a right to require that their building is added to an existing RTM (save with the agreement of the existing RTM company). We thought that providing leaseholders with such a right could lead to disputes and management issues where the existing RTM company did not want to take over management of the additional building.

Consultees' views

- 5.51 The majority of consultees were in favour of this proposal, representing both leaseholder and landlord interests.
- 5.52 A couple of consultees agreed with our proposals for the reasons set out in the Consultation Paper. A leaseholder, Anthony Molloy, said that an "...[a]utomatic right will only encourage qualifying tenants of other buildings to either delay joining or 'wait and see what happens first'".
- 5.53 A couple of consultees implied that there should be a right for qualifying tenants in a building not included in the existing RTM to have the RTM extended to include their building in certain circumstances. They suggested that this might be appropriate, for example, if there is appurtenant property shared between the buildings or if the buildings are clearly a "natural fit".
- 5.54 A significant minority of consultees were against this proposal. A few consultees thought that there should be scope for qualifying tenants in the buildings already included in the RTM to object to the new building joining or to change their minds.
- 5.55 A couple of consultees suggested that leaseholders in all relevant buildings should instead be invited to take part in the multi-building RTM claim at the outset. The Right to Manage Federation thought that this should be the case where buildings share appurtenant property.

Discussion and recommendation

- 5.56 Our recommendation that there need not be any link between buildings included in a multi-building RTM inevitably leads to the conclusion that an RTM company should not be obliged to include other buildings in the RTM at a later stage. If such an obligation existed, any building across England and Wales which met the qualifying and participation criteria could demand to join an existing RTM. It may be significantly more onerous for the existing RTM company to manage those other premises, and it

would be unfair to oblige them to do so. This would not prevent leaseholders of the other premises from setting up an RTM company and claiming the RTM in respect of their own building.

- 5.57 We do not consider that the position should be different where there is some link (such as shared appurtenant property) between the building which it is proposed should join (“the additional building”) and the buildings in respect of which the RTM has already been acquired. As set out above, we do not think that any such link is likely to be determinative of whether those buildings are capable of being managed together effectively. We consider that it is more important that the existing RTM company is willing to manage the additional building given the additional responsibilities this will entail.
- 5.58 However, it would be possible for an additional building to be included in an existing RTM where the existing RTM company agrees. We indicated in the Consultation Paper that the qualifying tenants of the additional building would first have to set up their own RTM company, and acquire the RTM over their own building before the two RTM companies could be joined in some way (potentially requiring a third, overarching RTM company to be set up).¹⁴ Damian Greenish commented that this procedure seemed “unnecessarily cumbersome”.
- 5.59 We agree that a more streamlined process might be adopted. The qualification and participation criteria will still have to be met in respect of the additional building. We envisage that the participating leaseholders in the additional building should become members of the existing RTM company, rather than a new RTM company as we originally envisaged. The existing RTM company will then submit a new claim notice for the additional building. The voting rules will need to be amended to ensure that leaseholders in an additional building are not able to exercise votes in the RTM company before the RTM is acquired over that building.

Recommendation 18.

- 5.60 We recommend that an additional building should be able to join an existing RTM provided that:
- (1) the qualification criteria are satisfied in respect of that additional building; and
 - (2) enough qualifying tenants from that building join the RTM company so as to satisfy the participation requirement for that additional building.

Leaving a multi-building RTM

Our proposals

- 5.61 In the Consultation Paper, we provisionally proposed that qualifying tenants of individual premises should be able to “break away” from an existing multi-building

¹⁴ CP, para 4.72.

RTM and acquire the RTM over their own building. The multi-building RTM company will then no longer manage that building.

Consultees' views

- 5.62 A sizeable majority of consultees were in favour of this proposal, representing both leaseholder and landlord interests. Some consultees commented on the importance of giving leaseholders choice and flexibility over the management of their properties. For example, Notting Hill Genesis, a housing association, said:

Yes. It should be possible for qualifying tenants to form an RTM [company] for a property that has exercised the RTM provided they meet the criteria and follow the mandated process so that it is not an exercise that can only be completed once and remains an option for future leaseholders to exercise control over the management they receive.

- 5.63 A couple of consultees pointed out that this was no different from allowing an RTM company to acquire the management functions in respect of their individual premises at the outset. The Property Bar Association stated:

...The net result of allowing them to do so would be little different in practical terms to the current position where multiple RTM companies can exist on one estate...

- 5.64 Some consultees disagreed with the proposal, predominately for reasons related to the additional complexity which would arise in relation to the management of the buildings in question. Some suggestions were put forward as to how those complexities might be addressed. For example, Birmingham Law Society agreed with the proposal on the condition that the Tribunal can determine any disputed terms of separation. A few consultees said there ought to be a mechanism for the management of shared amenities and the contribution to that management.

- 5.65 There were differing views raised on the process that ought to apply when a building breaks away from an existing multi-building RTM. A few consultees said that the building which is breaking away ought to have to follow the usual process for bringing an RTM claim including meeting the qualification and participation criteria necessary for bringing such a claim. One consultee thought that there ought to be a more streamlined process in such cases.

- 5.66 At paragraph 4.81 of the Consultation Paper, we suggested that the new RTM company would serve a claim notice on both the landlord and the existing RTM company. The Property Bar Association opposed sending claim notices on the existing RTM company as well as the landlord. They thought that it would be unsatisfactory if the existing RTM company could object to the new claim in the same way that the landlord can.

Discussion and recommendation

- 5.67 We remain of the view that it should be possible for a building to break away from a multi-building RTM. We agree with consultees who thought that this will give qualifying tenants greater choice and flexibility over the management of their premises.

- 5.68 If qualifying tenants of buildings do not have the option of leaving a multi-building RTM, it might lead to conflict among the leaseholders of different buildings. It might also make claiming the multi-building RTM less attractive as leaseholders of each building would effectively be locked in to being managed by the multi-building RTM company or forced to try have the entire RTM terminated.
- 5.69 There may be some disruption to existing management when one building breaks away from the multi-building RTM. However, we consider that this is justified to provide leaseholders with greater ongoing flexibility. We recommend in Chapter 13 that the landlord should have a defence to any new RTM claim if a minimum period of time has not elapsed since the last claim.¹⁵ We think that the same period should apply before a building can break away from a multi-building RTM, with both the landlord and the existing RTM company able to raise this point.
- 5.70 We envisage that the leaseholders of the building which is breaking away will have to form a separate RTM company in relation to their premises¹⁶ and serve an RTM claim notice on both the existing multi-building RTM company and on the landlord.
- 5.71 We consider that the mechanisms which we recommend when the RTM is initially claimed should also apply in the case of a building breaking away. For example, the new RTM company will not get management of shared appurtenant property automatically. Rather, it will have to include this in its claim notice and will not acquire management functions in respect of this property unless either the original RTM company and/or landlord agreed or the Tribunal¹⁷ made a determination, as discussed in Chapter 10.¹⁸ The original RTM company will be required to transfer any uncommitted service charges in accordance with the procedure set out in Chapter 10.¹⁹
- 5.72 In Chapter 13, we recommend that RTM companies should be given the right to apply to the Tribunal to give up the RTM. In deciding such an application, the Tribunal will also have the power to terminate the RTM in respect of individual buildings managed by a multi-building RTM company if the Tribunal considered that it was appropriate to do so.²⁰

¹⁵ See from para 13.217.

¹⁶ This will require consequential amendment to CLRA 2002, sch 6, para 5(1)(a) which exempts premises that are currently being managed by an RTM company.

¹⁷ First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

¹⁸ See from para 10.130.

¹⁹ See from para 10.187.

²⁰ See from para 13.140.

Recommendation 19.

- 5.73 We recommend that leaseholders of a building which has been included within a multi-building RTM should be able subsequently to form their own RTM company and acquire the RTM in respect of their building alone.

Minimum period before leaving a multi-building RTM company

Our proposals

- 5.74 We provisionally proposed in the Consultation Paper that the time restriction on successive RTM claims should also apply when leaseholders wish to break away from a multi-building RTM company and claim the RTM over their individual building.²¹ This would mean that the qualifying tenants of the premises wishing to break away would have to wait a minimum period before making the break away claim.

Consultees' views

- 5.75 A significant majority of consultees agreed with this proposal, representing both leaseholder and landlord interests. Very few consultees disagreed.
- 5.76 Some consultees commented on the benefits of this proposal as providing some stability, preventing frequent changes of management and allowing a period of time to see whether the RTM company can manage the premises effectively.
- 5.77 Some consultees commented on the length of the minimum period, with most suggesting a period of between 12 and 24 months. A couple of consultees indicated that a break away should take effect from the end of the service charge/financial year.

Discussion and recommendation

- 5.78 We remain of the view that there should be a minimum period following the acquisition date of a multi-building RTM before buildings are permitted to break away. We think this will provide for a period of stability during which the multi-building RTM company can establish itself, and will prevent the disruption which might arise if there were repeated and short-term changes to the management of the buildings concerned.
- 5.79 We consider that a two-year period is appropriate, striking the right balance between providing some continuity for landlords and leaseholders, whilst giving leaseholders of individual buildings sufficient flexibility to claim the RTM in their own right if they do not feel that a multi-building RTM is operating in their best interests. This is the same period as we recommend that leaseholders should have to wait before bringing a new RTM claim after a previous RTM has terminated.²²

²¹ Under the current law, there is a four-year moratorium on a further RTM claim being made in respect of the same property after the RTM has ceased: CLRA 2002, sch 6, para 5(1)(b); see CP, from para 11.75. We recommend that this should be replaced with a defence to an RTM claim which is made within two years of a previous RTM being terminated: see from para 13.217.

²² See from para 13.217.

5.80 We therefore recommend that either the existing RTM company in respect of the multi-building RTM or the landlord should be entitled to raise as a defence to a new claim the fact that the original RTM claim was made within the preceding two years. However, if neither objects, the claim should proceed. As we discuss in more detail in Chapter 13, we think the Tribunal should be able to make a declaration that the claim should proceed, even if the two-year defence is raised.

Recommendation 20.

5.81 We recommend that, where leaseholders of a building being managed by a multi-building RTM company wish to make a separate RTM claim in respect of their own building, there should be a defence to that RTM claim if the original multi-building claim took place within the preceding two years. Either the landlord or the existing multi-building RTM company should be able to raise the defence.

GOVERNANCE OF MULTI-BUILDING RTM COMPANIES

Current law

5.82 In Chapter 6, we recommend that RTM companies should continue to take the form of companies limited by guarantee.²³ As we explain in that chapter, the form and content of the articles of association of an RTM company are prescribed in secondary legislation (“the model articles”), and a provision of the articles of an RTM company has no effect to the extent that it is inconsistent with the model articles.²⁴

5.83 The day-to-day business of companies (including those limited by guarantee) is generally conducted by the directors rather than the members. Members of RTM companies can vote at general meetings,²⁵ and have the power to appoint directors by ordinary resolution,²⁶ and to direct directors to take (or not take) a specific course of action.²⁷ This gives members some influence over the running of the RTM company.

Our proposals

5.84 In the Consultation Paper, we asked whether consultees agreed with our view that the rules for voting at general meetings of multi-building RTM companies should be the same as for RTM companies managing one building. We considered that a change to the voting rules to dilute the influence of qualifying tenant members from buildings with more qualifying tenants, or to only allow leaseholders of certain buildings to vote on

²³ See from para 6.8.

²⁴ CLRA 2002, s 74(2) to (6); RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), reg 2; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), reg 2 (together, the “model articles”).

²⁵ Model articles, sch 1, art 33.

²⁶ Model articles, sch 1, art 22.

²⁷ Model articles, sch 1, art 9.

particular matters, would add significant complexity and result in additional costs of compliance.

Consultees' views

- 5.85 The vast majority of consultees agreed with the proposal, representing both leaseholder and landlord interests.
- 5.86 Some consultees referred to the need to keep the RTM regime simple. The Property Litigation Association Law Reform Committee said:

We agree that voting rights should be uniform, to avoid unnecessary complexity and cost in the creation of different regimes. We do not consider that the benefits of the regimes considered in the Consultation Paper would justify that complexity.

- 5.87 A few consultees thought that diluting the votes of leaseholders in larger buildings would be unfair. However, one consultee commented that blocks would still have the option to break away if they did not feel that their building was being given adequate consideration in the RTM.

- 5.88 Very few consultees disagreed with the proposal. However, Boodle Hatfield LLP, solicitors, said there might be significant differences in relation to how different buildings and communal areas needed to be managed. They said that:

...The one-size fits all requirement in relation to voting rights is already problematic in relation to complex buildings, and even some comparatively simple ones... .

- 5.89 They added that the model articles have inadequate flexibility in relation to voting rights.

- 5.90 The Property Bar Association said that there was a significant risk that the proposal would lead to conflicts within a multi-building RTM and said that we should investigate further the possibility of only allowing leaseholders from certain buildings to vote on particular matters.

Discussion and recommendation

- 5.91 We have considered whether RTM companies ought to have the flexibility to determine their own voting rules at general meetings. However, we think that this would fail to provide adequate safeguards for leaseholders participating in the RTM as the qualifying tenants of "larger" buildings could vote to give themselves more advantageous voting rights. It would also add additional complexity and costs if RTM companies were required to devise their own voting rules.

- 5.92 Several consultees commented on the different approach to voting rules taken in the Commonhold Consultation Paper, or otherwise commented that we should consider providing for different premises to have different classes of votes. In the Commonhold Report, we recommend the use of "sections" to allow units in a commonhold association to be grouped together according to their particular interest.²⁸ Different types of section would have a different membership class within the commonhold

²⁸ See Commonhold Report, Ch 8.

association. The commonhold community statement would set out issues which could only be voted on by particular sections.²⁹ It would allow distinctions to be made between residential and non-residential units or different buildings.³⁰

- 5.93 We do not think that the same approach is justified in the RTM context. Although there is potentially a risk that qualifying tenant members in buildings with more participating qualifying tenants might use their voting power to the detriment of other buildings, we believe this risk is mitigated in several ways. As set out above, each building will need to meet the participation criteria when a multi-building RTM claim is made. This will ensure that, at the time the claim is made, the multi-building RTM claim is supported by a sufficient proportion of qualifying tenants in buildings with fewer qualifying tenants. Once the RTM is acquired, the RTM company will ultimately be constrained by the terms of leases of buildings it is managing. It will not, for example, be able to force tenants of one building to pay for costs incurred in managing other buildings if the leases of that building did not permit that.
- 5.94 Further, if an RTM company was failing to perform its management functions satisfactorily in relation to a particular building, it will be open to leaseholders of that building to break away from the multi-building RTM and acquire the RTM themselves,³¹ or apply to the Tribunal to appoint a manager or terminate the RTM in respect of their individual building.³²
- 5.95 We therefore remain of the view that members of a multi-building RTM company should not have different voting rights from members of a single-building RTM company.³³ We consider that there are already adequate safeguards in place to ensure that the interests of leaseholders and landlords of buildings with fewer qualifying tenants are sufficiently protected.

Recommendation 21.

- 5.96 We recommend that members of multi-building RTM companies should have the same voting rights as members of single-building RTM companies.

²⁹ Commonhold CP, paras 5.39 to 5.41.

³⁰ There would be certain qualifying conditions that would have to be met in order to set up a "section". The Commonhold CP proposed that separate classes of vote could be given to: (i) residential and non-residential units; (ii) non-residential units which use their units for significantly different purposes; (iii) different types of residential units (such as flats and terraced houses); (iv) separate buildings in the same development; and (v) other premises within the commonhold which, in the interests of practicality and fairness, the Tribunal decides should form a separate section.

³¹ Discussed above from para 5.50.

³² See from para 13.43.

³³ In Ch 6, we set out the current voting rights regime and make recommendations for its reform.

Chapter 6: The RTM company

INTRODUCTION

- 6.1 To acquire the RTM, the leaseholders need to set up an RTM company, of which the participating leaseholders are members. The 2002 Act sets out a detailed statutory procedure that the RTM company must follow to acquire the RTM, which we discuss in Chapter 8.
- 6.2 In this chapter, we look at the regulation of RTM companies, including the company law obligations applicable to RTM companies and their directors. We make recommendations on the structure of RTM companies, their decision-making processes, and their constitutional documents.

THE RTM COMPANY STRUCTURE

Company type

Current law

- 6.3 RTM companies take the form of companies limited by guarantee.¹ In the Consultation Paper, we noted some key benefits of this structure:²
- (1) It is straightforward to add members to, or remove members from, a company limited by guarantee. Conversely, in a company limited by shares, the seller must complete a transfer form³ and request that the company register the transfer.⁴ The company then needs to record the transfer in the register of members⁵ and issue a new share certificate;⁶ and
 - (2) RTM companies and commonhold associations all have the same company structure. This was intended to simplify the process of changing between company types.
- 6.4 In the Consultation Paper, we asked whether consultees agreed that a company limited by guarantee was the most appropriate form for RTM companies to take.

Consultees' views

- 6.5 Almost all consultees agreed that RTM companies should continue to be companies limited by guarantee. Several consultees simply commented that there were no

¹ CLRA 2002, s 73(2)(a).

² CP, paras 5.6 to 5.10.

³ Companies Act 2006, s 770.

⁴ Companies Act 2006, s 772.

⁵ Companies Act 2006, s 771(1).

⁶ Companies Act 2006, s 776(1)(a).

problems with the status quo. For example, the Residential Landlords Association said that:

All stakeholders engaged in the system such as solicitors, accountants and the tribunal service are familiar with the system in its present form and we cannot see any advantage in disrupting RTM in its current form.

- 6.6 Other consultees pointed out specific benefits of retaining the company limited by guarantee structure. For example, Michelle Goodrum told us that this structure “makes for easier change of membership”. Several consultees also argued that company limited by share structure was an inappropriate alternative. Stephen Desmond (Desmond Training Ltd) added that:

Companies limited by shares ... can be exploited by unscrupulous landlords charging a lot of money for stock transfer forms and submission/replacement of share certificates.

- 6.7 However, a few consultees did prefer alternative company structures, such as the co-operative society or community interest company (“CIC”).

Discussion and recommendations

- 6.8 In the Consultation Paper, we noted that the company limited by guarantee structure was preferable to a co-operative society for three reasons. First, co-operative societies are limited by shares,⁷ which involves a higher administrative burden. Second, two characteristics of co-operative societies (the requirement to have three members on registration, and the “one member one vote” rule) are inconsistent with our recommendations on these issues elsewhere in the Report.⁸ Third, co-operative societies are infrequently used, meaning that there is a lack of familiarity by the public and professionals with this model.

- 6.9 We have also considered, but ruled out, the CIC structure due to its high regulatory and compliance burden. Currently, 77% of CICs are private companies limited by guarantee.⁹ However, CICs can also be companies limited by shares, which is undesirable for the reasons explained above. In addition, each CIC must submit a community statement upon registration and an annual community interest report (addressing the CIC’s activities, stakeholder involvement, and financial information). This would impose an additional compliance burden on RTM companies, and we have not heard arguments that these are necessary.

⁷ Financial Conduct Authority, *Finalised Guidance 15/12: Guidance on the FCA’s Registration Function Under the Co-operative and Community Benefit Societies Act 2014*, <https://www.fca.org.uk/publication/finalised-guidance/fg15-12.pdf>, para 6.2.

⁸ We discuss the voting rights regime that applies to RTM companies, and our recommendations for change, from para 6.80 below.

⁹ Office of the Regulator of Community Interest Companies, *Frequently Asked Questions for Funding Organisations*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605431/13-782-community-interest-companies-frequently-asked-questions-for-funding-organisations.pdf.

Recommendation 22.

- 6.10 We recommend that RTM companies should continue to be companies limited by guarantee.

Using RTM companies as nominee purchasers

- 6.11 In the enfranchisement regime, a “nominee purchaser” must acquire the freehold when leaseholders exercise collective enfranchisement.¹⁰ In the Enfranchisement Report we refer to collective enfranchisement as a “collective freehold acquisition” (“CFA”). Currently, anyone (whether an individual or corporate body) can be a nominee purchaser. In the Enfranchisement Report we are recommending that leaseholders carrying out a collective freehold acquisition should be required to use a nominee purchaser which is a corporate body with limited liability.¹¹ However, leaseholders will not be required to use a company (for example, the nominee purchaser could be an LLP or co-operative society). Further, the nominee purchaser will not be required to use prescribed articles of association (although a set of model articles will be produced to assist leaseholders).
- 6.12 In the Consultation Paper, we considered whether an RTM company should be capable of being used as the nominee purchaser. This is permitted under the current law.¹² Theoretically, all the members of an RTM company may want to participate in a collective freehold acquisition. However, this will not always be the case, for financial or other reasons. As a result, we provisionally proposed that the leaseholders should have to incorporate a new company to act as nominee purchaser, rather than use an existing RTM company for this purpose.

Consultees’ views

- 6.13 The majority of consultees agreed with our provisional proposal. These consultees emphasised that RTM and nominee purchaser companies serve different purposes, and therefore needed to be different entities. The Law Society added that it would be “relatively quick and inexpensive” to establish a new company to act as nominee purchaser.
- 6.14 By contrast, some consultees told us that it would be undesirable to set up a second company, and thought that the RTM company should be used as the nominee purchaser. One leaseholder, Gary Keogh, said that unpicking commercial relationships between RTM companies and their suppliers, and then transferring them to the new company would be “unnecessary complications”. Another leaseholder, David Woolley, told us that managing one company is “too much” for typical

¹⁰ See Enfranchisement Report, from para 5.6.

¹¹ See Enfranchisement Report, from para 5.47.

¹² It is permitted by implication. The RTM company ceases to be an RTM company if the freehold is transferred to it: CLRA 2002, s 73(5).

leaseholder directors, and managing two companies would “get them totally confused”.

- 6.15 Another small group of consultees told us that it should be optional to use the RTM company as the nominee purchaser. For example, Birchall Blackburn Law, BPL Solicitors Limited and Jennifer Studholme, a solicitor, said that an RTM company should not be used as a nominee purchaser where all the members of the RTM company did not wish to participate in the enfranchisement. However, they thought that:

There may be times where the RTM members are willing and able to participate in the enfranchisement or conversion to commonhold and creating a new company to act as nominee purchaser would be unnecessarily burdensome.

Discussion and recommendation

- 6.16 We remain of the view that in almost every case, it will be preferable for the leaseholders to form a new company (or other corporate vehicle) to act as the nominee purchaser. We think that this will usually be a more streamlined process.
- 6.17 If the nominee purchaser is a separate company, the RTM company can continue to exist alongside the nominee purchaser company and can continue to exercise the RTM.¹³ By contrast, if the RTM company is used as the nominee purchaser, the RTM will terminate automatically when the freehold is transferred to the RTM company.¹⁴ Where not all the members of the RTM company want to (or can afford to) participate in the CFA, this could give rise to complications under company law, such as minority protection or unfair prejudice claims by those who do not participate in the CFA. Such members would also remain members of the company when it becomes the freeholder, possibly giving rise to the need for complicated voting arrangements to ensure that those who have not paid for the freehold do not have the same rights as those who have.
- 6.18 However, we recognise that there may be situations where all of the members of an RTM company want to participate in the CFA. In this situation, it may prove simpler and cheaper to use the RTM company as the nominee purchaser than to create a second company with the same membership. Given that any type of company or corporate vehicle can be used as a nominee purchaser, we do not think that there is a need to make RTM companies the sole exception.
- 6.19 We have therefore concluded that there should be no prohibition on using RTM companies as nominee purchasers in CFAs. However, we think that leaseholders should seriously consider whether it is appropriate to use the RTM company as a nominee purchaser in their particular circumstances, before proceeding with this course of action.

¹³ Whether or not the continuation of the RTM (and RTM company) in this situation is desirable or appropriate will depend on the circumstances. See Ch 13 for details on how an RTM can be brought to an end.

¹⁴ CLRA 2002, s 73(5) and s 105(5). This is necessary, as freehold ownership is not compliant with the RTM company's model articles.

Recommendation 23.

6.20 We recommend that there should be no prohibition on using RTM companies as nominee purchasers in collective freehold acquisitions.

CREATION OF THE RTM COMPANY

Current law and problems

- 6.21 The process of setting up an RTM company is relatively straightforward and low-cost.¹⁵ In general, a company only requires one director and one member, which can be the same person.¹⁶ Once a company becomes an RTM company by meeting the requirements of section 73(2) of the 2002 Act, its membership is restricted to qualifying tenants and (once the RTM is acquired) a landlord under a lease of the whole or any part of the premises.¹⁷ Anyone who is not a qualifying tenant or a landlord under a lease ceases to be a member of the company with immediate effect.¹⁸ Steps could then be taken to have their name removed from the register of members.¹⁹
- 6.22 Pursuant to section 73 of the 2002 Act, a company is an RTM company in relation to the premises if:
- (1) it is a private company limited by guarantee;
 - (2) its articles of association state that its object (or one of its objects) is the acquisition and exercise of the right to manage the premises;
 - (3) it is not also a commonhold association; and
 - (4) another company is not already an RTM company in relation to the premises.²⁰
- 6.23 This final criterion that there can be only one RTM company in relation to particular premises is problematic. It has the potential to prevent the formation of genuine RTM companies by leaseholders, because another RTM company has already been established by another party. For example, we were told that a landlord might set up an RTM company in respect of the premises to prevent the leaseholders from claiming

¹⁵ See the user-friendly guide provided by Companies House: <https://www.gov.uk/limited-company-formation/register-your-company>.

¹⁶ Companies Act 2006, ss 7(1) and 154(1).

¹⁷ CLRA 2002, s 74(1); RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, art 26; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1, art 26.

¹⁸ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, art 27(1); RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1, art 27(2).

¹⁹ *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23 at [53].

²⁰ CLRA 2002, ss 73(2) to (4).

the RTM. Alternatively, a managing agent might set one up and try to persuade the leaseholders to claim the RTM and appoint the managing agent to handle the claim and manage the premises going forward.

- 6.24 In *Danescroft RTM Co Ltd v Inspired Holdings Ltd & Eagil Trust Company Ltd*²¹ the Leasehold Valuation Tribunal held that it could not have been Parliament's intention that a landlord could set up an RTM company and thereby defeat an RTM claim by a leaseholders' subsequent RTM company. The Tribunal commented that the criterion was intended to prevent a multiplicity of competing claims of rival RTM companies formed by leaseholders. It added that it was arguable whether an RTM company formed by a landlord could ever be an RTM company. This interpretation prevents landlords from taking advantage of the literal meaning of the statutory drafting.

Consultees' experience of this practice

- 6.25 Very few consultees had direct experience of landlords setting up RTM companies to prevent leaseholders from acquiring the RTM. However, the Leasehold Advisory Service ("LEASE"), the Association of Residential Managing Agents ("ARMA") and Catherine Williams (a founder of the National Leasehold Campaign, responding in a personal capacity) each told us that they had received enquiries or reports from their members and customers about this practice. A few consultees added that although they did not have knowledge of the practice, it had potential to occur under the current law. For example, the Right to Manage Federation said that "once word gets around to landlords that the loophole exists it will certainly be exploited".
- 6.26 A higher proportion of consultees had experience of managing agents setting up RTM companies. As above, LEASE, ARMA and Catherine Williams told us that members and customers had reported managing agents setting up RTM companies. Catherine Williams noted that this practice had been most commonly reported in relation to new-build estates.
- 6.27 Several individuals also reported direct experience of managing agents setting up RTM companies. For example, an individual explained that:

There are management companies which approach dissatisfied leaseholders enticing them to take over the management and appoint them as the managing agent– this management company forms the RTM at their own expense, the management company then appoint one of their own people as director ... and then invite leaseholders to join by promising them much cheaper service charges and better services.

- 6.28 In response to our leaseholder survey, a leaseholder told us that a managing agent covered the costs of claiming the RTM, on the condition that they then took over management of the block. They told us that:

Certain managing agents have identified an opportunity here, and actively promoted RTMs, recognising that the structure pretty much lets them off the hook since the

²¹ *Danescroft RTM Co Ltd v Inspired Holdings Ltd & Eagil Trust Company Ltd* (29 April 2013) LON/00AC/LRM/2012/0032 First-tier Tribunal Property Chamber (Residential Property) (unreported), para 26.

RTM company takes on all legal liability and the chances of the RTM company (and its amateur directors) then holding the managing agent to account under contractual law are very remote.

- 6.29 There was some disagreement among consultees as to whether the involvement of managing agents was positive or negative. Mark Chick, a solicitor, said that he had experience of managing agents establishing RTM companies as part of a “legitimate facilitated exercise of the RTM which is usually done at a discount to win the management business”. In his view, “the consumer usually benefited from such arrangements”. Urang Property Management, a managing agent, also told us that they had experience of managing agents setting up RTM companies only “when done on behalf of leaseholders based on their instructions”. By contrast, Long Harbour and HomeGround, a landlord and an asset manager, said that it had seen “specialist aggressive RTM agents incorporate RTM companies ... without representative membership of leaseholders”.

Consultees’ views

- 6.30 To prevent the practices described above, we provisionally proposed to abolish the limit on the number of RTM companies (within the meaning of the legislation) that can exist in relation to a set of premises. Instead, we provisionally proposed a replacement rule that once an RTM company serves a claim notice relating to the premises, no other RTM company may do so until the claim is withdrawn, or rejected by the Tribunal,²² or the RTM ceases.
- 6.31 Almost all consultees supported our provisional proposal. For example, the Residential Landlords Association said that our proposal could prevent a landlord from setting up a “rival” RTM company to prevent leaseholders from acquiring the RTM.
- 6.32 There were very few principled objections to our proposal. However, a few consultees were concerned that two groups of leaseholders (each constituting 50% of the total leaseholders) could establish RTM companies in respect of the same premises. Bow Cross West Phase 5 Residents’ Association suggested we should go further, and that a mechanism should be put in place to prevent landlords from filing “bogus” claim notices to prevent genuine claims.

Discussion and recommendation

- 6.33 We believe that consultee responses reveal either an existing practice of “bogus” RTM companies, or a potential loophole which could be exploited in the future. We think that this justifies abolishing the limit on the number of RTM companies which can exist in respect of the same premises. If two competing groups of leaseholders both established RTM companies, the first company to serve a valid claim notice would prevail.
- 6.34 However, it is not necessary for us to adopt our provisional proposal that once an RTM company serves a claim notice relating to the premises, no other RTM company may do so until the claim is withdrawn, rejected by the Tribunal, or the RTM ceases. The 2002 Act already has this effect because:

²² First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

- (1) section 81(3) prevents the service of a second claim notice where one is already in force in respect of the premises; and
- (2) schedule 6, paragraph 5(1)(a) effectively prevents service of a claim notice where the RTM has already been acquired in relation to the premises, as such premises would be exempt.

6.35 For a claim to be valid, the claim notice must be served by an RTM company which has enough leaseholder members to satisfy the participation requirements.²³ As a result, although a landlord or managing agent could still establish an RTM company in respect of the premises, they will not be able to claim the RTM, or prevent the leaseholders from establishing their own RTM company in respect of the premises.

6.36 We have considered whether our recommendation could have the negative side-effect of curtailing legitimate arrangements between managing agents and leaseholders, of the type described by consultees in paragraph 6.29 above. It would no longer be the case that a managing agent could set up the only permissible RTM company over the premises, effectively forcing the leaseholders to use that company (and that managing agent) if they wanted to claim the RTM. This is the situation we wanted to prevent. However, the leaseholders could still consent to become members of the company set up by the managing agent if it suited them to do so, and use it as the vehicle to claim the RTM. Managing agents will also be able to advise leaseholders on how to form an RTM company and claim the RTM.

Recommendation 24.

6.37 We recommend that more than one RTM company should be permitted to exist in relation to each premises.

ARTICLES OF ASSOCIATION

The current law

6.38 A company's "articles of association" is a document setting out the rules that the company must comply with. Usually, companies limited by guarantee that do not register their own articles of association are deemed to be subject to default model articles of association.²⁴ This is not the case for RTM companies, which are subject to specific articles of association.²⁵ We call these "the model articles", in line with the relevant legislation, but they would be more accurately described as "prescribed articles".²⁶ RTM company articles cannot deviate from the model articles in a manner

²³ CLRA 2002, ss 79(4) to (5). At least one-half of the qualifying tenants of flats in the premises must be members of the RTM company. In Ch 3, we recommend the retention of this requirement.

²⁴ Companies Act 2006, s 20; Companies (Model Articles) Regulations 2008 (SI 2008 No 3229).

²⁵ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1 (together, the "model articles").

²⁶ CLRA 2002, s 74(7).

that is inconsistent with the model articles, and any attempt to do so will have no effect.²⁷

6.39 The model articles are set out in separate English and Welsh regulations. The provisions in each set of model articles are mirrored, so that (for example) in both England and Wales, Article 33 specifies voting rights in RTM companies. References to “the model articles” in this Report should therefore be taken to apply to both the English and Welsh regulations.

6.40 In the Consultation Paper, we discussed the existing provisions of the model articles relating to:

- (1) eligibility to be a director of an RTM company;²⁸
- (2) adding directors to an RTM company;²⁹
- (3) circumstances in which directorship of an RTM company will automatically cease;³⁰
- (4) eligibility to be a member of an RTM company;³¹
- (5) directors’ meetings;³²
- (6) the conduct of general meetings,³³ and
- (7) the allocation of votes at general meetings.³⁴

6.41 We noted that the model articles are silent on whether members can bring legal action against the directors for breach of their general duties.³⁵

6.42 We provisionally proposed that the model articles should be maintained in their current form, subject to some minor amendments.³⁶ However, our recommendations in other sections of the Report now necessitate some more substantive amendments, to which we now turn.

²⁷ The RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), reg 2(2); RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), reg 2(2); *Fairhold Mercury Ltd v HQ (Block 1) Action Management Co Ltd* [2013] UKUT 487 (LC), [2014] Landlord and Tenant Reports 5.

²⁸ Model articles, art 22.

²⁹ Model articles, arts 1, 22.

³⁰ Model articles, art 23.

³¹ Model articles, art 26.

³² Model articles, arts 12 to 13, 17 to 18.

³³ Model articles, arts 16, 28, 9, 33, 35, 29.

³⁴ Model articles, art 33.

³⁵ *Palmer’s Company Law* (2018) vol 2 para 8.3703.

³⁶ CP, para 5.49.

Terminology

6.43 In Chapter 3, we recommend that the RTM should extend to “residential units”, and not just to “flats”.³⁷ As a result, the terminology used in the model articles will need to be amended.

Voting rights

Current law

6.44 Under general company law, companies are free to stipulate in their articles how votes are allocated and apportioned to members. The voting allocation for RTM companies, however, is constrained by Article 33 of the model articles. Broadly speaking, the aim of these constraints is:

- (1) to determine the relative voting power of residential and non-residential parts;
- (2) to ensure the landlord can exercise at least some voting power in the RTM company; but
- (3) to ensure that where all qualifying tenants are members, they are able to exercise a majority of votes.

6.45 The general approach of the voting rules is to allocate votes to flats and other parts of the premises, then specify who may exercise those votes. We explain the details of voting rights in RTM companies here, and include a flowchart of this process in Figure A of Appendix 3.

6.46 The first question is whether there are any “landlords under leases” (of the whole or any part of the premises) who are company members. Although somewhat ambiguous, references to “leases” in the model articles imply long leases only,³⁸ which prevents landlords of assured shorthold tenancies (“ASTs”) from exercising votes in the RTM company where that landlord is not a long leaseholder. This is clearly consistent with the general policy positions of the current law and our suggestions for reform. There is no suggestion that shorthold tenants should be able to exercise votes in the RTM company.

6.47 A sublease granted out of a long lease can itself qualify as a long lease. So, for example, A (freeholder) may grant a lease for a term of 99 years to B, who subsequently grants C a sublease for a term of 25 years. Both leases qualify as “leases” (that is, are long leases) for the purposes of the model articles, and therefore both A and B are “landlords under leases”.

6.48 If there are no landlords under leases of the whole or any part of the premises who are members of the company, then one vote is available to be cast in respect of each flat in the premises. The vote is to be cast by the member who is the qualifying tenant

³⁷ From para 3.12; Recommendation 1.

³⁸ See from para 6.60 below.

of the flat.³⁹ If there is a residential unit which is not held by a qualifying tenant then nobody will be entitled to cast a vote in respect of that residential unit.

- 6.49 The process is more complicated if there are landlords under leases who are members of the company.
- 6.50 First, votes are allocated to the residential parts of the premises. Each residential unit that is held on a lease is allocated the same number of votes as the number of landlords under leases who are company members.⁴⁰ Residential units not subject to a lease are not allocated votes.⁴¹
- 6.51 These votes are exercisable by the qualifying tenant of that residential unit if the qualifying tenant is a company member; if they are not, the vote is wasted.⁴²
- 6.52 Second, votes are allocated to non-residential parts. The ratio of votes allocated to non-residential parts of the premises to votes allocated to residential parts is defined by the ratio of the non-residential internal floor space to the residential internal floor space.⁴³ In other words, if premises have 20% of the *total* internal floor space devoted to non-residential use (implying a ratio of 1:4), and the residential parts have been allocated 12 votes in accordance with paragraph 6.48 above, the non-residential parts will be allocated three votes.
- 6.53 The votes allocated to non-residential parts are exercisable by the immediate landlord (which may be the freeholder).⁴⁴ To return to the subleasing scenario outlined in paragraph 6.47 above, if C's sublease from B is for commercial purposes, then B (rather than A) exercises the votes allocated to that non-residential part.
- 6.54 Finally, a landlord under a lease of the whole or any part of the premises who is a member of the company but is not entitled to any votes under steps one or two is entitled to one vote.⁴⁵
- 6.55 This system has a number of consequences given the current qualification criteria (in particular, the non-residential limit⁴⁶ and the qualification requirement,⁴⁷ which we discuss in Chapter 3). Provided that all leaseholders who are eligible to become members of the RTM company do in fact become members:
- (1) For premises in which all residential units are held by qualifying tenants, the qualifying tenants will always be able to command a supermajority (75%) of

³⁹ Model articles, art 33(2).

⁴⁰ Model articles, art 33(3)(a).

⁴¹ Model articles, art 33(c)(e).

⁴² Model articles, art 33(3)(c).

⁴³ Model articles, art 33(3)(b).

⁴⁴ Model articles, art 33(3)(d).

⁴⁵ Model articles, art 33(3)(f).

⁴⁶ See from para 3.94.

⁴⁷ See from para 3.140.

votes. This enables them to pass both ordinary and special resolutions, giving them total decision-making control over the RTM company.

- (2) Regardless of the proportion of residential units held by qualifying tenants, the qualifying tenants will always be able to exercise a simple majority (50%) of votes in the RTM company. This means that leaseholders will always be able to pass ordinary resolutions, giving them substantial control over the RTM company (for example, appointment and removal of directors requires only an ordinary resolution).

6.56 If there are leaseholders who do not join the RTM company, or who do not exercise their right to vote, there is potential for the leaseholders to be outvoted in some cases by the landlord. In our view, this is the right outcome because leaseholders cannot be forced to be interested, engaged, or involved in managing the premises. Indeed, the need to have enough qualifying tenant members to ensure the RTM company has enough votes to operate effectively acts as an incentive for leaseholder members to encourage others to join the RTM company and be engaged in management decisions.

Problems with the current law

6.57 In pre-consultation discussions with a variety of stakeholders, the issue of voting rights in RTM companies was not mentioned as an aspect of RTM that needed reform. Accordingly, we did not make proposals in the Consultation Paper regarding reforming voting rights in RTM companies.

6.58 However, it has become apparent that the voting rights regime needs to be amended to take account of our recommendation, discussed in Chapter 3, that the non-residential limit be increased from 25% to 50%.⁴⁸ The current rules for allocating and exercising votes to non-residential parts of the premises, if left unchanged, would significantly undermine the effectiveness of this recommendation.

6.59 Qualifying tenants in premises which fall in the upper range of the permitted proportion of non-residential floor space will face the possibility of being outvoted by landlords if they acquire the RTM. Most notably, in premises with a large (but necessarily less than 50%) proportion of non-residential floorspace, landlords would be able to exercise a simple majority of votes in RTM company meetings. In practice, this will mean that landlord members could appoint their own directors and dismiss those who were appointed by qualifying tenants before the RTM was acquired. This would significantly undermine the purpose and value of claiming the RTM – to give qualifying tenants substantive control over how their premises are managed.

6.60 There are also two ambiguities in the text of the current law. The first is that the model articles in both England and Wales refer to “leases”, but do not explicitly state that this refers only to long leases. The second is that the allocation by article 33(3)(f) of one vote to *any* landlord arguably inflates the number of votes controlled by the freeholder in circumstances where freeholder and intermediate landlords are related entities.

⁴⁸ See para 3.126.

Options for reform

- 6.61 In general, we are hesitant to make significant recommendations on which we have not consulted, unless there is a clear need. In this instance, effective implementation of our recommendation to increase the non-residential threshold necessitates modifications of voting rights in RTM companies. As well as recommending the clarification of the two ambiguities in the model articles referred to above, we set out two options for reforming the structure of the voting rights regime in order to preserve the outcomes of the current system (outlined in paragraph 6.44 above).
- 6.62 Our view is that simple amendments to the model articles will address the ambiguities. First, we recommend that the meaning of “lease” in the model articles should be defined so that voting rights are allocated only to persons party to a long lease as defined in the 2002 Act.
- 6.63 Second, we recommend that the allocation of one vote to any landlord under a lease in article 33(3)(f) should apply only to the freeholder who has not otherwise been allocated a vote; it should not apply to any intermediate landlords.
- 6.64 We now turn to the more fundamental question of allocation of voting rights. We have considered many different options for modifying the voting rights regime, but ultimately have been guided by the following principles:
- (1) Given the lack of consultation on this issue, we prefer to alter the current voting rules as little as possible.
 - (2) The change that has precipitated the need for amending voting rights is the change in the non-residential threshold. It was therefore our preference to confine our recommendations to the way in which votes are allocated to the non-residential parts of the building.
- 6.65 In the light of these principles, we have concluded that a change is needed to the way in which votes are allocated to non-residential parts compared to residential parts of the premises.
- 6.66 The precise wording of the current rule is:⁴⁹
- ...a total number of votes will be allocated to [a non-residential] part as will equal the total number of votes allocated to the residential units multiplied by a factor of A/B, where A is the total internal floor area of the non-residential parts and B is the total internal area of all the residential parts.
- 6.67 Under the non-residential threshold stipulated in the current law (no more than 25% non-residential floor space), the maximum value that the factor A/B can have is a third. However, our recommendation to increase the maximum amount of non-residential internal floor space in premises claiming RTM to 50% would allow a factor A/B as high as one. These votes are exercisable by the immediate landlord or (if there is no lease) the freeholder of the non-residential part(s). The increase in the non-

⁴⁹ Model articles, art 33(3)(b).

residential threshold therefore drastically increases the potential voting power of landlord members of the RTM company.

6.68 In light of the principles outlined above, we considered three possible ways forward.

Option 1

6.69 The first is for B (in the factor “A/B”) to represent the total internal floor area of the *whole* premises, rather than that of the residential parts. For premises in which just under 50% of the total internal floor area is non-residential, the factor A/B would therefore be just under one half, instead of just less than one as under the current formula. Similarly, in premises in which the non-residential parts comprise 25% of the total internal floor space, the factor A/B will be one quarter, rather than one-third as under the current law. As can be seen from the latter example, this change would have the effect of marginally reducing the voting power of landlords in existing RTM companies.

6.70 More generally, mathematical modelling reveals two general effects of this change:

- (1) The non-residential part of the premises can (depending on the number of residential units not held by qualifying tenants) be up to 50% of the total internal floor area and still allow the leaseholders a simple majority of votes.
- (2) The non-residential part of the premises can (depending on the number of residential units held by non-qualifying tenants) be up to 33.3% (exactly one third) of the total internal floor area and still allow the leaseholders an absolute majority (75%).

6.71 This change is justifiable in principle. The current formula puts non-residential parts on an equal voting footing to residential parts in terms of voting power within the RTM company. In other words, the voting power per square metre of space is the same for non-residential parts as it is for that under residential leases.

6.72 Given that the RTM is primarily concerned with management of residential property and affects rights under commercial leases only insofar as they concern common or appurtenant property, a ratio which allocates more power per square metre to residential parts than to non-residential parts is appropriate. Non-residential parts would still have their voice in the RTM voting process, but it would be reduced in a principled and justifiable way.

Option 2

6.73 The second option for change is introduce a conversion factor into the A/B ratio which adjusts the votes allocated to the non-residential parts in such a way as to ensure that leaseholders always at least have the ability to exercise a simple majority. This assumes they all participate and vote unanimously – if either of those premises is not true, it is inappropriate for the law to nevertheless mandate that qualifying tenants will always control an absolute majority.

6.74 Mathematically, this turns out to be relatively simple to achieve: the current factor A/B should simply be divided by three. This will mean that, as in the current law, the maximum value for the ratio of votes allocated to non-residential parts compared to

residential parts will be one-third. Because at least two-thirds of residential units in the premises must be held on long leases,⁵⁰ it is mathematically certain that leaseholders whose premises qualify for the RTM will also be able to exercise at least a simple, if not absolute, majority in the RTM. The dilution factor is not arbitrary: it is designed to replicate the outcomes of the current law. A flowchart setting out how Option 2 would determine voting rights (and highlighting the small change with respect to the current law) is at Figure B of Appendix 3.

- 6.75 This change would result in a more significant reduction in votes allocated to non-residential parts than Option 1 above, but the same justification for this reduction applies. Given that the RTM is primarily concerned with management of residential property, and affects rights allocated under commercial leases only insofar as they concern common or appurtenant property, a ratio which allocates more power per square metre to residential parts than to non-residential parts is appropriate.

Option 3

- 6.76 A third method of ensuring leaseholder voting power in the RTM company would be to institute a cap on the proportion of total votes allocated to landlords.
- 6.77 More specifically, this change would involve leaving the current form of Article 33(3) as it currently is, but adding a provision to the effect that the total votes exercisable by landlords under leases can never be more than one-third of the total votes exercisable by qualifying tenants. This would ensure that leaseholders would always be able to exercise an absolute majority if they all vote unanimously. A flowchart setting out how Option 3 would determine voting rights (and highlighting the change with respect to the current law) is at Figure C of Appendix 3.
- 6.78 This change is perhaps the bluntest of the three presented here, and also involves the largest deviation from the present state of affairs. Members of existing RTM companies (particularly landlords) might find that the voting power they are used to exercising in the RTM company is dramatically reduced.
- 6.79 On the other hand, this option is arguably the one most aligned with the underlying motivations of our reforms and our Terms of Reference. As we state above for Options 1 and 2, there is no principled reason why floor space under non-residential leases should be allocated the same voting power per square metre as floor space under residential leases, in a regime in which only management functions over residential and common parts are transferred.

Discussion and recommendation

- 6.80 We do not think Option 1 represents a workable avenue of reform. It does not give a sufficient proportion of votes to qualifying tenants in premises with a permissible portion of non-residential space under the new requirement.
- 6.81 Option 2, on the other hand, preserves some relationship between the amount of non-residential floorspace in the premises and the votes that can be exercised by the immediate landlord of that space. It also ensures that, if all qualifying tenants were to

⁵⁰ As discussed from para 3.148, we now recommend the retention of this rule.

participate and vote unanimously, they would always be able to exercise absolute control over the RTM company.

- 6.82 Option 3 ensures that leaseholders have effective control of the RTM company, regardless of the permutations of leasehold interests which may exist within particular premises. However, it does so through blunter means than Option 2. Furthermore, unlike Options 1 and 2, the justification for Option 3 is not based on replicating the relationship drawn in the current law between voting rights and floor space. Its justification lies in its simplicity in achieving the desired outcome of giving the leaseholders effective control of the RTM.
- 6.83 We have concluded that both Options 2 and 3 represent viable paths for reform. In our view, Option 3 would be preferable, as the certainty it would provide outweighs the abstract appeal of the more narrowly tailored change in Option 2. Given the technical nature of these provisions, however, and the fact that we did not consult on any such changes, we do not make a definite recommendation as to which of these two options should be implemented. We leave it to Government to decide which of those two is more appropriate.

Recommendation 25.

- 6.84 We recommend that the meaning of “leases” in the model articles should be clarified so that it refers only to “long leases”, as that expression is defined in the 2002 Act.
- 6.85 We recommend that the allocation of one vote to any landlord under a lease in the model articles of association should apply only to the freeholder who has not otherwise been allocated a vote; it should not apply to any intermediate landlords.

General meetings

Current law and problems

- 6.86 In the Companies Act 1985 (and earlier Companies Acts), companies were required to hold what was then called an annual general meeting (“AGM”). The Companies Act 2006 removed this requirement for most types of company.⁵¹ However, certain types of company (public companies, private traded companies and commonhold associations) are still required to hold an AGM.⁵² The Commonhold Report does not propose to amend this requirement for commonhold associations.
- 6.87 RTM companies are not required to hold an AGM.⁵³ However, members of an RTM company can demand that the directors hold a general meeting if:

⁵¹ See Commonhold CP, para 9.4.

⁵² Companies Act 2006, s 336; Commonhold (Amendment) Regulations 2009 (SI 2009 No 2363), sch, art 10.

⁵³ *Palmer’s Company Law* (2018) vol 2 ch 7.502.

- (1) the request is made by members with at least 5% of the total voting rights of all members; and
 - (2) the request states the general nature of the business to be addressed at the meeting.⁵⁴
- 6.88 If a general meeting is held, no business (other than the appointment of a chairman) can be conducted unless 20% of the members entitled to vote or two members of the company are present (whichever is the greater).⁵⁵
- 6.89 In the Consultation Paper, we noted that the current law places a procedural burden on RTM company members, because it places the onus on members to demand a general meeting, rather than obliging RTM company directors to hold regular meetings. Before publication of the Consultation Paper, some stakeholders had expressed concern that this can obstruct leaseholder involvement in, or even awareness of, RTM company decision-making. As a result, we provisionally proposed to amend the model articles to require that RTM company directors hold a general meeting once per year. Meetings are required for members to participate in the company's decision-making and to allow members to discuss and debate the day-to-day running of the company with the directors.

Consultees' views

- 6.90 The vast majority of consultees who responded to this question agreed with our provisional proposal. These consultees often noted that holding a general meeting once per year would promote good governance and accountability. For example, a leaseholder, Ron Wheeldon, said:
- We hold an AGM and directors serve four yearly terms. It is essential to keep members of the company involved and aware of ongoing issues.
- 6.91 Several consultees commented on what matters should be considered at a general meeting. Birmingham Law Society suggested that the RTM company should be required to prepare and lay annual accounts. The Law Society considered that leaseholders should be consulted by the directors on "all material matters" such as making and enforcing covenants or regulations.
- 6.92 In addition, two individuals thought that the costs of holding the general meeting should be recoverable through the service charge. We address this in Chapter 10 below.
- 6.93 By contrast, consultees who opposed our provisional proposal told us that holding a general meeting once per year would be onerous and unnecessary. For example, Peel Common Residents' Association Limited highlighted the administrative burden of organising an AGM in respect of a large site, including notifying members and finding an appropriate venue. On the other hand, Mark Chick suggested that this requirement was impractical or undesirable for smaller blocks.

⁵⁴ Companies Act 2006, ss 303(2)(b), 303(4)(a).

⁵⁵ Model articles, art 29.

6.94 Finally, consultees asked about the consequences of non-compliance with the general meeting requirement. For example, a leaseholder, J Gardner, queried whether the requirement would be met where no one attends the meeting, and the penalty for an RTM company that failed to hold a meeting.

Discussion and recommendation

6.95 We have concluded that it should be mandatory for directors of RTM companies to hold a general meeting each year. Although it is inevitable that most decisions will be made by the directors outside the meetings, we think a general meeting is an important opportunity for members to hold the directors to account, and vocalise their opinions or concerns. We also think that the burden of calling and holding regular general meetings should lie with the directors, rather than members relying on the “demand” mechanism which currently exists. We anticipate that the need to prepare for a general meeting will help to prevent directors from losing interest in the company’s affairs, or becoming “absentee”.

6.96 Although our recommendation departs from the general position under company law that a general meeting is not required, we think that the characteristics of RTM companies make it particularly important to hold general meetings. RTM companies have a direct impact on the property and daily life of their members, and are often created by leaseholders who want greater control and accountability over their properties. The requirement to hold a general meeting once per year aligns with the position in commonhold associations.

6.97 However, we do not think that these arguments apply with equal force to RTM companies that have only one member. This could occur where the property consists of only one residential unit (such as a leasehold house, or flat above a shop), and the landlord did not also join the RTM company. We think that in this scenario, holding a general meeting would simply be a formality. As a result, we think that RTM companies with one member should be exempt from this requirement.

6.98 We considered whether our recommendation would create a disproportionate burden on RTM companies, particularly in relation to small blocks. However, we have concluded that the democratic advantages of general meetings outweigh this burden because:

- (1) the financial burden of holding a general meeting will be mitigated by our recommendation below that the cost of holding a general meeting will be recoverable via the service charge;⁵⁶
- (2) it will be relatively straightforward to hold a general meeting in relation to a small block, given there will be limited administration surrounding notification;⁵⁷ and

⁵⁶ See para 10.223 below.

⁵⁷ Notice may be given in hard copy, electronically, or by means of a website: Companies Act 2006, s 308. If given on the website, the notice should be available on the website throughout the notice period, state that it concerns a notice of a company meeting, and specify the place, date and time of the meeting: Companies

- (3) as we are not recommending any prescription of the contents of the agenda at the general meeting, it would be open to smaller RTM companies to hold relatively short or informal general meetings.

Consequences of failing to hold a general meetinga

6.99 We do not think that RTM company directors who fail to meet this requirement should be penalised. When, prior to the enactment of the Companies Act 2006, it was a requirement for every company to hold an AGM, failure to do so rendered the company and every officer in default liable to a fine.⁵⁸ This is still the case for those types of companies (such as public companies) which are still required by the Companies Act 2006 to hold an AGM. However, we do not think that an equivalent provision should apply to RTM companies, for two reasons.

6.100 First, as we explained at paragraph 6.88 above, a general meeting cannot proceed if it does not reach quorum. However, a consultee told us that, over time, members may become less interested in engaging with the RTM company. As a result, an RTM company might be in breach of the requirement to hold a general meeting once a year due to a lack of attendance, despite efforts to organise such a meeting.

6.101 Second, if the RTM company directors breached the model articles by failing to call a general meeting each year, various remedies are already available to the members under existing law.⁵⁹ These might include:

- (1) an action for unfair prejudice;
- (2) a remedy against the company for breach of a personal membership right; or
- (3) using the existing right under the Companies Act 2006 for a certain threshold of members to require the directors to call a general meeting.⁶⁰ If directors fail to do so, the members who request the meeting are entitled to call it at the company's expense.⁶¹

Act 2006, s 309. If given electronically or in hard copy, the notice must state the time, date and place of the meeting, and the general nature of the business to be dealt with at the meeting: Companies Act 2006, s 311. Notice must be sent to every member of the company and every director: Companies Act 2006, s 310. At least 14 days' notice must be given: Companies Act 2006, s 307(1).

⁵⁸ Companies Act 1985, ss 366(3) and (4).

⁵⁹ Companies Act 2006, s 33(1).

⁶⁰ Companies Act 2006, s 303.

⁶¹ Companies Act 2006, s 305(1) and (6).

Recommendation 26.

6.102 We recommend that the model articles of association should be amended to require RTM company directors to hold a general meeting once a year. However, RTM companies with only one member should be exempt from this requirement, for as long as they continue to have only one member.

COMPANY LAW REQUIREMENTS

The current law

6.103 In addition to the obligations and requirements in the model articles, RTM companies are subject to general company law. In the Consultation Paper, we summarised the key provisions of the Companies Act 2006 that apply to:

- (1) appointing directors;⁶²
- (2) removing directors;⁶³
- (3) the general duties owed by directors to the company,⁶⁴
- (4) the liability of directors under civil law;
- (5) the liability of directors under criminal law;⁶⁵
- (6) the court's power to grant directors relief from civil liability;⁶⁶
- (7) directors' and officers' liability insurance;⁶⁷ and
- (8) the duties of "small companies"⁶⁸ in relation to accounts,⁶⁹ registers⁷⁰ and filing.⁷¹

6.104 We asked consultees whether they thought any requirements of company law should be relaxed in relation to RTM companies. We suggested that given no companies are

⁶² Companies Act 2006, ss 7(1), 154(1).

⁶³ Companies Act 2006, ss 168(1), 312(3), 338.

⁶⁴ Companies Act 2006, ss 171 to 177.

⁶⁵ Companies Act 2006, ss 167, 451, 1121.

⁶⁶ Companies Act 2006, s 1157.

⁶⁷ Companies Act 2006, s 233.

⁶⁸ Small companies have an annual turnover of less than £10.2 million: Companies Act 2006, s 382. Most RTM companies are likely to meet this description.

⁶⁹ Companies Act 2006, ss 386 to 388, 1135.

⁷⁰ Companies Act 2006, ss 790M, 113, 162, 165, 167.

⁷¹ Companies Act 2006, ss 396(1), 444(1)(a), 451, 853A, 853L.

currently exempted from requirements such as filing accounts, there would have to be an exceptional reason for RTM companies to benefit from relaxed requirements.

Consultees' views

- 6.105 Consultees were closely divided on this issue. However, more consultees opposed the relaxation of company law requirements than supported it.
- 6.106 Consultees who supported a relaxation of company law requirements generally told us that RTM companies are often operated by people without a company law background, and that the company has a limited non-commercial purpose. The most common type of relaxation that consultees suggested was accounting and filing duties. For example, a leaseholder, David Silverman, said that it would be helpful to limit the administration undertaken by an RTM company by eliminating the need to complete an annual company return.⁷²
- 6.107 In addition, a few consultees suggested that RTM companies should be eligible for not-for-profit status, and Malcolm Wood suggested that RTM companies should receive relaxed treatment “in a way that some ‘not-for-profit’ organisations are set up”.
- 6.108 Consultees who opposed a relaxation of company law requirements generally highlighted the benefits of applying company law to RTM companies. The Property Bar Association said that company law requirements are “there for good reason” to protect the members of the company and third parties dealing with the company. Consensus Business Group, a landlord, added that the relaxation of company law requirements was unlikely to promote better block management. Further, Church & Co Chartered Accountants told us that the roles that the RTM company undertakes are critical to the preservation of the physical and financial safety of the residents and landlord. It stated that these issues are so important, “if anything there should be more scrutiny than less”.
- 6.109 A few consultees also told us that company law is not currently too onerous in its application to RTM companies. The Property Litigation Association Law Reform Committee emphasised that almost all RTM companies will be treated as a “small company” for accounting and filing purposes.

Discussion

- 6.110 We have concluded that it would be inappropriate to relax company law requirements in relation to RTM companies for four reasons. First, even if RTM companies have non-professional directors and members, this is also true of many other companies which do not benefit from relaxations. In any case, RTM companies will often benefit from being classified as “small companies”. This means that certain requirements

⁷² Now an annual confirmation statement.

relating to accounts,⁷³ strategic reports,⁷⁴ directors' reports⁷⁵ and audits⁷⁶ are relaxed or excluded.

6.111 Second, it is possible that company law requirements may discourage some leaseholders from forming or joining an RTM company. However, this is not necessarily problematic. The need to comply with company law sends an important signal that claiming the RTM involves significant legal and practical responsibilities, including compliance with company law and building management requirements.

6.112 Third, company law requirements can assist to improve the RTM company's performance, such as encouraging transparency.

6.113 Fourth, confusion about compliance with company law is better addressed through making a training regime available for RTM company directors, rather than through relaxing company law requirements. We make recommendations on this in the next chapter.

⁷³ Companies Act 2006, ss 381 to 384, 444 to 444A.

⁷⁴ Companies Act 2006, s 414B.

⁷⁵ Companies Act 2006, s 415A.

⁷⁶ Companies Act 2006, s 477 to 479.

Chapter 7: Assistance and support for RTM companies

INTRODUCTION

- 7.1 If an RTM claim is successful, the RTM company will acquire significant management responsibilities in addition to the existing duties of all company directors under company law. In this chapter, we consider the assistance that is available to RTM companies and their directors, in the form of educational resources and professional managing agents.
- 7.2 We recommend that free online training covering company law and building management should be made available to RTM company directors and prospective directors, and that they should be incentivised (but not legally required) to complete such training. We also recommend that while RTM companies may wish to appoint a managing agent, they should never be under an obligation to do so.

EDUCATION OF RTM COMPANY DIRECTORS

The current position

- 7.3 In the Consultation Paper, we suggested that many prospective and current directors of RTM companies could benefit from training on their responsibilities.¹ This training could also help to protect third parties affected by the decisions of RTM company directors, such as leaseholders who are not members of the RTM company and landlords who have an interest in the reversion.
- 7.4 However, we pointed out that the availability of training resources for RTM directors is currently limited. Access to comprehensive educational resources is restricted to members of professional associations such as the Association of Residential Managing Agents (“ARMA”). By contrast, free online information about the RTM tends to be highly generalised. An exception is the guidance and interactive learning tool published by Companies House that is tailored to RTM directors.² However, as we stated in the Consultation Paper, the topics covered by this tool are not exhaustive.
- 7.5 We provisionally proposed that training should be encouraged and well publicised, but not mandatory.

Consultees’ views

- 7.6 A sizeable majority of consultees agreed that training should be encouraged, but not mandatory. Some suggested that mandatory training would have an impact on participation in the RTM. For example, one consultee agreed that a basic understanding of directors’ responsibilities was essential but would “probably put most candidates off”. The Right to Manage Federation also told us that training would

¹ CP, from para 5.112.

² <https://companieshouse.govocentral.com/content/e6356b9e-e184-469d-be97-0642d3063f0e/web>.

automatically inhibit the annual rotation of directors, leading trained directors to monopolise the board.

- 7.7 A few consultees who answered “Other” echoed this view. For example, the Residential Landlords Association said that training could discourage participation in the RTM, and that it would be difficult to create guidelines for training given that directors possess a variety of experience.
- 7.8 Many of the consultees who said that they agreed with our proposal provided qualifications in their comments. For example, several consultees suggested that training could be compulsory in some cases, and optional in others. Damian Greenish, a solicitor, saw “force in the argument” that training should be mandatory for a large or complex building with multiple uses, but that “it would be odd ... to require it for a single ‘house’ RTM”. Similarly, the Right to Manage Federation said that it was “difficult to argue against [training] if the RTM company is intending to manage itself, especially if it is a large block”. However, they were “reluctant” to support compulsory training for two-flat converted houses.
- 7.9 Several consultees who answered “Other” also thought that training should be compulsory in some cases. Some suggested that training should be mandatory if the block is over a certain size, if the RTM directors do not utilise a managing agent, or if the director does not have building management experience.
- 7.10 Some of the consultees who thought that training should not be mandatory suggested alternative safeguards. For example, Birmingham Law Society suggested that people should take appropriate advice from professionals before agreeing to a directorship. Michelle Goodrum of Sykes Anderson Perry Ltd suggested that directors could sign a statutory declaration confirming they are aware they are taking on responsibilities, and that training is available. A few consultees suggested that an information booklet would be more useful than training.
- 7.11 By contrast, consultees who thought that training should be mandatory emphasised that the decisions of RTM company directors would directly impact the lives, health and safety of residents.
- 7.12 A few consultees also argued that director training could increase the long-term success of RTM claims. The British Property Federation said that unless directors were aware of their “onerous responsibilities and duties”, there was a “grave risk that RTMs will fail in time”. Wallace Partnership Group Limited, a landlord, said that they were aware of directors resigning from RTM companies once they became aware of the responsibilities and potential personal liabilities involved. Further, Long Harbour and HomeGround, a landlord and an asset manager, said that RTM directors need to be equipped with sufficient knowledge to hold appointed managing agents to account.
- 7.13 Finally, a few consultees emphasised that training would not necessarily be onerous, as it could be run online. The Property Bar Association stated that:

If people are not prepared to give up a few hours for such basic training, they are unlikely to be the right sort of person to take on the role in the first place.

- 7.14 The Property Bar Association added that there were various ways a mandatory policy could be enforced, such as making training a requirement of eligibility to be a director under the prescribed articles (allowing members to enforce the policy themselves), or making training a condition of directors' and officers' insurance policies.
- 7.15 In our leaseholder survey, we asked consultees whether they had experienced any difficulties since acquiring the RTM. One leaseholder noted a lack of knowledge by directors about legal issues, such as issuing licences to alter. Another leaseholder noted that:
- Despite different directors being in place over time; none had an understanding of the legal liabilities. They thought they were on the board of a glorified residents' association, with no responsibility...
- 7.16 Stakeholders noted that RTM company directors currently rely on information from a range of sources to learn about their role, including the Leasehold Advisory Service ("LEASE"), Leasehold Life, the Institute of Residential Property Management, ARMA, professional managing agents, and solicitors.

Discussion and recommendation

- 7.17 Although we have given serious consideration to recommending mandatory training, we have ultimately concluded that training should be strongly encouraged but not mandatory for directors of RTM companies.
- 7.18 We think it would be highly desirable for all directors, or at least one from each RTM company, to undertake training. However, recommending mandatory director training would generate difficulties surrounding enforcement, and potentially necessitate a new regulator to police and impose penalties for non-compliance. In the Consultation Paper, we suggested that creating this type of framework would be disproportionate to the potential benefits of mandatory training.³ We remain of the view that it would be disproportionate to create a new regulatory structure to police and penalise directors who do not complete training. However, to ensure that the benefits of the new training regime can be realised, we think that directors should be incentivised to undertake it.
- 7.19 Below, we explain how directors of RTM companies can be incentivised to undertake training. We also set out the key features of our envisaged training regime. However, the details of such training would be for Government to develop alongside professionals in the industry and others with an interest in, and knowledge of, the RTM.

Who should undertake training?

- 7.20 We think that at least one director in each RTM company should be strongly encouraged to complete RTM director training. If the director who has completed training ceases to be a director, another director should be encouraged to undertake training.
- 7.21 The director who completes training will be able to share knowledge with their co-directors, and may encourage them also to undertake training. The impact of training

³ CP, para 5.123.

and a greater awareness of the RTM company's rights and responsibilities will also be felt by members of the RTM company (and in the long term, leaseholders more broadly).

A mechanism for incentivising director training

- 7.22 As we explain in Chapter 13, a leaseholder or landlord of the premises can apply to the Tribunal⁴ under Part 2 of the Landlord and Tenant Act 1987 ("the 1987 Act") to appoint a manager, or to terminate the RTM.⁵ To make such an order, the Tribunal must be satisfied that one of the "fault-based" grounds set out in section 24 of the 1987 Act is satisfied, and that it is just and convenient to make the order in the circumstances of the case.⁶ If a manager is appointed in relation to the premises, the RTM ceases to be exercisable.⁷
- 7.23 We recommend that these fault-based grounds be extended, to include the circumstance where no directors of the RTM company have undertaken the relevant training, and the Tribunal considers it just and convenient to make an order in the circumstances of the case.
- 7.24 The requirement that an order should only be made where it is considered just and convenient in the circumstances means that the Tribunal will not always appoint a manager or order the RTM should terminate when there has been a failure to undertake training. For example, the Tribunal might decide not to appoint a manager if the director had missed training due to personal circumstances, or there was only a small gap between a trained director retiring, and a new director taking over the role. Similarly, the Tribunal may decide not to appoint a manager if, despite not having completed the training, the directors are managing the premises efficiently and transparently.
- 7.25 The Tribunal would be more likely to order the appointment of a manager where the failure to complete training had contributed to a decline in management standards over the property.

Topics for training

7.26 We envisage that training will cover matters such as:

- (1) running an RTM company;⁸

⁴ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

⁵ As modified by the CLRA 2002, sch 7, para 8.

⁶ We set out the fault-based grounds in full at para 13.43.

⁷ CLRA 2002, s 105(4).

⁸ For example, appointing and removing directors; how directors make decisions; how to organise general meetings; how votes should be conducted at general meetings; accounting and finance; directors' duties and the personal liability of directors.

- (2) management responsibilities and appointing managing agents;⁹
- (3) health and safety, including the new “accountable person” regime discussed below;¹⁰
- (4) insurance;
- (5) service charges;¹¹ and
- (6) lease consents.¹²

7.27 However, the full list of topics to be addressed in training should be formulated by Government following further analysis and consultation with leaseholders and training providers.

Format of training

7.28 Training needs to be delivered in a format that is accessible and realistic for volunteer directors. We envisage that this will require training to be delivered online, and not involve ongoing continuing professional development (“CPD”) requirements. We also envisage that an online manual, which can be updated regularly, would be provided alongside training for ongoing reference.

7.29 However, the exact format and length of training is also a decision for Government following further analysis and consultation with leaseholders and training providers. We urge Government to explore how to make this training accessible for users without online access.

Benefits of director training

7.30 Although we are not recommending that training should be mandatory for the directors of RTM companies, we believe that director training has the potential to increase the success and effectiveness of RTM companies for the following reasons.

7.31 First, it is vital that the prospective directors of an RTM company understand the significant responsibility associated with being a company director and taking over management functions. This includes the possibility of personal civil or criminal liability for breaches of company law,¹³ and personal criminal liability for health and safety

⁹ Including complying with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No 246), catering for on-site caretakers, forming a multi-building RTM (such as the possible consequences of fracturing management, procedure for adding or removing buildings).

¹⁰ For more detail, see Ch 10.

¹¹ Including the trust law obligations associated with service charges.

¹² Including the prohibition on retrospective consents and consents in respect of absolute covenants.

¹³ The Companies Act 2006 imposes criminal penalties on directors where an enactment is contravened, and the director authorised, permitted, participated in or failed to take reasonable steps to prevent the contravention (Companies Act 2006, s 1121). Offences include failing to file accounts and reports (Companies Act 2006, s 451) and failing to notify the registrar of changes to the directorship of the company (Companies Act 2006, s 167).

offences.¹⁴ Without training, leaseholders may accept a directorship without fully appreciating their potential liabilities and obligations. This might lead to a decline in management standards, and even the termination of the RTM.

- 7.32 Second, training will cover matters beyond company law that are unique to the RTM and building management. This means that even directors with significant previous experience as a company director will find value in training.
- 7.33 Third, RTM company directors accept not only company law obligations towards their members, but responsibility over the health and safety of the building's occupants who may not be entitled to be members of the company.
- 7.34 Fourth, the appointment of a managing agent does not pass the legal responsibility for the RTM, nor the obligations owed under the leases, to the managing agent. All legal obligations and liability remain with the RTM company through its directors, who need to be sufficiently well informed to be able to instruct their managing agents effectively. We are recommending that the RTM should be expanded to allow multi-building RTM claims,¹⁵ and as a result, RTM directors may be accepting responsibility over increasingly complex premises.
- 7.35 As some of these arguments also apply to nominee purchaser companies or commonhold associations, Government may also wish to make the same or similar training available for directors of nominee purchaser companies or of commonhold associations.

Impact of the Regulation of Property Agents: Working Group Report

- 7.36 A final consideration that needs to be taken into account is the Regulation of Property Agents: Working Group Report ("the RoPA Report").¹⁶ The RoPA Report recommends a system of minimum entry requirements and continuing professional development for property agents. It proposes that a new regulator will set and periodically review a modular syllabus for property agent qualifications, and be equipped with a range of enforcement powers to penalise infringements.
- 7.37 Importantly, the RoPA Report contemplates that the legislation required to regulate property agents should allow for future extension to landlords and RTM companies.¹⁷ It also notes that the Law Commission is considering the circumstances in which RTM directors should be required to meet training requirements, and suggests that "if such changes come to pass, the new regulator will clearly have a role in overseeing their implementation".¹⁸

¹⁴ A company director will be guilty of a health and safety offence if it was committed with their consent or connivance, or is attributable to their neglect: Health and Safety at Work etc Act 1974, s 37(1).

¹⁵ See Ch 5 above.

¹⁶ Ministry of Housing, Communities and Local Government, *Regulation of Property Agents: Working Group Report* (July 2019), <https://www.gov.uk/government/publications/regulation-of-property-agents-working-group-report>.

¹⁷ Above, para 36.

¹⁸ Above, para 94.

7.38 As set out above, we are not recommending that a regulator should be appointed specifically to oversee the provision of training to RTM companies.¹⁹ Whilst we can see that there may be benefits of having a consistent regulatory regime which applies to anyone responsible for managing a property (including both managing agents and RMT companies), we also think that there may be justification for taking a lighter touch approach for RTM companies. In particular, it might not be appropriate to hold RTM company directors to the same standard as professional property agents who are charging for the service (although the building management obligations will be the same). In addition, there will be specific topics which concern RTM companies only and which might not be covered in training given to property managers generally (for example, company law requirements).

Recommendation 27.

7.39 We recommend that:

- (1) at least one director of each RTM company should be strongly encouraged to undertake online training; and
- (2) the fault-based grounds in Part 2 of the 1987 Act should be expanded to include circumstances where no director of the RTM company has undertaken training, and it is just and convenient to appoint a manager or terminate the RTM.

Who should provide training?

7.40 In the Consultation Paper, we provisionally proposed that Government should provide training to RTM company directors free of charge.²⁰ We suggested that this training could be delivered through an organisation such as LEASE, which is an independent government-funded body. We indicated this would be in keeping with LEASE's current functions and output as it already publishes advice guides and webinars on a range of topics relating to residential leasehold.²¹

Consultees' views

7.41 The vast majority of consultees agreed with our provisional proposal. Consultees told us that this would prevent training becoming a financial hurdle to exercising the RTM, and would incentivise RTM claims.

7.42 A few consultees agreed that LEASE would be an appropriate stakeholder to deliver training. LEASE agreed with our provisional proposal, but did not comment on whether it would be willing to deliver training. By contrast, a few consultees thought that director training should be funded through the service charges for the building.

¹⁹ See from para 7.18.

²⁰ CP, para 5.127.

²¹ <https://www.lease-advice.org/advice>.

Discussion and recommendation

7.43 We remain of the view that Government should fund training, especially given our recommendation that the Tribunal may take a failure to undertake training into account when considering applications under Part 2 of the 1987 Act. If RTM directors are required to self-fund training (as may be the case for managing agents or other professionals), this could serve as a financial barrier to some RTM company directors completing the training. We think that the decision on who provides training should be left to Government, in consultation with stakeholders.

Recommendation 28.

7.44 We recommend that Government should ensure that training resources for RTM directors and prospective RTM directors are provided free of charge.

RTM COMPANIES' USE OF PROFESSIONAL MANAGING AGENTS

The current position

7.45 RTM companies are not currently obliged to appoint managing agents. However, the majority of consultees told us that in their experience, most RTM companies do. Consultees indicated that several factors influence the decision to appoint a managing agent. These include:

- (1) the size and complexity of the premises;
- (2) the cost of appointing a managing agent; and
- (3) whether the RTM company directors have the skills or ability to self-manage the premises.

7.46 Birmingham Law Society also noted that RTM companies might not appoint a managing agent at the outset, but do so at a later stage when they realise the “intricacies” of acquiring the RTM.

Our proposals

7.47 In the Consultation Paper, we asked whether it should ever be mandatory to appoint a managing agent which meets regulatory standards to be set by the Ministry of Housing, Communities and Local Government (“MHCLG”). There are currently no regulatory standards in force applicable to managing agents, and the consultation question was therefore dependent on the outcome of the work ongoing at that time. The resulting RoPA Report sets out proposed regulatory standards for this industry. In summary, the RoPA Report recommends that:

- (1) property agents (including managing agents, estate agents and letting agents) should be regulated by a new regulator and should be licensed;
- (2) property agents should be required to adhere to a code of practice and belong to a redress scheme;

- (3) directors of regulated property agencies and licensed agents should have to meet a “fit and proper person” test;
- (4) the directors of management companies and management agents should be qualified to level four on the Ofqual scheme; and
- (5) Government should consider extending the scope of the proposed regulations to RTM companies.²²

7.48 In the Consultation Paper, we outlined four arguments in favour of mandatory managing agents.²³ First, we suggested that the property interests of landlords may be better protected if RTM companies must ensure that management is carried out to specified professional standards. Second, we pointed out that high standards of management and recourse will become more important if our recommendations regarding multi-building RTMs and the non-residential threshold are implemented. Third, we suggested that because most RTM companies already appoint managing agents, making this mandatory would not be a deterrent to the RTM. Finally, we suggested that the use of a regulated managing agent would protect against any shortfall in the knowledge of directors.

Consultees’ views

7.49 Just over half of consultees thought that it should be mandatory to appoint a regulated managing agent in some or all circumstances. However, consultees were strongly divided on the situations in which it should be mandatory. For example, Notting Hill Genesis, a housing association, thought that “ideally this would be mandatory in all circumstances”. In contrast, Stephen Mark Kirk suggested that this should be applicable “in some cases”. From paragraph 7.63 below, we consider the specific cases where consultees suggested that it should be mandatory to appoint a managing agent.

7.50 Consultees who supported the appointment of managing agents told us that managing agents were better able to protect the interests of landlords and leaseholders. For example, ARMA said that our proposal “ensures that all parties are protected by a proper professional party”, and a leaseholder, Anthony Molloy, said that it would give “reassurance to leaseholders”. Some consultees also thought that RTM companies were poorly equipped to take over management. Stephen Desmond (Desmond Training Ltd) told us that in practice, many leaseholders running an RTM company “do not comply with company law and sometimes do not manage in accordance with the lease”. Y&Y Management Ltd, a managing agent, suggested that the directors of RTM companies “usually only look after their own interest”.

7.51 By contrast, consultees who did not think it should be mandatory to appoint a regulated managing agent told us that some managing agents are less effective at property management than residents. A leaseholder, Peter Milford, said:

²² Ministry of Housing, Communities and Local Government, *Regulation of Property Agents: Working Group Final Report* (July 2019), para 36.

²³ CP, paras 5.135 to 5.140.

The repeated failure of remote external management agents that met the regulatory standards to effectively manage [our property] was central to our decision to establish an RTM in the first place.

- 7.52 Consultees also pointed out that the purpose of RTM is to give the leaseholders control over management, and that the complexity and costs of management will vary significantly between sites. As a result, some consultees thought that the RTM company should be able to determine whether to appoint a managing agent on a case-by-case basis. The Law Society suggested that each case should be decided by the majority of tenants.
- 7.53 A few consultees also suggested that using a managing agent should be encouraged, rather than be made mandatory.

Discussion

- 7.54 We are conscious that the RTM is about leaseholders taking control of the management of their building. To some, it might seem strange to suggest that leaseholders who have exercised the RTM might want to, let alone be required to, hand that control over to a professional managing agent. However, for some leaseholders, being able to choose their managing agent and, critically, to be in charge of instructing that managing agent, would improve their feeling of control and engagement. They do not necessarily want to do the day-to-day management themselves.
- 7.55 We think that the appointment of a managing agent should be a choice for leaseholders exercising the RTM, and that it should not be mandatory for an RTM company to appoint a managing agent in any particular circumstances. Below, we discuss each of the specific cases raised in the Consultation Paper.²⁴ In general, we are persuaded by four overarching arguments.
- 7.56 First, we think that it would be unfair to require that an RTM company appoints a managing agent in circumstances where the landlord (who does not necessarily have any expertise in building management) would not also be required to appoint a managing agent.
- 7.57 Second, using a professional managing agent does not guarantee a high standard of management (particularly as the RoPA Report recommendations have not yet been implemented). Consultees and respondents to our leaseholder survey shared experiences of professional managing agents failing to manage the building adequately, or charging excessive fees. Further, even if we were to mandate that an RTM company must use a managing agent in a particular circumstance, this would not guarantee that the managing agent has expertise in that type of property (such as retirement properties or listed buildings).
- 7.58 Third, as we have recommended that the directors of RTM companies should be strongly encouraged to undertake training, the standard of management by RTM companies is likely to improve. Many RTM companies may still choose to use a managing agent after receiving training. However, the additional cost of a managing

²⁴ See from para 7.63.

agent may not be justified where the members have the expertise and knowledge to manage in-house, particularly if the premises are not large or complex and the leaseholders work cooperatively.

- 7.59 Fourth, if we were to recommend mandatory appointment of managing agents, various practical difficulties would arise. For example, we would need to decide what would happen if no managing agent was willing to act, or if the RTM company instructed the managing agent to act contrary to the managing agent's own codes of conduct. We would also need to specify the minimum level of services that the managing agent would need to provide, to prevent an RTM company circumventing this requirement by paying a nominal fee while continuing to exercise most management functions.

Impact of RoPA recommendations

- 7.60 RTM companies were considered to be out of scope for the RoPA Report, partially due to the Law Commission's ongoing project.²⁵ The relevant section of the report explained that:

Some [RTM companies] will manage the properties themselves, while others will employ a managing agent in turn (who will be covered under our proposals). While some of these companies are very small bodies for whom full regulation would be disproportionate, some are substantial entities upon whom many leaseholders depend. We have raised this with the Minister of Housing and Homelessness who confirmed these companies as out of scope at this time, not least because the Law Commission, as part of its 13th Programme of Law Reform, is looking specifically at Right to Manage. Following the conclusion of this work, we expect Government will make clearer its intentions in this regard.

- 7.61 However, the RoPA Report suggests that Government should consider extending the scope of the proposed regulations to RTM companies and landlords.²⁶ If Government does decide to require all RTM companies to meet the regulatory standards proposed by the RoPA Report, there would be little merit in requiring RTM companies to appoint a licensed agent instead of allowing them to self-manage. If Government does not require RTM companies to meet the proposed regulatory standards, there will be a discrepancy between the standards of management required for premises where the RTM company employs a licensed managing agent and premises where the RTM company self-manages. This distinction could arguably be justified on the basis that managing agents are professionals who charge for their services, whereas RTM companies are more similar to landlords engaging in self-management.

- 7.62 We suggest that Government considers whether extending the RoPA recommendations to RTM companies would be too onerous, and how the requirements could be tailored to RTM companies.

²⁵ Ministry of Housing, Communities and Local Government, *Regulation of Property Agents: Working Group Final Report* (July 2019), para 35.

²⁶ Above, para 36.

Specific cases where a managing agent could be mandatory

7.63 In the Consultation Paper, we asked consultees whether it should be mandatory to appoint a managing agent in any (or all) of the following circumstances:

- (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; or
- (3) where the premises have special characteristics such as:
 - (a) being a listed building; or
 - (b) having a specialised use, such as retirement property.

7.64 We also asked consultees if they thought that there were any other circumstances where RTM companies should be required to appoint a managing agent. This question elicited a wider range of suggestions than it is possible to cover here, including:

- (1) where there are high rise buildings (over 18 metres in height);
- (2) where the RTM company is failing to comply with legal and regulatory requirements, or there is evidence of mismanagement by the RTM company; and
- (3) if the Tribunal determines that a managing agent should be appointed.

More than 25% commercial property

7.65 In the Consultation Paper, we provisionally proposed to remove the non-residential threshold altogether. However, we suggested that an RTM company should have to instruct professional managing agents if commercial property exceeded 25% of the internal floor area.²⁷

7.66 A sizeable majority of consultees agreed with this proposal. However, a few of these consultees suggested that it should be mandatory to appoint a managing agent where there was any commercial property, as the very existence of commercial property (and not merely its size) created complexity. Consultees told us that RTM companies lacked the experience to manage commercial property, because such premises required “specialised knowledge” (Anthony Harris) or “unique services” (Residential Landlords Association).

7.67 However, one leaseholder thought that the RTM company should be able to choose whether to appoint a managing agent when there are commercial premises. They noted that:

It is important to not only think of large commercial operations but also of smaller store owners who are involved in the communal life of their building, and thus happy

²⁷ CP, para 2.145.

to engage in communal management without the need for outside assistance, particularly in smaller blocks where the management requirements can be comparatively simple.

- 7.68 Our provisional proposal to make managing agents compulsory if commercial property exceeded 25% of the floorspace was linked to our related proposal to abolish the non-residential threshold. Making a managing agent compulsory in this scenario was intended to safeguard and balance the interests of leaseholders or landlords in non-residential parts, as the proposal would have made it possible for leaseholders that make up only a small proportion of floorspace to claim the RTM. However, as explained at paragraph 3.118 above, we are no longer suggesting abolition of the non-residential threshold. Instead, we are recommending that the threshold for the exemption should be raised, such that only buildings containing more than 50% non-residential premises are exempt from the RTM. Consequently, we no longer think that it is necessary to propose a safeguard by requiring the appointment of a managing agent.

Premises over a certain size

- 7.69 Just over half of consultees who responded to this question thought that it should be mandatory to use a managing agent where the building is over a certain number of units. However, consultees' responses highlight the difficulty of prescribing the size of premises that should trigger the appointment of a managing agent. Consultees variously proposed thresholds of more than two units, four units, five units, six units, eight units, 10 units, 20 units, 25 units, 30 units, 40 units or 100 units. However, consultees did not provide us with evidence or reasons for selecting these thresholds.
- 7.70 By contrast, another group of consultees told us that the size of a building was not indicative of its complexity. For example, Investment Technology Ltd t/a Canonbury Management, a managing agent, suggested that the complexity of the lease and the building were more relevant than size.
- 7.71 ARMA said that the more relevant issue was whether the building was over 18 metres high. Michael Byrne, a leaseholder, suggested that a managing agent should be mandatory, for example, where the RTM company has over 100 members.
- 7.72 We do not think that it is appropriate to mandate use of a managing agent where premises are over a certain size, especially as we have no principled reason for setting a particular threshold. Instead, we think that leaseholders should be permitted to determine whether they wish to engage the services of a managing agent, and address this issue in director training.

Buildings with special characteristics

- 7.73 The majority of consultees thought that it should be mandatory to use a managing agent where the premises include a listed building. The Charities' Property Association emphasised that listed buildings had "special characteristics", and that charity landlords needed reassurance that their property was not being devalued.
- 7.74 Further, a sizeable majority of consultees thought that it should be mandatory to use a managing agent where the premises had a specialised use, such as a retirement property. Consultees who supported the appointment of managing agents in

retirement properties told us that leaseholders may be vulnerable, and that a managing agent could ensure continuity of services.

- 7.75 Contrary to the above, several consultees expressed the view that it should not be mandatory to appoint a managing agent over a retirement property. A leaseholder, Stephen Mark Kirk, noted that some retirement homes are successfully managed by those living within the retirement community. Bramshott Place Village Residents' Association added that:

...many retirement villages do not have “regulatory activities” and are nothing more than housing estates with internally organised activities.

- 7.76 We have concluded that it should not be mandatory to appoint a managing agent in these circumstances. As we indicated at paragraph 7.57 above, appointing a generalist managing agent (rather than a managing agent with specialist expertise in retirement or listed properties) will not offer any greater protection than allowing leaseholders to self-manage the property.
- 7.77 In addition, we think that the concerns raised by consultees about the vulnerability of leaseholders in retirement properties are substantially addressed by our recommendation below that “regulated activities” in respect of retirement properties should not be permitted to be acquired by the RTM company as part of its management functions.²⁸

High rise residential buildings over 18 metres high

- 7.78 Several consultees suggested that it should be mandatory to appoint a managing agent where a residential building is more than 18 metres high, or more than a certain number of storeys. High rise residential buildings over 18 metres high fall within the MHCLG's Building Safety Programme. As a result, we assume that these consultees were concerned that RTM companies could become responsible for buildings with additional fire safety requirements or require remedial work to replace cladding.
- 7.79 As we discuss in more detail in Chapter 10, Government's policy is that, when an RTM company acquires the RTM, it will become the “accountable person” under Government's forthcoming building legislation.²⁹ The accountable person will be required to appoint a suitable “building safety manager”. While an RTM company in this type of building may still choose to appoint a managing agent to take care of other aspects of management, the accountable person will be responsible for the statutory obligations set out in the forthcoming legislation.

RTM company failing to comply with legal and regulatory requirements

- 7.80 Several consultees suggested that it should be mandatory to appoint a managing agent where the RTM company is failing to comply with legal and regulatory requirements, or there is evidence of mismanagement by the RTM company.

²⁸ See from para 10.38.

²⁹ See from para 10.19. Ministry of Housing, Communities and Local Government, *A Reformed Building Safety Regulatory System: Government Response to the 'Building A Safer Future' Consultation* (April 2020), p 21.

7.81 We do not think that these circumstances necessitate the appointment of a managing agent. In these circumstances, the proper source of redress is for the leaseholders and/or the landlord to seek a remedy under the relevant legislation or scheme. For example, if the RTM company had failed to comply with company law, the aggrieved party should pursue company law remedies. In addition, either party could make an application for the appointment of a manager under section 24 of the 1987 Act if one of the fault-based grounds were met.

Where an application is made to the Tribunal

7.82 The Berkeley Group Holdings plc, a developer and landlord, suggested that the landlord should have a right to seek an order of the Tribunal to require the RTM company to appoint a managing agent where this is necessary:

- (1) to ensure compliance with legal or statutory obligations relating to the property;
- (2) for the protection of the landlord's or third parties' interests;
- (3) for the protection of "place making" rights;
- (4) where the building contains multiple storeys or the size or complexity of the building reasonably require a professional managing agent with similar expertise; or
- (5) where the RTM company is in breach of its obligations.

7.83 Part 2 of the 1987 Act already enables landlords to apply for the appointment of a manager, or to have the RTM terminated and management functions revert to the landlord. We think that this provides an appropriate mechanism for landlords to apply to the Tribunal to have a manager appointed in certain circumstances, including where the Tribunal considers it just and convenient to do so.

Chapter 8: The acquisition process

INTRODUCTION

- 8.1 Once the RTM company has been set up, it must follow a statutory process to acquire the RTM. As part of this process, certain statutory notices must be served on the relevant parties in order to let leaseholders know of the intended RTM claim, and then to initiate the RTM claim and allow the landlord the opportunity to respond. In this chapter we detail the existing procedures, explain the problems with the existing process, and make recommendations to improve and streamline it. We also discuss the date on which the RTM is acquired if the claim is successful.
- 8.2 The recommendations below have been developed in alignment with analogous recommendations in the Enfranchisement Report. Where we consider that differences in approach between RTM and enfranchisement are appropriate, we have explained this below.
- 8.3 There will inevitably be some element of formal procedure in any system for the exercise of leaseholder rights; our aim is to reduce the complexity of the process where possible, to maximise the chance of a claim being properly made. We address the costs of the process separately, in Chapter 12, but make occasional reference to them in this chapter.

NOTIFYING LEASEHOLDERS OF A FORTHCOMING CLAIM – THE NOTICE INVITING PARTICIPATION

Current law and problems

- 8.4 Under the current law, the RTM company initiates the RTM claim by serving a “claim notice” on the landlord (and certain other parties).¹ The claim notice must be served on all landlords and qualifying tenants.² It must include certain prescribed information and must be in a prescribed form, which includes accompanying notes.³
- 8.5 As discussed in Chapter 3, the RTM company cannot initiate an RTM claim until qualifying tenants from at least half of the flats in the building have become members of the RTM company.⁴ Before serving a claim notice, it must also have given a notice inviting participation (“NIP”) to each qualifying tenant who is not already a member (or

¹ CLRA 2002, s 79. We discuss this in more detail below from para 8.27.

² CLRA 2002, ss 79(6)(a) and 79(8). It must also be served on any third party to the lease, and to any manager appointed under Part 2 of the Landlord and Tenant Act 1987 (ss 79(6)(b) and (c)).

³ CLRA 2002, s 80; The Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010 No 825), reg 4 and sch 2; The Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011 (SI 2011 No 2684), reg 4 and sch 2.

⁴ CLRA 2002, s 79(5). As discussed in Ch 3, the 2002 Act currently provides that if there are only two qualifying tenants of flats contained in the premises then both must be members of the RTM company. We have recommended the removal of this requirement; see from para 3.183.

agreed to become a member) of the RTM company.⁵ This notice informs the non-member qualifying tenants that the RTM company is claiming the RTM, and invites them to join the RTM company as members. It must do this regardless of whether it already has the requisite number of qualifying tenants to serve a claim notice.

- 8.6 The requirement to serve a NIP before being able to claim the RTM has proven to be a stumbling block in many cases. It is intended to benefit non-participating qualifying tenants, but we were told that it has become a procedural hurdle which some landlords exploit to hold up the acquisition of the RTM and to challenge the validity of claims.
- 8.7 The 2002 Act explicitly provides that a NIP is not invalidated by any inaccuracy in any of the particulars that must be included.⁶ However, the distinction between an inaccuracy and a more serious error is not always easy to draw. The case law has developed by way of examples, rather than statements of principle. The Upper Tribunal has held, applying the general position of English law regarding non-compliance with statutory requirements,⁷ that errors such as a typographical error in the address of the property will not invalidate the notice.⁸ A notice which omits relevant information entirely, however (for example, by naming the wrong landlord), would be invalid.⁹ Even if the error goes beyond an inaccuracy, it may not be fatal to the process. It is necessary to ask whether Parliament intended that the error should result in total invalidity.¹⁰ A failure to provide the prescribed notes which explain the effect of the notice is an error which results in total invalidity.¹¹
- 8.8 It is therefore unclear what the consequences will be of any particular inaccuracy, and a landlord may exploit this even though the NIP is not served for the benefit of the landlord.

Our proposals

- 8.9 In the Consultation Paper, we proposed to remove the requirement that the RTM company must serve NIPs before being able to serve an RTM claim, given the problems which NIPs have caused for leaseholders. However, we acknowledged that leaseholders not initially involved in the RTM claim must still be made aware of its existence and of their right to join the RTM company. We therefore further proposed that the prescribed notes that must accompany the claim notice, a copy of which must

⁵ CLRA 2002, s 78(1).

⁶ CLRA 2002, s 78(7). Those particulars are prescribed by ss 78(2) to (5), and the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010 No 825), reg 3 and sch 1, and the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011 (SI 2011 No 2684) reg 3 and sch 1.

⁷ *R v Soneji* [2006] 1 AC 340; *Osman v Natt* [2014] EWCA Civ 1520; *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89.

⁸ *Assethold Ltd v 15 Yonge Park RTM* [2011] UKUT 379 (LC); *Assethold Ltd v 14 Stansfield Road RTM Co Ltd* [2012] UKUT 262 (LC).

⁹ *Assethold Ltd v 13-24 Romside Place RTM Co Ltd* [2013] UKUT 603 (LC).

¹⁰ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571.

¹¹ *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC).

be given to all qualifying tenants, should include a prominent statement that qualifying tenants are entitled to become members of the RTM company at any time.

- 8.10 We also asked whether the proposed abolition of the NIP would, in the opinion of consultees, make the acquisition of the RTM quicker and/or cheaper.

Consultees' views

Abolition of the notice inviting participation and associated costs

- 8.11 Our proposal to remove the requirement that the RTM company serve NIPs received support from a majority of stakeholders representing different interests. Many who supported it agreed with our aim of streamlining the process but emphasised that the RTM company should nevertheless be encouraged to engage other leaseholders as much as possible to ensure awareness of the RTM claim and of their right to join the RTM company.

- 8.12 The Law Society gave qualified support:

only if RTM is exercised by over 50% of qualifying tenants... A notice could be required to be left at each tenant's property that is subject to the RTM... A declaration or statement of truth that this was done could be completed to which the landlord could not object.

- 8.13 Many who disagreed with the proposal emphasised the importance of other leaseholders being notified. The RTM Federation argued that although they were "aware of the issues with NIPs",

all non-participating leaseholders have a right to know what is taking place. They need to be contacted. ... In our experience the sending of NIPs usually results in more leaseholders becoming members. Many sitting on the fence get the NIP and realise the process is actually happening and this prompts them to join. They are also entitled to join at this stage without contributing to the cost, which is an added incentive.

- 8.14 Some consultees were concerned that a few leaseholders could make the claim and operate the RTM without the support or involvement of others. As one leaseholder, Professor Anthony Naldrett, put it:

a small group of leaseholders could decide to form an RTM, that would then claim the right to manage, and subsequently act in a manner that is not acceptable to the majority of leaseholders who are not fully informed about what is going on.

- 8.15 Many leaseholders who had experience of RTM said that the cumulative cost in a large block was very burdensome for the individual leaseholders initiating the claim. Michael Byrne gave the example of his RTM company spending "about a thousand pounds sending out section 78 notices when we already had 70% of the building as members". Bow Cross West Phase 5 Residents' Association gave a cost of around £2,000 for "3 blocks and 97 private flats" and a member of another RTM company said it had been £250 for a smaller block. Church & Co Chartered Accountants and the Property Bar Association both referred to the cost being "de minimis", but it is clear that leaseholders did not view it as such.

8.16 Leaseholders also agreed that there would be a correlative saving in time which would scale with the number of leaseholders in the premises. Estimates in time-saving varied considerably, and were therefore not reliable enough to draw any meaningful conclusions.

Statement in notes to claim notice as to right to participate

8.17 This proposal was very well supported. The Property Bar Association argued it is “plainly desirable in terms of inclusivity to publicise the entitlement to join in at any time”, particularly when viewed in conjunction with our proposal to abolish the NIP. A residents’ association agreed, and added that new qualifying tenants should be made aware of the RTM within a month of arrival.

8.18 Most consultees who disagreed with this proposal preferred to retain the requirement for a NIP.

Discussion and recommendations

8.19 We acknowledge the importance of ensuring that leaseholders not involved in the RTM company during the preparation of the claim should be made aware of its existence and allowed to participate. However, we do not consider that there is a sufficiently strong reason for this process to be mandatory, particularly when it has been exploited by those who wish to delay or thwart the RTM claim.

8.20 We think the concerns about ensuring awareness and participation are adequately addressed by other elements of the regime. First, the requirement for at least 50% participation by qualifying tenants in the RTM company at the time of the claim¹² will prevent a minority of leaseholders from claiming the RTM without the support of any other leaseholders in the premises. It ensures that there is an incentive to encourage others to join the RTM company, so that there are enough participating qualifying tenants to meet this requirement.

8.21 Second, additional members of the RTM company means more members to share the costs involved in making the claim, which is a further incentive.

8.22 Third, we are recommending that the prescribed notes accompanying the claim notice must refer in a prominent way to the ability of qualifying tenants to join the RTM company as members at any stage.¹³ As explained above, a copy of the claim notice must be given to all qualifying tenants. While they will only receive the information once the claim has commenced, it will ensure that they are made aware of their ability to join the RTM company immediately or at a later date, and influence how it manages the property.

8.23 Finally, removing the statutory requirement to serve NIPs does not prevent the RTM company from voluntarily sending letters to other leaseholders informing them of the proposed RTM claim and inviting them to join. Indeed, it will be in the interests of the RTM company to do so for the reasons given above.

¹² See from para 3.155.

¹³ See from para 8.41.

8.24 We do not think it is necessary to introduce any mechanism to ensure new qualifying tenants are made aware of the existence of the RTM and of their ability to join the RTM company. We would expect purchasers to be made aware of the existence of the RTM as part of the conveyancing process. Leaseholders will also be given the name and address of the RTM company when they receive a service charge demand.¹⁴

Recommendation 29.

8.25 We recommend that the requirement to serve notices inviting participation should be abolished.

Recommendation 30.

8.26 We recommend that the prescribed notes accompanying the claim notice should include a prominent statement that qualifying tenants are entitled to join the RTM company at any time.

SIGNING THE CLAIM NOTICE

Current law

8.27 A claim to acquire the RTM is made by giving a claim notice to each person who is landlord under a lease of the premises and certain other relevant third parties.¹⁵ We discuss in greater detail below the persons who must be given the claim notice. A copy of the claim notice must also be given to each person who is a qualifying tenant of a flat contained in the premises.¹⁶

8.28 Section 80 of the 2002 Act specifies various pieces of information that must be included in the claim notice.¹⁷ Secondary legislation prescribes additional content and the form in which the claim notice must be given.¹⁸

8.29 There is no explicit requirement in the 2002 Act or secondary legislation that the claim notice be signed on behalf of the RTM company. Furthermore, the Court of Appeal

¹⁴ Landlord and Tenant Act 1987, s 47, as modified by CLRA 2002, sch 7, para 12. In Ch 11, we recommend that only the RTM company's details should be included in service charge demands: see from para 11.91.

¹⁵ CLRA 2002, ss 79(1) and 79(6).

¹⁶ CLRA 2002, s 79(8).

¹⁷ CLRA 2002, ss 80(1) to (7).

¹⁸ CLRA 2002, ss 80(1), (8) and (9); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010 No 825), reg 4 and sch 2; Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011 (SI 2011 No 2864), reg 4 and sch 2.

has held that no such requirement can be inferred from the prescribed form¹⁹ and that a failure to include a signature will not invalidate the claim notice.²⁰

- 8.30 In our view, it is important that the landlord and other interested parties can be certain that the notice has been served with the authority of the RTM company. Without a signature by or on behalf of the RTM company, a landlord might justifiably raise questions about the legitimacy of the claim notice.

Our proposals

- 8.31 We asked consultees whether there should be a requirement that the claim notice be signed by or on behalf of the RTM company. We also asked whether, if a signature is to be required, it should be that of either an officer of the RTM company or of a person otherwise authorised by an officer of the RTM company to sign the claim notice.

Consultees' views

Should there be a requirement for a signature?

- 8.32 A large majority of consultees agreed that there should be a requirement for the claim notice to be signed by the RTM company to ensure that (as one residents' association put it) "the claim has been authorised by the RTM Company." The Cadogan Group, a landlord, agreed, arguing "it is not a difficult, expensive or time-consuming requirement."

- 8.33 In opposition to the proposal, the Leasehold Advisory Service ("LEASE") said:

we do not consider that a signature should be obligatory as this would reduce the scope for arguments by the landlord as to the validity of the signature and by extension the validity of the notice.

- 8.34 A significant number of consultees, particularly law firms and conveyancers, wanted us to clarify that an electronic signature would suffice.

Who should sign the claim notice?

- 8.35 Many consultees indicated that a signature of either a single officer of the RTM company or a person authorised by an officer to sign the claim notice on behalf of the RTM company should be acceptable. The "authorised person" option was said to be convenient in cases where a lawyer or conveyancer is working with the RTM company to submit the claim.

Discussion and recommendations

- 8.36 We continue to believe that there should be an express requirement for the claim notice to be signed by or on behalf of the RTM company. It provides evidence that the notice is served with the requisite authority, of which landlords might otherwise seek evidence. We think that either a single officer of the RTM company or a person

¹⁹ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 at [44].

²⁰ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 at [68].

authorised by such an officer should be able to sign the claim notice on behalf of the RTM company.

- 8.37 We understand the concern expressed by LEASE, that the requirement for a signature has the potential to become a procedural hurdle or a source of challenge by landlords. However, our view is that the requirement is simple enough not to present a challenge for RTM companies or their advisors. To further assuage this concern, we think the requirement, together with an indication of who can sign, should be clearly emphasised in the prescribed form.
- 8.38 In August 2019, the Law Commission published a Report on the Electronic Execution of Documents, which contained a statement of the law on electronic signatures.²¹ The Report set out our view that an electronic signature is capable in law of being used to execute a document provided that:
- (1) the person signing the document intends to authenticate the document; and
 - (2) any formalities relating to execution of that document are satisfied.
- 8.39 An electronic signature is capable of satisfying a statutory requirement for a signature unless the relevant enactment specifies or suggests otherwise.²² We therefore reiterate our view that a claim notice could be signed with an electronic signature.
- 8.40 In the Enfranchisement Report, we are recommending that the requirement for signatures be retained in the analogous scenarios in the enfranchisement process.²³

Recommendation 31.

- 8.41 We recommend that:
- (1) there should be an explicit requirement that a claim notice be signed by or on behalf of the RTM company. The signature could be applied either by hand or electronically;
 - (2) the signature should be that of either a single officer of the RTM company or of a person authorised by such an officer to sign on behalf of the RTM company; and
 - (3) the requirement should be clearly emphasised in the prescribed form.

²¹ Electronic Execution of Documents (2019) Law Commission Report No 386, pp 2 to 3.

²² *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67.

²³ See Enfranchisement Report, paras 8.139 to 8.141, and 8.145.

THE CLAIM NOTICE – WHO NEEDS TO BE SERVED?

Current law and problems

- 8.42 The claim notice must be given to each person who is, on the date the claim is served:²⁴
- (1) a landlord under a lease of the whole or any part of the premises;
 - (2) a party to the lease other than as a landlord or leaseholder; or
 - (3) a manager appointed under Part 2 of the Landlord and Tenant Act 1987 (the “1987 Act”).
- 8.43 If a claim notice must be given to a manager appointed under Part 2 of the 1987 Act, a copy of that notice must also be given to the Tribunal or court by which the manager was appointed.²⁵
- 8.44 A claim notice does not have to be given to someone who cannot be found, but if no one can be found then the missing landlord procedure must be used.²⁶ A copy of the claim notice must also be given to each qualifying tenant of a flat contained within the premises.²⁷
- 8.45 The 2002 Act defines a “landlord” as including a landlord under a sub-lease.²⁸ In *Elim Court*,²⁹ the Court of Appeal considered whether a claim notice needed to be served on an intermediate landlord in circumstances where the landlord did not have management functions under the lease and did not reside in the premises. The RTM company did not appeal against the Upper Tribunal’s decision that a claim notice needed to be served on the intermediate landlord but argued that the failure to meet that requirement did not invalidate the claim. The Court of Appeal agreed with this position, holding that the intermediate landlord did not have management functions under the lease and so was not one of the primary persons affected by the acquisition of the RTM.³⁰ Failure to serve a claim notice on the intermediate landlord did not therefore invalidate the claim.
- 8.46 The requirement to serve a claim notice on every freeholder and landlord under sub-leases of the premises is overly burdensome for RTM companies. It potentially means having to serve claim notices on all intermediate landlords and landlords under short

²⁴ CLRA 2002, s 79(6).

²⁵ CLRA 2002, s 79(9). “Tribunal” means the First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

²⁶ CLRA 2002, s 79(7). Discussed below from para 8.51.

²⁷ CLRA 2002, s 79(8).

²⁸ CLRA 2002, ss 112(2) and (3).

²⁹ [2017] EWCA Civ 89.

³⁰ In Ch 10 we explain that the RTM company only acquires management functions insofar as they are contained in the leases of whole or part of the premises; CLRA 2002, s 96.

leases (that is, those which are not long leases of the kind defined in section 76 of the 2002 Act).

Discussion and recommendations

- 8.47 We did not ask a consultation question on this point. However, in the course of formulating other recommendations in this chapter and equivalent aspects of the Enfranchisement Report, it has become clear that this requires consideration.
- 8.48 We consider that the RTM company should only be required to serve the claim notice on the freeholder. The responsibility to notify intermediate landlords (that is, landlords under leases interposed between the freeholder and the ultimate leaseholders who are qualifying tenants) of the RTM claim should then rest with the freeholder. We adopt the same position in this regard with respect to the analogous requirements for service in the Enfranchisement Report.³¹
- 8.49 In Chapter 4, we recommend allowing the acquisition of the RTM where the freehold is held by more than one legal person.³² In that context, we consider that the RTM company should have to serve all freeholders of which it could reasonably have known (for example, by conducting a search at HM Land Registry).

Recommendation 32.

- 8.50 We recommend that in order to fulfil the requirement to serve landlords with the claim notice, the RTM company should only be required to serve the freeholder (or freeholders, if more than one), as opposed to any interposed landlords in a chain of leases.

Procedure if the landlord cannot be found

- 8.51 Where the RTM company is unable to find or ascertain the identity of the landlord or other relevant third party who would be entitled to receive a claim notice, the 2002 Act sets out a different claim procedure.³³ In those circumstances, the RTM company may apply to the Tribunal for an order that it is entitled to acquire the RTM.³⁴ We call this the “missing landlord procedure”.
- 8.52 The Tribunal will only make such an order if it is satisfied that notice of the application has been given to each qualifying tenant in the premises.³⁵ Before making an order, the Tribunal may require the RTM company to take certain steps by way of

³¹ Enfranchisement Report, paras 8.156 to 8.160.

³² See para 4.71.

³³ CLRA 2002, s 79(7) and s 85.

³⁴ CLRA 2002, s 85(2).

³⁵ CLRA 2002, s 85(3).

advertisement or other steps for the purpose of tracing persons who are landlords or managers under a lease of the premises.³⁶

8.53 If the missing party is found then:

- (1) the application comes to an end;³⁷ and
- (2) the RTM company is treated as having a given the claim notice to the relevant person on the date of the application to the Tribunal.³⁸

8.54 Otherwise, the Tribunal may order that the RTM company is entitled to acquire the RTM on such date as is specified in the order.³⁹

SERVICE OF NOTICES

Current law

8.55 The 2002 Act specifies that notices served as part of the RTM process must be in writing.⁴⁰ A notice may be sent by post,⁴¹ but other methods such as delivery by hand are not excluded. Service by post is deemed to be effected by addressing, pre-paying and posting a letter,⁴² and is presumed to have been given at the time it would be delivered in the ordinary course of post unless the contrary is proven.⁴³

8.56 The 2002 Act also specifies addresses at which the RTM company “may” serve notices on a landlord. A notice may be given to a landlord at either:

- (1) the last address provided to a member of the RTM company by the landlord for the service of notices as required by section 48 of the 1987 Act,⁴⁴ or

³⁶ CLRA 2002, s 85(4).

³⁷ CLRA 2002, s 85(5). The person must have been found after the application was made but before the making of the order.

³⁸ CLRA 2002, s 85(6)(a).

³⁹ CLRA 2002, s 90(6).

⁴⁰ CLRA 2002, s 111(1)(a).

⁴¹ CLRA 2002, s 111(1)(b).

⁴² Interpretation Act 1978, s 7. This presumption may be displaced if the relevant statute displays the contrary intention. However, in *Moskovitz and others v 75 Worples Road RTM Co Ltd* [2011] 1 EGLR 95, the Upper Tribunal proceeded on the basis that Interpretation Act 1978, s 7 does apply.

⁴³ Interpretation Act 1978, s 7. The burden of proof is on the intended recipient to prove that a notice sent by post was not in fact delivered to them within that time (either by showing that it was delivered later or, in practice, by showing that it has not been delivered at all): *Calledine-Smith v Saveorder Ltd* [2011] 3 EGLR 55. See also *Services Charges and Management* (4th edition), Tanfield Chambers, para 26-21.

⁴⁴ CLRA 2002, s 111(3)(a).

- (2) if such an address has not been given, the last address given to a member of the RTM company in a written demand for sums payable under the lease in accordance with section 47 of the 1987 Act.⁴⁵
- 8.57 The exception to this is that a notice may not be given to one of those addresses if the landlord has specified that such a notice must be given at a different address in England or Wales.⁴⁶
- 8.58 For notices which have to be served on a qualifying tenant, the 2002 Act provides that the RTM company may serve the notice at the relevant flat, unless the leaseholder has notified the RTM company of a different address in England and Wales.⁴⁷
- 8.59 The provisions do not say explicitly that service to one of the addresses specified in the 2002 Act will constitute “deemed service”. However, they have been held to have this effect in the context of service on a leaseholder,⁴⁸ and could be assumed to have this effect for service on a landlord.⁴⁹ Under a deemed service regime, service is deemed to have taken place if the notice has been served on the correct party at one of the specified addresses for that party. The RTM company would not therefore have to prove that the notice has actually been received, and it is not open to the intended recipient to claim, or seek to prove, that they did not in fact receive the notice.
- 8.60 However, the provisions are again permissive in nature – they specify addresses at which a notice “may” be given if the RTM company wishes to avoid having to prove actual receipt of the notice.⁵⁰ They are not intended to exclude other methods of service; a notice may be validly given to a landlord or leaseholder at a different address but it may then fall to the RTM company to prove that the notice was in fact received.

Overview of our recommendations concerning service of notices

- 8.61 Below, we make several recommendations which change the way notices are served and the circumstances in which a notice will be deemed to have been received. In brief, these are:
- (1) Service by email: We recommend that service of notices by email should be capable of constituting valid service. These recommendations apply to any notice served as part of the RTM claim process.

⁴⁵ CLRA 2002, s 111(3)(b).

⁴⁶ CLRA 2002, s 111(3)(b).

⁴⁷ CLRA 2002, s 111(5).

⁴⁸ *Avon Freeholds Ltd v Regent Court RTM Co Ltd* [2013] UKUT 0213 (LC), [2013] Landlord and Tenant Reports 23.

⁴⁹ See a general discussion of the effect of provisions which set out an optional method of service: *UKI (Kingsway) Ltd v Westminster City Council* [2019] 1 WLR 104 at [15] and [16]. See *UKI (Kingsway) Ltd v Westminster City Council* [2019] 1 WLR 104 at [15] and [16] on the effect of such provisions more generally.

⁵⁰ *Gateway Property Holdings Ltd v Ross Wharf RTM Company Ltd* [2016] UKUT 97 (LC) at [21].

- (2) Deemed service of claim notices: We recommend changes to the deemed service regime for claim notices to include more addresses, including some specified email addresses.
- (3) Required checks for claim notice: We recommend some additional checks which the RTM company should carry out before it seeks to rely on the deemed service regime or seeks to follow the missing landlord procedure.

8.62 We discuss each of these recommendations in more detail below.

SERVICE BY EMAIL

Current law and problems

8.63 The RTM company is required to give the claim notice to all landlords under a lease of the whole or part of the premises, and other specified parties.⁵¹ It is currently unclear whether an RTM company could give the claim notice, or other notices which form part of the RTM procedure, to those persons by sending it to them by email.

8.64 First, it is not entirely beyond doubt that sending the claim notice in electronic form by email would satisfy the requirement in the 2002 Act for the notice to be “in writing”. The Interpretation Act 1978 provides that, unless the contrary intention appears, “writing” will include any “modes representing or reproducing words in a visible form”.⁵² It is reasonably clear that an electronic document sent by email would generally meet this requirement.⁵³

8.65 We note however that in relation to a similar requirement in the 1993 Act, the county court held that a hard copy had to be given.⁵⁴ While that decision has been doubted,⁵⁵ there is no direct authority affirming that notices may be given by email under the 2002 Act. In relation to the 2002 Act, the Upper Tribunal has held that a copy of a claim notice may be sent to a qualifying tenant by email in accordance with section 79(8) of the 2002 Act. However, the Upper Tribunal did not consider whether notices (as opposed to copies of notices) could be served in that way.⁵⁶

8.66 Second, the burden of proof will be on the RTM company to prove that the landlord actually received the email containing the claim notice. If the RTM company instead delivers the claim notice to the addresses specified in section 111(3) of the 2002 Act, it will be for the landlord to prove that the claim notice was not received.⁵⁷ Service by

⁵¹ CLRA 2002, s 79(6) and (9).

⁵² Interpretation Act 1978, sch 1.

⁵³ Electronic Execution of Documents (2019) Law Commission Report No 386, paras 2.15 to 2.17.

⁵⁴ *Cowthorpe Road 1-1A Freehold Ltd v Wahedally* (16 February 2016) Central London County Court (unreported) at [52].

⁵⁵ In our Report on Electronic Execution of Documents, we noted that this decision was “unfortunate” because the relevant provision about service by post was permissive rather than mandatory: Electronic Execution of Documents (2019) Law Commission Report No 386, para 3.68.

⁵⁶ *Assethold Ltd v 110 Boulevard RTM Co Ltd* [2017] UKUT 316 (LC) at [13].

⁵⁷ Interpretation At 1978, s 7.

email is therefore a riskier option for the RTM company even though it might be a cheaper and quicker method of giving the notice to the landlord.

Our proposals

- 8.67 We provisionally proposed that the specified addresses for service on landlords and qualifying tenants should include certain specified email addresses.
- 8.68 In particular, we provisionally proposed that an RTM company may give a notice to a landlord by email at the following email addresses:
- (1) an email address the landlord has specified for the service of RTM notices;
 - (2) an email address the landlord has specified for the purposes of serving notices generally; or
 - (3) an email address held by HM Land Registry as an address at which the registered proprietor can be served with notices.
- 8.69 We also provisionally proposed that the law be clarified to confirm that an RTM company is entitled to serve a copy of a claim notice on a qualifying tenant at an email address they have confirmed as an email address for the service of notices under the RTM provisions.

Consultees' views

Service by email to landlords

- 8.70 This proposal was supported by a significant majority of consultees. For example, the Residential Landlords Association thought that:

the proposal would modernise the process and make the process more efficient for all parties. We can not see any grounds for rejection.

- 8.71 A smaller number of consultees expressed qualified support, while outlining some particular concerns. An individual, Helen Gibbons, agreed with the proposal but added that the “challenge is in getting that contact information if [the] landlord is not willing to provide” it.

- 8.72 Some consultees expressed concern about outdated addresses at HM Land Registry. For example, the Property Litigation Association Law Reform Committee said:

Our concern is that addresses stated at the Land Registry often become outdated, in which case notices served at those addresses may not be received, which could result in litigation and uncertainty.

- 8.73 Birmingham Law Society suggested that the option to use an email address listed at HM Land Registry should only be available “as a last resort when no other method is available.” Mark Chick, a solicitor, thought that service at an email address held by HM Land Registry was “a step too far” given our proposals to introduce deemed service, and the fact that the management functions are acquired automatically if no counter-notice is received.

- 8.74 Peel Common Residents Association Limited said they “would prefer at some stage the words ‘landlord or his legal representative’”. In other words, they were of the view that the RTM company should be able to serve the landlord’s lawyers or agents.
- 8.75 Damian Greenish, the Cadogan Group and erkeley Group Holdings plc, a developer, doubted the validity and practicalities of email service generally.⁵⁸

Service by email to qualifying tenants

- 8.76 Most consultees supported these proposals. Consultees who agreed with this proposal noted that the use of email is commonplace. For example, Investment Technology Ltd t/a Canonbury Management, a managing agent, said it was:

Long overdue to give the option of electronic service. We have had [no] issue with using email for this purpose anyway and the Tribunals have upheld email service.

- 8.77 Millstream Management Services, a specialised managing agent, answered “Other”. They were concerned about confining notices only to email, particularly in the context where leaseholders are in retirement living and there may be a significant generational technology gap.
- 8.78 Those who disagreed with the proposal were not comfortable with perceived uncertainties of email service. They were concerned about the use of email service more generally, rather than the use of email for serving copies of the notices on qualifying tenants. For example, Residential Management Group Limited, a managing agent, responded “not until electronic service of documents is ubiquitous.”

Discussion and recommendations

Service of notices by email generally

- 8.79 We think that permitting notices to be served by email will make the process of serving notices easier, cheaper and more efficient. We therefore recommend that the RTM legislation should put beyond doubt that notices may be served by email and so remove the risk of a more restrictive approach being taken by the Tribunal. We think that, for consistency, this recommendation should apply to any notice given under the 2002 Act. This is in line with the general move towards acceptance that email service constitutes “writing” under statutory requirements.
- 8.80 We think that this should apply generally, and not only to specified email addresses. However, unless the RTM company serves on one of the specified addresses set out in the “deemed service” recommendations below, they would not benefit from the deemed service regime.
- 8.81 It is important to note that our recommendations do not have the effect of *requiring* service by email, to the exclusion of service by post or by hand. Rather, they are intended to provide the RTM company with the option of sending a notice by email to an intended recipient in appropriate circumstances.

⁵⁸ Email service is in fact an acceptable form of service, albeit with some caveats – see for recent Supreme Court discussion *Barton v Wright Hassall LLP* [2018] UKSC 12.

Service to qualifying tenants by email

- 8.82 In line with our provisional proposal, we recommend that an RTM company may serve a notice on a qualifying tenant at an email address that the qualifying tenant has confirmed may be used for the service of notices under the RTM provisions. Given that we recommend the abolition of the NIP, this recommendation is likely only to be relevant to the copy of the claim notice which must be given to each qualifying tenant.
- 8.83 Some consultees were concerned that certain qualifying tenants may not use email and so may not receive a copy of the claim notice. However, as we have emphasised above, our recommendations do not have the effect of requiring the use of email, to the exclusion of service by post or by hand. Rather, they are intended to provide the RTM company with the option of sending a notice by email to a qualifying tenant who has provided a suitable email address.

Recommendation 33.

- 8.84 We recommend that notices under the RTM legislation should be capable of being given by email.

Recommendation 34.

- 8.85 We recommend that an RTM company may give a notice or a copy of a notice to a qualifying tenant at an email address which the qualifying tenant has notified to the RTM company in writing as an email address for the service of notices under the RTM legislation.

DEEMED SERVICE OF CLAIM NOTICES

Current law and problems

- 8.86 As explained above, the 2002 Act currently provides that the RTM company may give a notice to the landlord, including a claim notice, at certain specified addresses.⁵⁹ If the RTM company gives a notice to the landlord at one of those addresses, then service will be deemed to have been effected, and it will not be necessary for the RTM company to prove in any subsequent dispute that the landlord in fact received the notice. Put another way, once an RTM company has served a notice at one of the addresses specified by the 2002 Act, it is irrelevant whether the intended recipient actually receives the notice. Provisions such as these are designed to “protect the server from the risk of non-delivery”.⁶⁰ The existing provisions, however, have some shortcomings. They only specify two categories of address, which do not include email

⁵⁹ CLRA 2002, s 111(3).

⁶⁰ *UKI (Kingsway) Ltd v Westminster City Council* [2019] 1 WLR 104, [2018] UKSC 67 at [16] per Lord Carnwath, endorsing the reasoning of Slade LJ in *Galinski v McHugh* (1988) 57 P&CR 359.

addresses. The addresses which are specified in the 2002 Act must have been provided by the landlord to either the RTM company,⁶¹ or to a qualifying tenant who is a member of the RTM company.⁶² If the RTM company does not have such an address, it may later bear the onus of proving that the landlord did in fact receive the notice.

Our proposals

8.87 In the Consultation Paper, we proposed to expand and clarify the addresses included in the “deemed service” mechanism for claim notices.⁶³ The claim notice would be treated as having been served regardless of whether the landlord actually received it, provided the notice is delivered by hand, or sent by post or email to certain physical or email addresses.

8.88 Following the approach put forward in the Enfranchisement Consultation Paper,⁶⁴ we provisionally proposed that there should be two groups of designated addresses, Group A and Group B:

Proposed “Group A” addresses: a high probability that the notice will be received by the landlord or other relevant person	Proposed “Group B” addresses: a reasonable likelihood (less than for those in Group A) that the notice will be received
<ul style="list-style-type: none"> • any address (including an email address) that has been provided by the landlord to the RTM company or a leaseholder member of the RTM company as an address at which a notice may be served under the RTM legislation; and • the landlord’s current address.⁶⁵ 	<ul style="list-style-type: none"> • the landlord’s last known address; • the latest address given by the landlord for the purposes of section 47 of the 1987 Act; • the latest address given by the landlord for the purposes of section 48 of the 1987 Act; and • the latest email address given by the landlord for the purposes of serving notices (including notices in proceedings).

8.89 We proposed that service at a Group A address would be deemed to have been effected. We said that for service to a Group B address to be deemed effective, the claim notice would also have to be served at the address of the registered proprietor

⁶¹ CLRA 2002, s 111(4).

⁶² CLRA 2002, s 111(3).

⁶³ CP, from para 6.119.

⁶⁴ Enfranchisement CP, paras 11.69 to 11.70.

⁶⁵ If the landlord or other related third party is a company, this will be its registered company address.

of the property as held by HM Land Registry.⁶⁶ This was intended to provide an additional safeguard against the risk of the notice not in fact being received by the landlord.

- 8.90 We said it would still be open to the RTM company to serve notices on the landlord at another address. In such cases, however, the RTM company would run the risk of the landlord denying receipt of the claim notice in the future, and the RTM company would bear the onus of proving that service had been effected.

Consultees' views

- 8.91 This proposal received strong support from a wide variety of consultees. Professor James Driscoll thought the proposal would “simplify claims”. Those who answered “other” did so mostly because they objected to one or more of the proposed service addresses, but supported the substance of the proposal. The RTM Federation did not see the need for the distinction between Group A and B addresses. Investment Technology t/a Canonbury Management suggested that the landlord’s current address category in Group A should be defined and proposed that this should mean the current HM Land Registry service address.
- 8.92 The few consultees who disagreed did so on the basis that they were not convinced by email as a method of service. Shula Rich (Brighton Hove and District Leaseholders Association and FPRA) thought that our proposals would make RTM “more difficult”.

Discussion and recommendations

- 8.93 We remain of the view that the current deemed service provisions could be improved, to clarify the law and broaden the categories of addresses covered by them.
- 8.94 We therefore recommend that an RTM claim notice should be deemed to have been validly served if it is delivered by hand or sent by post or email to a designated address, even if the landlord does not receive or respond to that notice. We have, however, reviewed the way in which we proposed to achieve these objectives, and made some modifications to our recommended procedure. We explain this in more detail in the Enfranchisement Report, where we make the same recommendations.⁶⁷ We think that our new procedure provides a better balance between procedural efficiency and flexibility on the one hand, and the likelihood that the notice is actually received on the other. In particular, the alterations we have made to the proposed categories of Group A and Group B addresses are intended to better reflect the reliability of those addresses for service.
- 8.95 The table below sets out the addresses which fall into Group A and Group B under our revised scheme. Wherever possible, a Group A address for service must be used. If an RTM company serves a notice to a Group B address, we recommend that it must also serve the notice at the address(es) given for the registered proprietor of the property at HM Land Registry. We note that companies and limited liability

⁶⁶ CP, para 6.123. Note that we did not ask a specific question about the additional requirement to serve the notice at the address held at HM Land Registry in the case of Group B addresses.

⁶⁷ See Enfranchisement Report, from para 8.206.

partnerships which are registered at Companies House will have a registered office, and therefore will always have a “current address” for the purposes of Group A.

8.96 We do not recommend, however, that claim notices should be deemed to have been served if it is sent only to an address for service shown on the landlord’s title at HM Land Registry. Although some consultees proposed this option, this address may not be reliable in all cases, as discussed in more detail in the Enfranchisement Report.⁶⁸

	Group A	Group B
Addresses for “deemed service”	<ul style="list-style-type: none"> • The landlord’s current address. • The latest address (including an email address) that has been provided by the landlord: <ul style="list-style-type: none"> • to either a leaseholder member of the RTM company or an officer of the RTM company as an address at which an RTM notice can be served; • for the purposes of sections 47 or 48 of the Landlord and Tenant Act 1987; or • for the purposes of serving notices generally (for example, notices in proceedings). <p>But in each of the above cases, only where the address has been provided within the 12 preceding the service of the claim notice.</p>	<ul style="list-style-type: none"> • The landlord’s last known address. • The latest address (including an email address) that has been provided by the landlord to either a leaseholder member of the RTM company or an officer of the RTM company: <ul style="list-style-type: none"> • as an address at which an RTM notice can be served; • pursuant to sections 47 or 48 of the Landlord and Tenant Act 1987; or • for the purposes of serving correspondence or notices generally (for example, notices in proceedings). <p>But in each of the above cases, where the address has been provided more than 12 months preceding the service of the notice.</p>
Additional steps required for deemed service	None	Where the landlord’s property is registered, the claim notice must also be served on each of the addresses given for the landlord as registered proprietor at HM Land Registry.

Service at other addresses

8.97 It is important to emphasise that our recommendations are not intended to exclude service at other addresses or by other means. If the validity of service is disputed, but the RTM company can demonstrate that the landlord or other relevant person did in

⁶⁸ Enfranchisement Report, paras 8.222 and 8.234.

fact receive the notice, then the requirement to serve notice on that person will be satisfied. Our recommendations on deemed service are intended to provide RTM companies with some certainty, particularly where they fear that the landlord may not reply or may claim not to have received the claim notice in order to delay the RTM claim. In most cases, however, we would expect that the RTM company or its leaseholder members will have an established correspondence address for the landlord and that the landlord will respond.

- 8.98 We should also make clear that where a landlord has served a counter-notice, they will not be able to defeat the claim on the basis that the claim notice was not served in accordance with a valid service route. The service of the counter-notice cures any defect in service of the claim notice.
- 8.99 An RTM company may therefore decide to serve a claim notice on their landlord otherwise than as prescribed by our new procedural regime, in the hope that the landlord will serve a counter-notice and the claim will be able to proceed. However, any such decision by an RTM company runs the risk that the landlord will not serve a counter-notice, and the RTM company may be left to prove that the claim notice was in fact served and received.

Application to notices other than the claim notice

- 8.100 In the Consultation Paper, we said that we envisaged the deemed service provisions applying to any notice which is given to the landlord as part of the RTM regime, including under our proposed information notice procedure.⁶⁹ We note that the existing provisions on service contained in the 2002 Act apply to all notices served on the landlord. However, we do not make formal recommendations in this regard, as the suitability of the deemed service provisions may depend on the enforcement mechanisms relating to information notices.
- 8.101 Similarly, we envisaged that these provisions would apply to notices served on a manager appointed under Part 2 of the 1987 Act.

⁶⁹ CP, para 6.124.

Recommendation 35.

8.102 We recommend that:

- (1) Claim notices sent by post, delivered by hand or sent by email (as applicable) to the landlord at the prescribed categories of address should be deemed to have been served.
- (2) The prescribed categories of address should be divided into two groups, Group A and Group B. A leaseholder can only send or deliver the claim notices to addresses falling within Group B if an address within Group A cannot be identified.
- (3) Group A addresses should consist of:
 - (a) the landlord's current address; and
 - (b) the latest address (including an email address) that has been provided by the landlord:
 - (i) to either a leaseholder member of the RTM company or an officer of the RTM company as an address at which an RTM notice can be served; or
 - (ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or
 - (iii) for the purposes of serving notices generally (including notices in proceedings),but, in each case, only where the address has been provided within the 12 months preceding the service of the claim notice.
- (4) Group B addresses should consist of:
 - (a) the landlord's last known address; and
 - (b) the latest address (including an email address) that has been provided by the landlord:
 - (i) to either a leaseholder member of the RTM company or an officer of the RTM company as an address at which an RTM notice can be served; or
 - (ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or
 - (iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, where the address has been provided more than 12 months preceding the service of the claim notice.

- (5) Where a claim notice is served on a Group B address, the RTM company must also (in the case of registered land) serve the claim notice on each of the addresses given for the landlord as registered proprietor at HM Land Registry.
- (6) A landlord who has served a counter-notice should not be permitted to argue that the claim notice was not properly served.

STARTING A CLAIM: PRE-SERVICE CHECKS

8.103 As set out above, the RTM company must serve the claim notice on the landlord and certain other persons.⁷⁰ It is in the RTM company's interests to identify and serve the claim notice on those persons, because if it fails to do so there is a risk that the claim may be found to be invalid.⁷¹ Both the current law on service of notices and our recommendations concerning deemed service depend on the RTM company serving the notice on the correct landlord.

8.104 Where an RTM company wishes to claim the RTM but is unable to find or ascertain the identity of the landlord or other relevant third party who would be entitled to receive a claim notice, it must apply to the Tribunal under the missing landlord procedure discussed above.⁷² Before making such an order, the Tribunal will need to be satisfied that it was not possible for the RTM company to identify a landlord for service of a claim notice.

8.105 In the Consultation Paper, we said that before embarking on the relevant claim procedure, the RTM company should carry out certain checks to lessen the risk of:

- (1) serving the wrong person or serving the correct person but at an incorrect address; or
- (2) applying to the Tribunal under the missing landlord procedure without taking all reasonable steps to locate the landlord.

8.106 In the Consultation Paper, we called these checks the "pre-service checks". However, this language is somewhat misleading for a number of reasons, including the following:

⁷⁰ CLRA 2002, s 79(6). See above from para 8.42.

⁷¹ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89.

⁷² CLRA 2002, s 79(7) and s 85. See above from para 8.51.

- (1) We have concluded that the Tribunal could still make a declaration that the RTM company is entitled to acquire the RTM even if the checks were not carried out before service of the claim notice.⁷³
- (2) We anticipate that the checks will be undertaken in situations where the missing landlord procedure is followed, in which case there is no “service”.

8.107 Nevertheless, in the text below, we continue to refer to “pre-service checks” to retain continuity with the Consultation Paper. However, we also use the more general term “specified checks”.

Our proposals

8.108 In the Consultation Paper, following proposals in the Enfranchisement Consultation Paper, we proposed that the RTM company should be required to carry out the following checks before being able to serve a claim notice which would benefit from the deemed service regime.

- (1) The RTM company should be required to search HM Land Registry to identify the registered owner (where relevant) of the premises over which the RTM is claimed.
- (2) In the case of service at a Group B address, the RTM company should be required to carry out the following additional checks:
 - (a) in the case of an individual landlord:
 - (i) a search of the probate records to check whether a grant of probate has been issued to anyone in respect of the landlord; and
 - (ii) a search of the Insolvency Register to check whether the known landlord has in fact become insolvent; and
 - (b) in the case of a company landlord, a search at Companies House to confirm the status of the company.

8.109 Finally, we proposed that the RTM company should be required to include a statement of truth in the claim notice to confirm that the specified checks had been carried out.

8.110 We did not intend that the pre-service checks would have the effect of curing a failure to serve the correct landlord. So, for example, if P is the landlord on 1 January, but has a trustee in bankruptcy, T, appointed on 2 January, the property transfers automatically to T on 2 January. If the claim notice is served on P after the appointment of T, then service will be ineffective.⁷⁴

⁷³ This would be relevant where the RTM company serves the claim notice on the landlord who does not serve a counter-notice, and the RTM company makes a (voluntary) application to the Tribunal for a determination that it was entitled to acquire the RTM.

⁷⁴ This example highlights the benefits of applying to the Tribunal for a declaration that the RTM has been acquired if the landlord does not serve a counter-notice. If the RTM company in fact served the wrong

Our proposals: missing landlord procedure

8.111 Before making an order under the missing landlord procedure,⁷⁵ the Tribunal may require the RTM company to take certain steps by way of advertisement or other steps for the purpose of tracing persons who are landlords or thirds party managers under a lease of the premises.⁷⁶

8.112 We were told that it may not be clear to the RTM company in advance of making the application what steps the Tribunal will require it to undertake to try to locate the landlord or other relevant persons. This may lead to delays and costs which could be avoided if the RTM company carried out the checks before applying to the Tribunal. Indeed, the RTM company might trace the landlord and avoid the need to make an application using the missing landlord procedure at all.

8.113 We provisionally proposed that before making an application under the missing landlord procedure the RTM company should be required to:

- (1) if the landlord's identity is known, conduct the pre-service checks which we proposed should be required before serving a claim notice on a Group B address (see paragraph 8.129(2) above);
- (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.

8.114 The proposed checks reflect the practical steps that the Tribunal would generally require an RTM company to take.

The purpose of the checks

8.115 The checks were intended to perform a range of functions:

- (1) To assist the RTM company in identifying the landlord and an address at which that landlord would be deemed served.
- (2) To reduce the risk that landlords would not in fact receive the claim notice.
- (3) To assist the RTM company to identify cases in which a landlord's interest has passed to another, and provide for deemed service at an alternative address in such cases as follows:

landlord, and received no counter-notice, the members of the RTM company might think they have acquired the RTM on the date set out in the claim notice. However, this could be challenged at any subsequent point on the basis that the RTM company did not serve a valid claim notice in the first place. See our discussion and recommendations from para 8.212 below.

⁷⁵ See from para 8.51 for details.

⁷⁶ CLRA 2002, s 85(4).

- (a) where an individual landlord has died: the address of any personal representatives given in any grant of probate;
 - (b) where an individual landlord is insolvent: the address for their trustee in bankruptcy as shown on the Insolvency Service website;
 - (c) where a company landlord is insolvent: 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.
- (4) To identify the steps that the RTM company would be required to have taken if an application to the Tribunal under the missing landlord procedure was to be successful, to avoid wasted time and costs for the RTM company.

Consultees' views

8.116 A majority of consultees agreed with the proposals, generally noting in any additional comments that this would not be an onerous requirement and that it struck the right balance. Professor James Driscoll agreed but noted that it was "very complicated". Some consultees suggested that the RTM company should also be required to check the address at Companies House where the landlord is a company.

8.117 Some consultees, including HM Land Registry itself, noted that the addresses at HM Land Registry might be outdated:

there are limitations in respect of the address for service details we hold, which may make this approach less effective than you intend. Whilst HM Land Registry publish details on how to update address information and provide the option to have an email address for service detailed in the register, the onus is on landlords to inform us of any changes. In our experience this often gets overlooked, and we do not currently have a mechanism for ensuring that this is done in all cases.

8.118 Three consultees submitted identical responses advocating for consistency between the checks required when using a Group A or a Group B address for service. They said:

A Group A address could be available but the landlord could equally have died or been made insolvent. Either applicants should do the pre-service checks in all cases, or only where a response to the claim notice is not forthcoming within a designated period and the participants wish to proceed with the RTM application.

8.119 Consultees who opposed these proposals generally did so because they felt that they placed too much of a burden on the RTM company and were too complex. For example, Investment Technology Ltd t/a Canonbury Management said:

Far too complicated and will stop RTMs being formed and claims issued. The current process is fine – add in email service and simplify identification of address to be used – either section 47/48 address or HMLR address.

8.120 Shula Rich thought that a more rigorous regime was justified for enfranchisement, implying that this was not the case for RTM.

Enfranchisement is taking something away - it is more serious. [The landlord] has to make sure that the lessees have an address for the service of notices if it's out dated that's their look out. Just the same as the lessee who receives letters under the lease at their flat but has no arrangement for forwarding. Under the Lease they will have 'received' it.

8.121 Investment Technology Ltd t/a Canonbury Management said:

The current rules are fine - there will always be an address at HMLR or Companies House or via service charge demands. The number of cases where this is not so is minimal and less than 0.0001%.

8.122 The Property Litigation Association Law Reform Committee agreed that there should be a statement of truth because it might reduce the scope for dispute as to whether the checks had been completed. However, they warned that this may result in additional costs to the RTM company if legal advice on the implications of signing the statement of truth is required.

8.123 LEASE did not agree with the requirement for a statement of truth, saying:

a statement of truth is to our mind an unnecessary obstacle and opens the door to potential litigation by the landlord as to the nature and extent of any checks that have been allegedly carried out.

8.124 Some consultees who disagreed with the proposals in respect of the missing landlord procedure were concerned about the obscurity of the London Gazette.

Discussion and recommendations

8.125 The proposals in the Consultation Paper were originally developed in the enfranchisement context and set out in the Enfranchisement Consultation Paper. In developing our recommendations, we have also had regard to consultees' comments on the same proposals in the enfranchisement context.⁷⁷

8.126 We adopt the same recommendations below as we do in the Enfranchisement Report, and explain them in more detail in that paper.

8.127 We remain of the view that the objectives pursued by the proposals are worthwhile, and consider that the checks are practical and sensible steps to be taken by an RTM company prior to the service of a claim notice. The checks will minimise the risk that the RTM company serves the claim notice on the wrong person, or at an incorrect address, rendering the service invalid and forcing the RTM company to start the claim again.

8.128 However, considering consultees' comments caused us to reconsider the role of the checks and of the Tribunal.

⁷⁷ Summarised in the Enfranchisement Report, paras 8.213 to 8.217.

Should any pre-service checks be required?

8.129 In the Consultation Paper we provisionally proposed that the checks would be mandatory; that is, if the appropriate checks had not been carried out:

- (1) An RTM company would not benefit from the deemed service regime if it sought a Tribunal declaration of its right to acquire the RTM. This could arise if the RTM company served a claim notice on a landlord at a Group A or Group B address but the landlord did not serve a counter-notice.
- (2) An RTM company would not be able to obtain an order from the Tribunal under the missing landlord procedure.

8.130 The question of the landlord's identity is clearly one that both the RTM company should, and the Tribunal will, be interested in. However, while our proposed checks are valuable in establishing this, there is a question around whether they should be mandatory.

8.131 In some cases, conducting the checks would not change the actions of the RTM company. If the RTM company can demonstrate to the Tribunal that it has in fact served the correct landlord at one of the Group A addresses, it does not seem fair that it should not benefit from the deemed service regime because it has not carried out the checks. Whether or not it carried out the checks is effectively irrelevant in terms of outcome.

8.132 We do not therefore consider that a failure to undertake checks before the service of the claim notice should act as an automatic bar on the application of the deemed service regime where the landlord does not return a counter-notice.

8.133 However, if the Tribunal is involved in determining whether the RTM company has successfully acquired the RTM using the deemed service regime, it will have to be satisfied that the RTM company has in fact achieved deemed service. This is where the specified checks become relevant.

8.134 In the enfranchisement context, the leaseholders must apply to the Tribunal if no counter-notice (a "Response Notice" in the enfranchisement context) is received. The Tribunal must make a determination as to whether the leaseholders should acquire the freehold. This is not the case in the RTM context. If no counter-notice is received in response to an RTM claim notice, the RTM company acquires the RTM on the date specified in the claim notice. There is no need to apply to the Tribunal for a determination.

8.135 Pursuant to our recommendation below, the RTM company will have the option of applying to the Tribunal for an order affirming that the RTM company is entitled to acquire the RTM if the landlord does not respond to the claim notice.⁷⁸ If such a voluntary application is made, the Tribunal will need to be satisfied that the correct landlord has been served, and an appropriate address used. This will require the RTM company to present the Tribunal with evidence, and that evidence will in many cases be the results that would have been revealed if the checks had been carried out prior

⁷⁸ See from para 8.193.

to service of the claim notice. The Tribunal will want to see the results of the checks on or as close as possible to the date of service of the claim notice.

8.136 We remain of the view that the RTM company should undertake the steps outlined in our proposals before making an application to the Tribunal under the missing landlord procedure. It will avoid the costs and delays of making an application but then having that application postponed pending the completion of any steps the Tribunal orders the RTM company to undertake in order to satisfy the Tribunal that the missing landlord procedure is appropriate in the circumstances. Conducting the checks in advance should save the RTM company time and money. The Tribunal will want the results of the specified checks at a date that is as close as possible to the date that the application is made to the Tribunal.

What should the specified checks be?

8.137 We continue to think that, broadly speaking, the checks we set out in the Consultation Paper are the correct checks in most cases although we now recommend that, for a corporate landlord, the RTM company should check at Companies House in every case rather than only where a Group B address is being used. However, as recognised in the Consultation Paper, the checks that are relevant in any particular case are context dependent. For example, we proposed that checks of the probate records and individual insolvency register were only necessary where there is an individual landlord (because that register is not relevant to corporate bodies).

8.138 Several of our specified checks were aimed at resolving issues around ownership or appropriate addresses where a person, whether an individual or company, is generally resident in or registered under the law of England and Wales. But the specified checks may not always be relevant in every context – for example, if the landlord is an individual and lives outside of England or Wales, the probate records will not record their death. We therefore recommend that the Secretary of State should be given power to set the nature of the specified checks that should be undertaken, which may supplement or adapt the basic checks that we have suggested.

8.139 If there is an instance where it is clear or highly likely the specified checks will be of no use (for example, where all of the evidence points to an individual being resident in Scotland, for example), then the Tribunal can issue directions to enable it to be satisfied in that case. In complex cases, the Tribunal might require the RTM company to conduct different or additional checks.

8.140 In response to consultees' comments, we have considered whether the London Gazette is the appropriate place for an advertisement where the landlord cannot be found, and have concluded that it is. The London Gazette is the official journal of record and a substantial number of different statutory notices are required to be placed in it. While other publications might have a wider circulation (whether nationally or simply in the locality of the property), the purpose and function of the London Gazette is limited and well known. The information contained in the printed London Gazette is also now available online. A notice placed in the London Gazette would therefore be more likely to lead to the identity or location of a landlord being revealed than would advertising in another place. Requiring an RTM company to place an advertisement in another publication in addition would lead to an increase in costs without materially improving the prospects of locating a landlord.

Recommendation 36.

8.141 We recommend that an application to the Tribunal for a declaration as to whether the RTM company has acquired the RTM should be accompanied by:

- (1) the results of the specified checks reflecting the position at the date of service of the claim notice; or
- (2) other evidence that the results of the specified checks would not have affected the RTM company's decision to serve the claim notice on the landlord set out in the claim notice, or the address(es) to which the claim notice was sent.

8.142 We recommend that the specified checks should include:

- (1) A check of the records held at HM Land Registry.
- (2) Where the landlord is understood to be a corporate body whose details are registered at Companies House, a check of the records at Companies House.
- (3) In the case of service at a Group B address (rather than Group A) and where the landlord is understood to be an individual who is likely to be resident in England and Wales, the following additional checks:
 - (a) a search of the probate records; and
 - (b) a search of the Individual Insolvency Register.

8.143 We recommend that, before making an application to the Tribunal under the missing landlord procedure, the RTM company must:

- (1) If neither the landlord's identity or address is known, place an advertisement in the London Gazette inviting any landlords of the premises (or other relevant persons) to contact the RTM company within 28 days.
- (2) If the landlord's identity is known but the RTM company does not have a Group A or Group B address for the landlord, carry out the specified checks at (2) above before placing an advertisement in the London Gazette.

Recommendation 37.

8.144 We recommend that in certain circumstances the Group A address for service should be as follows:

- (1) If an individual landlord is dead, the Group A address for service should be the address of any personal representatives at the address given in any grant of probate or letters of administration or, where no such grant has been issued, the Public Trustee.
- (2) If an individual landlord is insolvent, the Group A address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website.
- (3) If a corporate body is insolvent, the Group A address for service should be both:
 - (a) the corporate body's registered office address; and
 - (b) 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.
- (4) If a corporate body has been dissolved, the Group A address for service should be the Treasury Solicitor.

Recommendation 38.

8.145 We recommend that the Secretary of State be given power to make regulations setting out:

- (1) the specified checks that must be undertaken by an RTM company prior to making an application to the Tribunal for a declaration as to its right to acquire the RTM, or under the missing landlord procedure; and
- (2) the weight that should be attributed to the result of the specified check by the Tribunal when establishing whether it is satisfied as to either the identity of the landlord or whether a correct Group A or B address for service has been used.

THE COUNTER-NOTICE

8.146 Once served with an RTM claim notice, a landlord or relevant third party may serve the RTM company with a counter-notice.⁷⁹ The counter-notice must be given no later

⁷⁹ CLRA 2002, s 84.

than the date specified in the claim notice,⁸⁰ which must be at least a month after the date on which the claim notice is served.⁸¹ As with the NIP and the notice of claim, the form and content is prescribed.⁸²

8.147 The counter-notice may contain a statement either admitting that the RTM company is entitled to acquire the RTM (a “positive counter-notice”) or alleging that by reason of a specified provision in the 2002 Act, the RTM company is not so entitled (a “negative counter-notice”).⁸³

8.148 If the RTM company receives a negative counter-notice, it may (within two months of receiving the counter-notice)⁸⁴ apply to the Tribunal for a determination that it was at the relevant time entitled to acquire the right to manage the premises.⁸⁵

The counter-notice: service

Current law and problems

8.149 As set out above, the landlord or other relevant third party may give a counter-notice to the RTM company.⁸⁶ The RTM company’s name and registered office must be specified in the claim notice.⁸⁷

8.150 We provisionally proposed that the RTM company should be permitted to specify an alternative address at which the landlord should serve the counter-notice. This could be a physical address in England or Wales for service by post or hand, or an email address.

Consultees’ views

8.151 A dominant majority of consultees supported this proposal. A member of an RTM company highlighted the benefits that this could bring in practical terms:

A new RTM registered office might not be the main address being used for the RTM claim i.e. the claim could be being handled by their lawyer or other professional advisor. It makes more sense to allow the proposed RTM to nominate an address separate from the registered office if it wishes to do so.

8.152 On the other hand, Investment Technology Ltd t/a Canonbury Management thought it would be unlikely to have a significant impact in practice.

⁸⁰ CLRA 2002, s 84(1).

⁸¹ CLRA 2002, s 80(6).

⁸² CLRA 2002, s 84(2); Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010 No 825); Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations (SI 2011 No 2684).

⁸³ CLRA 2002, s 84(2).

⁸⁴ CLRA 2002, s 84(4).

⁸⁵ CLRA 2002, s 84(3). The relevant time is the date on which the claim notice was given to the landlord or relevant third party.

⁸⁶ CLRA 2002, s 84(1).

⁸⁷ CLRA 2002, s 80(5).

It adds flexibility but is not going to change things – most RTMs are registered to the company undertaking the work so the address will just be the RTM registered office address.

8.153 The Berkeley Group Holdings plc, answering “Other”, thought that it was necessary to only include a postal address:

Given the sanctions that could arise for failure to serve a counter-notice, we believe service should be by post so that delivery can be proven.

8.154 Church & Co Chartered Accountants and Mark Chick both opposed this proposal because it meant that an email address could be included as an address for service. Mark Chick said:

I do not think an email address is a good idea for reasons of arguments about proof of delivery and receipt.

Discussion and recommendations

8.155 Consultee responses indicate that in practice, the most common reason that an RTM company would provide an alternative address is so that the counter-notice could be sent directly to their professional advisors. Service on solicitors, for example, is likely to be highly reliable, as requests for acknowledgement of service are commonplace for legal professionals.

8.156 This proposal received strong support from consultees and will create flexibility for RTM companies who wish to receive the counter-notice at an alternative address to the company’s registered office. We have already recommended elsewhere that an email address can be used for service of the claim notice; it is our view that there are no principled or practical reasons why this should not also extend to the counter-notice.

Recommendation 39.

8.157 We recommend 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 either:

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

The counter-notice: content

Current law and problems

8.158 As set out above, if the landlord or other relevant third party wishes to object to the RTM claim it must give the RTM company a counter-notice containing a statement alleging that, by reason of a specified provision in the 2002 Act, the RTM company is not entitled to acquire the RTM. This does not require the landlord to specify in any

detail the grounds on which it believes that the RTM company is not entitled to acquire the RTM. Landlords can raise new objections at a later stage with the permission of the Tribunal.⁸⁸

8.159 There is therefore limited incentive for landlord and relevant third parties to substantiate their grounds of opposition in the counter-notice. In the Consultation Paper, we explained that in practice counter-notices tend to include general and bland statements of denial. RTM companies are put in a difficult position as they may find it difficult to assess the merits of the opposition to the claim but must bear the costs of applying to the Tribunal if they wish to progress the claim further. This may even be used as a deliberate tactic to take RTM companies by surprise at a later stage.

Our proposals

8.160 We provisionally proposed that landlords and relevant third parties 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.

Consultees' views

8.161 There was very strong support for the proposal. Notting Hill Genesis, a housing association, for example, thought that it

might require landlords to put more work in at an early stage and to seek more thorough advice but this is an appropriately distributed burden and is preferable to the current arrangements.

8.162 One residents' association was emphatically in favour, stating:

An excellent idea, would stop some of the spurious objections, waste of Tribunal's time, and unnecessary expense. The response to the objections could be properly investigated and the response prepared before the Tribunal hearing.

8.163 The Association of Residential Managing Agents ("ARMA"), answering "Other", indicated that they supported the proposal but that "later counter arguments should be permitted to be lodged with the approval of the Tribunal". Similarly, the Berkeley Group suggested that the Tribunal should be able to award costs against the landlord for additional costs incurred as a result.

8.164 Damian Greenish, a solicitor, also responding "Other", was concerned that:

the landlord who serves a counter-notice finds himself in a less advantageous position than one who does not. In the latter case, the Tribunal will need to be satisfied that the RTM company was entitled to make the claim and as part of its "expert role" would not be inhibited from raising any relevant issues. The Tribunal still needs to be satisfied, whether or not the landlord is represented.

8.165 The Right to Manage Federation, disagreeing, said that:

⁸⁸ *Fairhold (Yorkshire) Ltd v Trinity Wharf (SE16) RTM Co Ltd* [2013] UKUT 502 (LC), [2014] Landlord and Tenant Reports 6; *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC); *Triplerose Ltd v Mill House RTM Co Ltd* [2016] UKUT 80 (LC), [2016] Landlord and Tenant Reports 23.

if an expert tribunal can see that an RTM is not entitled for just reasons, it should still have the power to give that determination regardless of whether it is in the counter-notice.

The Cadogan Group made a similar argument.

8.166 The Property Bar Association argued that this proposal could be counter-productive:

[I]f the landlord must go beyond indicating which section is relied upon for the purposes of opposing the claim, it will immediately escalate costs potentially to the tenants' disadvantage, as the landlord will need in short order to obtain comprehensive legal advice to ensure that points are not overlooked."

8.167 Conversely, Mark Chick said that "it may well be that the landlord only takes proper advice after service of the counter-notice".

Discussion and recommendations

8.168 We remain of the view that it is problematic that there is no requirement or real incentive to fully explain in the counter-notice any objections to the RTM company's entitlement to acquire the RTM. We have therefore concluded that landlords and relevant third parties should be required to state and explain all grounds of objection in the counter-notice, and should generally be prevented from raising new grounds at a later stage.

8.169 After considering consultee responses, however, we have concluded that this should operate as a general rather than absolute rule. There may be exceptional circumstances where the landlord or relevant third party has legitimate reasons for not being able to fully substantiate all grounds of objection in the counter-notice. For a landlord to take advantage of this exception, the Tribunal should be satisfied that

- (1) either the landlord did not have, and could not reasonably have had, the requisite knowledge of the new purported grounds of objection at the time of the counter-notice; or
- (2) was otherwise prevented from making the argument in question at the time the counter-notice was served.

8.170 In granting permission for the landlord to raise new grounds for denying the claim, the Tribunal will have the discretion to make such directions as it considers fit including in relation to costs. The Tribunal might therefore order that the landlord should bear the RTM company's costs in circumstances where it is permitting the landlord to additional grounds to those substantiated in the counter-notice.

Recommendation 40.

8.171 We recommend that landlords should be required to state and explain all possible objections in the counter-notice and should not generally be permitted to raise new arguments at a later stage.

8.172 The Tribunal should only permit new grounds of objection to be made in exceptional circumstances where:

- (1) either the landlord did not have, and could not reasonably have had, the requisite knowledge of the new purported grounds of objection at the time of the counter-notice; or
- (2) was otherwise prevented from making the argument in question at the time the counter-notice was served.

and may do so subject to such directions as it considers fit, including in respect of costs.

WHERE NO COUNTER-NOTICE IS SERVED

Current law and problems

8.173 The 2002 Act provides that the landlord or a relevant third party *may* serve a counter-notice on the RTM company.⁸⁹ This leaves open the possibility that the landlord may not serve a counter-notice at all. In that case, there is deemed to be no dispute about the entitlement of the RTM company to acquire the RTM,⁹⁰ and acquisition will take place on the date specified in the claim notice.⁹¹ In this situation, however, there is no opportunity to determine whether a claim is valid, and the RTM company cannot be sure that challenges to the RTM will not be made in the future.

8.174 In the context of a freehold enfranchisement, the problem of uncertainty in the claim does not arise because, where a Response Notice is not given in respect of an enfranchisement claim notice, the nominee purchaser must apply to the county court for an order determining the terms of the acquisition.⁹²

8.175 In the RTM regime, however, there is no such safeguard. As we observed in the Consultation Paper, this absence can operate to the detriment of leaseholders as it gives rise to the possibility of subsequent litigation concerning the validity of the RTM

⁸⁹ CLRA 2002, s 84(1).

⁹⁰ CLRA 2002, ss 90(2) to (3).

⁹¹ CLRA 2002, s 90(2).

⁹² Leasehold Reform, Housing and Urban Development Act 1993, ss 25 and 49. If the applicant shows that they are entitled to enfranchise, and have served the claim notice properly, the freehold or lease extension will be acquired on the terms set out in the claim notice: see Enfranchisement CP, paras 10.103 and 10.154.

claim and the rights of the RTM company.⁹³ Acquisition by default due to the absence of counter-notice cannot obviate the fact that, for example, premises do not qualify for the RTM or the RTM company does not have the requisite number of qualifying tenants as members when it serves the claim notice.⁹⁴ In the absence of a positive counter-notice or Tribunal determination, the RTM company can never be sure that it has validly acquired the RTM.

8.176 In order to address these issues, we proposed a voluntary form of the safeguard that is present in the enfranchisement regime: a right for the RTM company to seek a Tribunal determination if it wishes. We further proposed that the landlord should have a strictly confined right to be heard by the Tribunal in such proceedings.

Optional Tribunal consideration of claim

Our proposals

8.177 We proposed that, where no counter-notice is served, the RTM company should be able to apply to the Tribunal for a declaration:

- (1) that the RTM company was on the relevant date entitled to acquire the RTM;
- (2) as to the acquisition date on which the RTM was or will be acquired; and/or
- (3) as to the transfer of management functions in respect of non-exclusive appurtenant property.⁹⁵

8.178 We were not of the view that this procedure should be mandatory, because ultimately it is the RTM company which is best placed to weigh the time and expense of making such an application against the potential advantages of doing so.

Consultees' views

8.179 These proposals were very well supported, generally on the grounds of the certainty they would provide.

8.180 Damian Greenish agreed with all proposals, but argued that

there should always be a presumption that the landlord should be heard on any application to the Tribunal unless it is not just and equitable through his conduct that he should be heard.

8.181 The RTM Federation disagreed with all aspects of this proposal. In its view:

⁹³ For a recent example, see *Avon Ground Rents Ltd v Hayes Point RTM Co Ltd* (11 July 2017) D30CF139 High Court, Cardiff District Registry (unreported).

⁹⁴ Where an Act of Parliament confers a right on a specified class of persons, those persons cannot enlarge that right by requiring a court to proceed as if an Act applied where, on the facts, it does not: *Errington v Errington & Woods* [1952] 1 KB 260; *Rogers v Hyde* [1951] 2 KB 923.

⁹⁵ In Ch 10, we recommend that the RTM company should only acquire management functions in respect of non-exclusive appurtenant property if the landlord does not oppose this or where the Tribunal agrees. In either case, it will be necessary for either the parties or the Tribunal to set out how such management should be performed. See from para 10.119.

it will certainly be abused by landlords, who will in our opinion, just stop serving counter-notices and force every RTM to go through the Tribunal hoops ... If a landlord subsequently finds grounds for saying the RTM Co is not entitled to manage it can serve a notice on the RTM Co requiring it to comply, hand back management or apply to the Tribunal to either terminate the RTM or appoint a manager.

8.182 On the subject of declarations relating to non-exclusive appurtenant property, Damian Greenish argued that

as pointed out, the issue of the acquisition of management functions over non-exclusive appurtenant property will affect not just the landlord but also other leaseholders in other buildings. Should not those other leaseholders also have the right to be heard on an issue which might have a significant impact on them?

8.183 Church & Co Chartered Accountants were also of this view, arguing that in the case of non-exclusive appurtenant property, “the current manager of that property needs a right to be heard.”

Discussion and recommendations

8.184 Our recommendations provide an avenue through which the RTM company can obtain legal certainty as to its RTM claim if it so chooses. Although we think that an RTM company would be well-advised to apply to the Tribunal, we do not recommend that the RTM company should be obliged to go through this process, or that a failure to do so should affect the validity of its RTM claim.

8.185 Other than an additional option to apply to the Tribunal, we are not recommending any change the current law: if no counter-notice is served before the relevant date specified in the notice, the RTM is acquired on the date specified in the claim notice.⁹⁶ We do not therefore consider that this is a new opportunity for needless litigation, or a new incentive for the landlord not to give a counter-notice. We are only recommending an additional process by which the RTM company may be afforded comfort and certainty that its acquisition of the RTM will not be challenged later.

Landlord to apply to be heard

Our proposals

8.186 In the Consultation Paper, we proposed that the landlord should have only a limited right to participate in the proceedings and challenge the RTM company’s application. We suggested that the landlord should be required to apply to the Tribunal for permission to participate, and envisaged that the Tribunal would permit a landlord to participate in any proceedings only where it is just and equitable to do so. The Tribunal would also be empowered to give permission conditional on such terms as it thinks fit. Such terms might, for example, include an order that the landlord pays the RTM company’s costs or that the landlord is limited to challenging the application for the RTM only on the grounds provided in the application for permission.

⁹⁶ CLRA 2002, ss 90(2) and 90(3).

Consultees' views

8.187 A significant majority of consultee supported this proposal. LEASE agreed with the proposal in principle, but cautioned that it may still leave the counter-notice process vulnerable to manipulation by cynical landlords trying to stall the claim:

the Tribunal should be alive to the possibility of the landlord tactically and deliberately deciding not to serve a counter-notice and then when applying later for permission to participate in the proceedings give an excuse for the non-service and then set out objections to the RTM. We are concerned that as the Tribunal is dealing with new law they may be lenient initially. In deciding whether it is just and equitable to permit a landlord to participate in any proceedings the landlord's behaviour and motives should be taken into account.

8.188 Consultees who opposed the proposal argued that the freeholder should forfeit rights to participate in the process completely if they neglect to serve a counter-notice. A member of an RTM company argued that "if landlords cannot be bothered to reply on time, they don't deserve to keep the right to manage".

Discussion and recommendations

8.189 We consider that allowing the landlord to be heard represents an appropriate mechanism for balancing landlord and leaseholder interests. However, we are now of the view that the threshold for the Tribunal granting the landlord's application to be heard should be more strictly defined than that which we specified in the Consultation Paper.

8.190 We think the landlord should only be heard in the following circumstances:

- (1) The landlord was late serving the counter-notice, and had a reasonable excuse;
- (2) The landlord did not serve a counter-notice on the basis that it saw no reason to object to the acquisition of the RTM, but subsequently became aware of grounds for objection. The date of acquiring the requisite knowledge would be confined in a manner similar to paragraph 8.172; or
- (3) there is disagreement as to the management of non-exclusive appurtenant property.

8.191 The terms on which the Tribunal will accept an application by the landlord should include an order that the landlord pays the RTM company's costs, and that the landlord be confined to challenging only the grounds provided for in the application for permission to be heard.

Recommendation 41.

8.192 We recommend that the current position – that if no counter-notice is served, the RTM is acquired on the date specified in the claim notice – should be retained.

8.193 We also recommend that the RTM company should have the right to apply to the Tribunal for a declaration:

- (1) that the RTM company is entitled to acquire the RTM;
- (2) as to the acquisition date on which the RTM was or will be acquired; and/or
- (3) as to the transfer of management functions in respect of non-exclusive appurtenant property.⁹⁷

Recommendation 42.

8.194 We recommend that:

- (1) In circumstances where no counter-notice is served and an RTM company applies to the Tribunal for a determination as to its acquisition of the RTM, the landlord should have to apply to the Tribunal for permission to participate in the proceedings before it can be heard.
- (2) The Tribunal should only allow the landlord's application if one or more of the following has occurred:
 - (a) The landlord was late serving the counter-notice, and had a reasonable excuse;
 - (b) The landlord did not serve a counter-notice but subsequently became aware of grounds for objection, and a reasonably diligent landlord could not have acquired this information before the service date of the counter-notice; or
 - (c) there is disagreement as to the management of non-exclusive appurtenant property.
- (3) The landlord should pay the RTM company's costs, and be confined to challenging only the grounds provided for in the application for permission to be heard.

⁹⁷ In Ch 10, we recommend that the RTM company should only acquire management functions in respect of non-exclusive appurtenant property if the landlord does not oppose this or where the Tribunal agrees. In either case, it will be necessary for either the parties or the Tribunal to set out how such management should be performed. See from para 10.119.

NO RESPONSE TO COUNTER-NOTICE: ABOLITION OF DEEMED WITHDRAWAL

Current law and problems

8.195 Currently, the RTM company is deemed to have withdrawn its claim if it does not apply to the Tribunal within the requisite time frame after receiving a negative counter-notice. This is known as “deemed withdrawal”.⁹⁸

8.196 An analogous provision operates in the context of enfranchisement claims.⁹⁹ In the Enfranchisement Consultation Paper, we explained the fundamental problem with the current law in that context:¹⁰⁰

a leaseholder’s enfranchisement claim under the 1993 Act will be deemed to have been withdrawn if one of many deadlines for the progression of the claim are not met. The effect has been to create a series of traps into which leaseholders may fall, causing their claim to be treated as having been withdrawn, and making them liable to pay the landlord’s non-litigation costs.

8.197 To remove these traps, in the Enfranchisement Consultation Paper we provisionally proposed abolishing the deemed withdrawal provisions for enfranchisement claims. We proposed that instead of this deemed withdrawal, a landlord who has served a Response Notice should be able to apply to the Tribunal for an order striking out the claim notice if the leaseholders have not taken the next procedural step within a reasonable time.¹⁰¹

8.198 In the RTM Consultation Paper, we said that although there was no obvious evidence of the deemed withdrawal provisions causing problems in the RTM context, the introduction of an analogous provision would offer greater protection to leaseholders and provide more procedural certainty to all parties.

8.199 Our proposal would give both the landlord and any leaseholder the right to apply to the Tribunal to strike out a dormant claim. It would also give leaseholders an avenue to bring the claim to an end if the RTM company is not acting in their best interests in advancing the claim.

8.200 It is important to note that we did not propose to abolish deemed withdrawal in cases where the RTM company is being wound up, has become insolvent, has had a receiver or manager appointed, or is struck off the companies register. We only considered the abolition of deemed withdrawal in cases where a negative counter-notice is not followed by a Tribunal application.¹⁰²

⁹⁸ The list of circumstances which imply a deemed withdrawal are listed in CLRA 2002, s 87.

⁹⁹ Leasehold Reform, Housing and Urban Development Act 1993, ss 48(1) and 53(1)(a).

¹⁰⁰ Enfranchisement CP, para 11.148.

¹⁰¹ Enfranchisement CP, para 11.151. There is no set period either to set a deadline by which a step should have been taken by the leaseholders or which must have expired before a letter warning of an application to strike out can be made.

¹⁰² CLRA 2002, s 87(1).

Consultees' views

8.201 A large majority of consultees supported this proposal.

8.202 The Property Litigation Association Law Reform Committee said:

We agree with this proposal and consider that it is helpful that any reforms between the enfranchisement legislation and the right to manage legislation be aligned as far as possible.

8.203 The RTM Federation answered "Other" and explained:

The situation in RTM is different from enfranchisement. RTM does not result in a transfer of property. Many of the issues in RTM have been as a consequence of Parliament and subsequently lawyers and the judiciary seeming to think that the two processes should be the same. The issue of withdrawal should not be a problem in practice. If a claim is deemed withdrawn it is not fatal. Unlike enfranchisement the RTM company can immediately give a new claim ... Your proposal will just add more time and costs to the process, with no real benefit.

8.204 Damian Greenish was concerned about a lack of procedural structure in enfranchisement and RTM:

Part of the problem with the enfranchisement proposals on this is that the liberalised procedural regime ... does not impose any procedural time limits on the leaseholder. In consequence, the proposal that the landlord who has served a counter-notice can apply to strike out a claim if the leaseholder has missed a procedural time limit is completely toothless. It is not clear at present whether this will also be the case for RTM.

8.205 Mark Chick disagreed with the proposal on the grounds that "the landlord would have to take a positive step to 'get rid' of a claim where the tenants were not performing/not pursuing the case properly."

8.206 The National Leasehold Campaign was against the proposal because:

the threat of Tribunal and the costs and time associated with it are very real to leaseholders. If this change introduces a new way of the threat of Tribunal being used as a barrier to prevent unit holders wishing to apply for RTM then that is not good.

Discussion and recommendations

8.207 We continue to think that there are good reasons to introduce this change. The proposal's main effect should be to ensure that RTM companies are not forced to redraft and resubmit claims as a result of the series of traps surrounding deemed withdrawal.

8.208 As we acknowledged in the Consultation Paper¹⁰³ and Damian Greenish reiterated, our proposal did not indicate when an application to strike out a claim could be made.

¹⁰³ CP, footnote 499.

Having considered the timeframes of other aspects of the RTM claim process and the potential complexity of counter-notices (particularly in large and mixed-use developments), we think that the right to apply for a declaration that the RTM claim is withdrawn should only arise after six months. In effect, this increases the period in which the RTM company may apply for a Tribunal determination following a negative counter-notice from two months to six months.

8.209 We affirm our view, expressed in the Consultation Paper, that this right to have the claim declared to be withdrawn should be exercisable by leaseholders as well as landlords. We also adopt the confinement in the Consultation Paper, namely that we do not recommend the abolition of deemed withdrawal in cases where the RTM company is being wound up, has become insolvent, has had a receiver or manager appointed, or is struck off the companies register. We also consider that the party seeking to make the application should first provide the RTM company with 14 days' written notice of their intention to do so. This approach follows the position we take in the Enfranchisement Report.¹⁰⁴

Recommendation 43.

8.210 We recommend the abolition of deemed withdrawal for cases in which the RTM company does not respond to a counter-notice.

8.211 We recommend that if the RTM company does not respond to a valid negative counter-notice (by either modifying its claim, withdrawing the claim, or initiating a Tribunal determination) within six months of the date of service of that counter-notice, the landlord or any leaseholder may apply to the Tribunal to have the claim declared withdrawn. No such application shall be made unless the applicant has given the RTM company 14 days' written notice.

CHALLENGES TO THE VALIDITY OF NOTICES

Current law and problems

8.212 We have discussed above the various procedural requirements that must be satisfied if an RTM company wishes to acquire the RTM and have made various recommendations aimed at simplifying the process.

8.213 We are mindful that however simple we try to make the process, there will be some instances in which mistakes are made and the RTM claim is challenged on the grounds that the procedure for service has not been followed. The current law limits the scope of such procedural challenges in two main ways.

8.214 First, the 2002 Act specifies that a claim notice is not invalidated by any inaccuracy in the particulars required to be in the claim notice.¹⁰⁵ However, as we explained in the

¹⁰⁴ Enfranchisement Report, para 9.177.

¹⁰⁵ CLRA 2002, ss 81(1) and 81(2).

Consultation Paper and above, the distinction between an inaccuracy and a more serious error is not always easy to draw. The omission of required information or failure to comply with the prescribed form are both errors which Tribunals have found to invalidate the claim notice.¹⁰⁶

8.215 Second, in *Elim Court*, the Court of Appeal held that a failure to comply with a procedural requirement will not always cause an RTM claim to be invalid.¹⁰⁷ Rather, it is necessary to consider whether Parliament would have intended that a failure to comply should preclude the person from acquiring the right in question. This will depend on whether the error or omission was critical to the scheme as a whole, or whether it was of secondary or ancillary importance.

8.216 The decision in *Elim Court* forms part of a larger body of English law regarding the consequences of non-compliance with statutory duties. It is important to explain this general position in some detail, as it informs our reasoning and recommendations in this area.

General law of non-compliance with statutory duties

8.217 The Court of Appeal considered the question in the context of a collective leasehold enfranchisement in *Osman v Natt*,¹⁰⁸ in which a claim notice failed to specify the details of one of the qualifying tenants, contrary to statutory requirements.

8.218 The Court held that since at least 2006,¹⁰⁹ English law has not drawn a distinction between “mandatory” and “directory” provisions.¹¹⁰ Instead, the consequences of non-compliance are to be determined by the ordinary principles of statutory interpretation.¹¹¹ The ultimate question which must be asked in cases in which the statutory provision has not been complied with (either fully or substantially¹¹²) is whether the provision in question is of “critical importance” to the statutory scheme or whether it is “of secondary importance or merely ancillary”.¹¹³ Non-compliance with the former leads to invalidity; non-compliance with the latter does not.

The general approach applied to RTM legislation

8.219 The approach described in *Osman* in relation to leasehold enfranchisement was applied to requirements in the RTM regime in the case of *Elim Court*. In that case, a landlord challenged the validity of an RTM claim notice on the basis that it failed to

¹⁰⁶ Above, para 8.7 and CP, paras 6.14 to 6.15 and 6.37. In Wales, the use of a form “to the like effect” for a notice is permitted under regulation 8 of the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2011 (SI 2011 No 2684). No equivalent provision is made in the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010 (SI 2010 No 825).

¹⁰⁷ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2018] QB 571.

¹⁰⁸ [2014] EWCA Civ 1520.

¹⁰⁹ *R v Soneji* [2006] 1 AC 340.

¹¹⁰ *Osman v Natt* [2014] EWCA Civ 1520 at [24] and [25] (Etherton C).

¹¹¹ *Osman* at [24] and [25].

¹¹² *Osman* at [35].

¹¹³ *Osman* at [34].

comply with requirements of the 2002 Act, including on the basis that there was a requirement for signature of the claim notice.¹¹⁴

8.220 As discussed above,¹¹⁵ the Court of Appeal did not accept the argument that a signature was required in the manner argued by the freeholder. It did, however, consider consequences of non-compliance with requirements for serving NIPs,¹¹⁶ a failure to serve a claim notice on an intermediate landlord,¹¹⁷ and the lack of signature (in case the Court's decision that no such requirement existed was wrong).¹¹⁸

8.221 On the first point, the Court found that "even if a potential member of the company has not received a notice of invitation to participate in the correct form he or she can apply later to become a member of the RTM ... and the directors have no power to refuse."¹¹⁹ It judged the manner in which the RTM company had circulated the NIPs to be "a trivial failure of compliance",¹²⁰ and so held that such a failure did not render the RTM claim invalid.

8.222 On the second ground, the Court examined the relevant statutory provisions and concluded that:

Parliament has specifically considered the case in which, at least in some circumstances, a claim notice has been given to some landlords but not all of them and has decided that that does not invalidate the claim. It cannot therefore be said that giving a claim notice to everyone entitled to receive it is necessarily an essential feature of the statutory scheme.

8.223 On the third ground, the Court found that "the consequences of non-compliance are not fatal to the validity of the notice if the claim notice is signed by someone who is actually authorised by the RTM company to sign it."¹²¹

8.224 The Court held that non-compliance with the three purported requirements would not render the notice invalid, as those requirements were not of "critical importance" (to use the language of *Osman*) to the statutory scheme.

Summary of the position of the current law

8.225 The lengthy excursus above demonstrates the technical nature of deciding when a procedural error will render the claim invalid and when it will not. The 2002 Act specifies a narrow category of errors which are not susceptible to review; for

¹¹⁴ *Elim Court* at [46].

¹¹⁵ See para 8.29.

¹¹⁶ *Elim Court* at [60] to [67].

¹¹⁷ *Elim Court* at [69] to [75].

¹¹⁸ *Elim Court* at [68].

¹¹⁹ *Elim Court* at [64].

¹²⁰ *Elim Court* at [66].

¹²¹ *Elim Court* at [68].

everything else, leaseholders and landlords are left no choice if they dispute a notice but to apply to the Tribunal.

8.226 We do not believe the present state of the law in this regard is satisfactory for the purposes of ensuring an efficient, predictable, and straightforward RTM claim process. We have heeded the Court of Appeal's call that:¹²²

the Government may wish to consider simplifying the procedure further, or to grant the [Tribunal] a power to relieve against a failure to comply with the requirements if it is just and equitable to do so. Otherwise I fear that objections based on technical points which are of no significant consequence to the objector will continue to bedevil the acquisition of the right to manage.

8.227 We therefore proposed a two-fold approach in the Consultation Paper: to expand the categories of error which the statute exempts from review; and to grant the Tribunal a power to relieve failures of compliance when it is just and equitable to do so.

Specification of errors which can lead to validity

Our proposals

8.228 In our Consultation Papers for both RTM and enfranchisement, we suggested that errors in statutory notices should not invalidate the notice unless they compromise the recipient's ability to process and respond to the notice.¹²³

8.229 For the purposes of the RTM, we therefore proposed that the validity of all notices related to the RTM (including claim notices and counter-notices) should not be susceptible to challenge in the Tribunal or a court unless:

- (1) the prescribed form has not been used;
- (2) in the case of a claim notice, the notice fails to make clear to a reasonable recipient of the notice:
 - (a) that the RTM is being claimed;
 - (b) the identity of the RTM company; or
 - (c) the address at which any counter-notice should be served.¹²⁴
- (3) In the case of a counter-notice, the notice fails to make clear to a reasonable recipient of that notice:
 - (a) whether the RTM company's claim to acquire management is admitted or denied;

¹²² *Elim Court* at [68] (Lewison J).

¹²³ CP, para 6.86; Enfranchisement CP, paras 11.9(6) to (7) and 11.116 to 11.119.

¹²⁴ See our recommendations regarding service of the counter-notice, which give the RTM company greater scope to specify this address, from para 8.157.

- (b) the basis for any denial of the RTM company's claim to acquire management; or
- (c) the landlord's address for service; or
- (4) the notice has not been signed.¹²⁵

8.230 We refer to these reasons for potential invalidity as the "core requirements".

Discussion and recommendations

8.231 We did not ask a consultation question in relation to the above, but we considered consultee feedback in relation to a broader question regarding validity of notices in the Enfranchisement Consultation Paper.¹²⁶ We continue to think that the circumstances in which landlords should be able to challenge the validity of a claim notice should be significantly reduced. We consider that only a failure to comply with these core requirements as to the content and form of the claim notice should result in it being invalidated.

¹²⁵ See from para 8.41.

¹²⁶ Enfranchisement CP, paras 9.44 to 9.47.

Recommendation 44.

8.232 We recommend that for the purposes of the RTM, the validity of notices should not be challengeable unless:

- (1) the relevant prescribed form has not been used;
or
- (2) in a claim notice, the notice fails to make clear to a reasonable recipient:
 - (a) that the RTM is being claimed;
 - (b) the identity of the RTM company; or
 - (c) the address at which any counter-notice should be served.or
- (3) in a counter-notice, the notice fails to make clear to a reasonable recipient of that notice:
 - (a) whether the RTM company's claim to acquire the RTM is admitted or denied;
 - (b) the basis for any denial of the RTM company's claim to acquire management; or
 - (c) the landlord's address for service;or
- (4) the notice has not been signed.

Claim notices – waiver of invalidity and amendment of defects

Our proposals

8.233 In addition to limiting the grounds upon which a claim notice may be challenged, we proposed that the Tribunal should be given a power to waive defects in or make amendments to the claim notice and make any other directions it considers appropriate. We asked whether consultees agreed with the proposed new powers for the Tribunal.¹²⁷

Consultees' views

8.234 There was strong support for giving the Tribunal these new powers.

¹²⁷ CP, para 6.96.

8.235 There was agreement with this proposal from private leaseholders, many of whom cited examples of their landlords using immaterial defects to frustrate or at least delay the claim. For example, one individual said that their experience “is that the landlord will seek every small technicality to thwart the process and this proposal seems to address the problem”. Another leaseholder told us that:

allowing anyone to get away with ... prolonging processes just due to technicalities when it's clear what was intended is time-consuming, [and] wasteful for both courts and all parties. ... You cannot make a one size fits all, so it's imperative that differences are allowed for different properties and situations.

8.236 In disagreeing with the proposals, the Cadogan Group and Shula Rich both argued that notices can simply be served again. They suggested that if leaseholders are not capable of serving the claim in the correct form, they are perhaps not ready for the burden of acquiring the RTM.

8.237 Damian Greenish responded “Other” to this question, and expressed concern that the amendment aspect of the proposed change was unclear, both as to its purpose and effects:

For example, if a claim notice is amended (does its validity need to be challenged first, before an amendment can be made?) would the landlord then be able to serve another counter-notice? Would copies of the amended claim notice need to be given to all the other persons who received copies of the original notice? If the claim notice is amended, does that amended notice take effect (as amended) from the original service date or from the date of amendment?

Discussion and recommendations

8.238 In the Consultation Paper, we considered proposals concerning waiver of errors and amendment of notices as a whole. It is important, however, to distinguish between waiver of a defect and amendment of a notice. It is also important to distinguish between situations in which amendment occurs because of a defect which would otherwise render the notice invalid, and standalone amendment of a notice unrelated to any potential invalidity.

8.239 First, we consider the possibility of waiver of a defect in the claim notice (we consider analogous provisions in relation to the counter-notice in the next section). If a claim notice contains a defect which would render it invalid, we consider that that defect should be capable of being waived either by agreement with the landlord, or by the RTM company applying to the Tribunal for an order that the defect be waived. If the defect is waived, the notice will be treated as if it had always been valid.

8.240 A valid claim notice (including where a defect has been waived) will also be capable of amendment to correct a defect, either by agreement between the parties, or by the RTM company applying to the Tribunal for permission to amend that notice. We do not consider that a procedural or typographical error in a claim notice can be taken to mean that an RTM company's directors are not ready for the responsibilities of that role.

8.241 Separately, we also think that where the claim notice is neither invalid nor defective, but the RTM company nevertheless wishes to change the content of the notice, such amendment should be possible either by agreement with the landlord or with permission of the Tribunal. Such an application might be warranted where new information has come to the RTM company's attention since the notice was issued. We think that the RTM company should be able to initiate this process either as a stand-alone application, or as part of existing proceedings before the Tribunal.

8.242 Alternatively, the RTM company may choose to rectify a claim notice simply by re-issuing it. However, this will not always be an efficient use of time or money. Our recommendations allow the Tribunal to provide a procedural pathway which would not involve the RTM company having to serve further claim notices which are not substantively different from the original. This should remove some of the existing incentives for landlords to object to claim notices on the basis of errors which do not bear on the substantive entitlement of the RTM company.

8.243 The amended notice will have effect from the date of the original service of the notice. If the Tribunal considers that the amendment is of the kind that recipients of the original claim notice who are not party to the dispute should be made aware of, it should be open to the Tribunal to order the RTM company to give copies of the amended notice to those parties.

Recommendation 45.

8.244 We recommend that the parties should be able to agree to waive any defect in a claim notice which would otherwise render that notice invalid. The effect of such waiver will be to render the notice valid from the date on which it was served.

Recommendation 46.

8.245 We recommend that parties should be able to agree to amend a claim notice that is valid (including where a defect has been waived).

Recommendation 47.

8.246 We recommend that the Tribunal should, on the application of the RTM company at any time prior to the determination of the claim, have a power to:

- (1) waive a defect in a claim notice if that defect would otherwise render that notice invalid;
- (2) permit the RTM company to amend a defective claim notice where the defect does not affect the validity of the notice, or where a defect has been waived;
- (3) permit the RTM company to amend a claim notice that is not defective; and
- (4) make any consequential directions.

Counter-notices – waiver of invalidity and amendment of defects

Our proposals

8.247 We recommend above that the Tribunal should have a power to waive a defect in or permit amendments to an RTM company's claim notice. As a matter of fairness and symmetry, we also proposed in the Consultation Paper that landlords should be able to seek a waiver, amendment, or other related order in relation to a defect in their counter-notice.

8.248 However, we were conscious that to leave this right unconstrained would allow landlords to make a very general counter-notice and then apply to amend it later, when the RTM company has already been working to assess and respond to the initial counter-notice. This would significantly undermine our recommendation at paragraph 8.171 above, which aims to ensure that all substantive objections are raised in the counter-notice, and not at a later date.

8.249 We therefore proposed that although the Tribunal should have the power to waive or amend a defect in the counter-notice, it should only do so where the landlord has made a genuine mistake or other exceptional criteria are met.¹²⁸ Amendments to add new arguments which were reasonably available at the time of the counter-notice should not be permitted.

8.250 We did not make proposals to extend the Tribunal's power in this way in our Enfranchisement Consultation Paper. The pressing need for the Tribunal to be able to allow claims to proceed notwithstanding technical errors or omissions is particularly acute in the RTM context, as recognised by the Court of Appeal in *Elim Court*.¹²⁹

Consultees' views

8.251 This proposal was supported by a large majority of consultees although that support was not particularly emphatic. Most responses were expressed hypothetically, and some consultees (such as Damian Greenish) queried the utility of the proposal.

¹²⁸ CP, para 6.97.

¹²⁹ *Elim Court RTM Co Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89, [2018] QB 571 at [77] (Lewison LJ).

8.252 An individual who answered “Other” to this proposal explained that it:

seems fair at first sight, but I would be concerned that some of these ‘genuine mistakes’ may result from the negligence or incompetence of the landlord or his agents... Therefore you would have to be very careful that this didn’t just create a get-out or introduce delays for poor standards at the freeholder end of the process.

8.253 The Property Bar Association agreed in principle that the counter-notice “should be capable of amendment”, but that “in the interests of fairness it does not appear appropriate to impose a more restrictive regime in the case of a counter-notice.” Daniel Watney, surveyors,¹³⁰ opposed the proposal on the grounds that “the process needs to be more, not less, certain”. Church & Co Chartered Accountants argued that “one discovers information during the RTM process. Such discovery should not be forgotten or ignored as it might be significant to all parties.” This objection is addressed by our recommendation at paragraph 8.172, which would enable the subsequent inclusion of relevant information discovered after the counter-notice.

Discussion and recommendations

8.254 We continue to think that there should be some form of equivalent saving provision for defects in the counter-notice and procedural fairness for landlords. We make the same observation here as in the context of the claim notice: to distinguish firstly between the different legal effects of waiver of a defect and amendment of a notice; and secondly between situations in which amendment occurs because of a defect which would otherwise render the notice invalid, and standalone amendment of a notice unrelated to any potential defect or invalidity.

8.255 The Consultation Paper was somewhat ambiguous as to the relationship between this proposal and the proposal to bar new objections after the counter-notice has been served (discussed from paragraph 8.160). Some consultees were therefore understandably concerned about the conflicting effects of these proposals.

8.256 First, we consider the possibility of waiver of a defect in the counter-notice. If a counter-notice contains a defect which would render it invalid, that defect can be waived either by agreement between the parties, or by the Tribunal on the application of the party who gave the invalid counter-notice. If the defect is waived, the counter-notice will be treated as if it has always been valid. Unlike the analogous provision for claim notices, this application will have to be made as part of an existing procedure (for example, as a response to an RTM company application to the Tribunal seeking to declare the counter-notice invalid). It could not be made as a standalone application.

8.257 Second, we consider the possibility of amendment of a counter-notice. In developing our recommendations, we have been aware of the consultee responses and case law indicating that some landlords will use any opportunity to slow down a legitimate RTM claim in an attempt to discourage leaseholders from pursuing that claim. We do not think it appropriate to provide another avenue for the minority of unscrupulous landlords to continue doing. We therefore recommend that a counter-notice may only be amended with the agreement of the RTM company, or if the Tribunal thinks that

¹³⁰ On behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley and the Dulwich Estate (charity landlords).

permitting the landlord to amend the counter-notice is necessary to deal with an existing application. If the counter-notice is amended by agreement, the amended notice should have effect from the date of the original service of the notice.

8.258 We consider that there should be no right for a landlord to make a standalone application to the Tribunal to amend a counter-notice in the absence of the RTM company's agreement. We think this asymmetry in policy between claim notices and counter-notices is justified because it will act as an incentive for landlords to ensure the counter-notice is complete and correct, thus making the claim process more efficient, less costly, and less time-consuming.

8.259 We recognise that this position differs from our recommendations in the context of enfranchisement. There, we recommend that either the leaseholders or a landlord may apply to the Tribunal, either as part of a pre-existing claim or as a standalone application, for waiver or amendment of defects in their notice (whether or not those defects affect validity).¹³¹ We think that allowing landlords to amend the Response Notice is balanced by the Tribunal's role in assessing the merits of the claim and our other recommendations which seek to reduce the number of arguments landlords can make in the Tribunal on procedural grounds.¹³²

Recommendation 48.

8.260 We recommend that the parties should be able to agree to waive any defect in a counter-notice which would otherwise render that notice invalid. The effect of such an agreement will be to render the notice valid from the date on which it was served.

Recommendation 49.

8.261 We recommend that parties should be able to agree to amend a counter-notice that is valid (including following an agreement to waive a defect).

¹³¹ Enfranchisement Report, paras 9.63 to 9.69.

¹³² Enfranchisement Report, paras 9.58 and 9.60.

Recommendation 50.

8.262 We recommend that the Tribunal should, on application of the landlord during an existing proceeding concerning determination of the RTM claim or validity of the counter-notice, have a power to:

- (1) waive a defect in a counter-notice if that defect would otherwise render that notice invalid; and
- (2) make any consequential directions, including permitting amendment of the counter-notice.

How Tribunal discretion should be exercised

8.263 In the Consultation Paper, we set out a range of factors to which we thought the Tribunal should have regard when considering whether to exercise the powers recommended above.¹³³ We did not ask a specific consultation question about these criteria but, having considered our position further in light of consultee responses regarding waiver and amendment generally in the context of both RTM and enfranchisement, we think that our proposals could usefully be refined. Therefore, we recommend that when considering whether to waive any defect in a notice, or to amend a notice, the Tribunal should have regard to all the circumstances of the claim, including:

- (1) the need to ensure that RTM claims can be advanced fairly, at proportionate cost, and without undue delay;
- (2) the effect that refusing the application is likely to have on each of the parties;
- (3) the effect that granting the application is likely to have on each of the parties;
- (4) whether the party making the application has acted promptly; and
- (5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

¹³³ CP, para 6.94.

Recommendation 51.

8.264 We recommend that, in exercising powers to waive defects or amend a notice, the Tribunal should consider all the circumstances of the case, including:

- (1) the need to ensure that RTM claims can be advanced fairly, at proportionate cost, and without undue delay;
- (2) the effect that refusing the application is likely to have on each of the parties;
- (3) the effect that granting the application is likely to have on each of the parties;
- (4) whether the party making the application has acted promptly and in good faith; and
- (5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

THE ACQUISITION DATE

Current law and problems

8.265 The acquisition date is the date on which the RTM company acquires the legal right to exercise management functions over the premises.¹³⁴

8.266 Under the 2002 Act, if no counter-notice is given or a counter-notice is given which admits that the RTM company is entitled to acquire the RTM, the RTM company acquires the RTM on the date specified in the claim notice.¹³⁵ This will necessarily be more than four months after the claim notice was given because:

- (1) the date specified for the giving of a counter-notice must be not earlier than one month after the giving of the claim notice;¹³⁶ and
- (2) the acquisition date must be at least three months after¹³⁷ the date for the giving of the counter-notice.¹³⁸

8.267 If, on the other hand, the landlord issues a counter-notice which disputes the validity of the RTM claim, the RTM company may apply to the Tribunal for a determination as

¹³⁴ CLRA 2002, s 90.

¹³⁵ CLRA 2002, s 90(2).

¹³⁶ CLRA 2002, s 80(6).

¹³⁷ *Windermere Court Kenley Road RTM Co Ltd v Sinclair Gardens Investments (Kensington) Limited* [2014] UKUT 420 (LC).

¹³⁸ CLRA 2002, s 80(7). The RTM company can specify an acquisition date which is more than three months after the counter-notice date. It may be convenient, for example, to set a later date in order to coincide with a service charge payment date.

to whether the RTM company is entitled to acquire the RTM.¹³⁹ If the Tribunal finds that the RTM company is entitled to acquire the RTM, the acquisition date is taken to be three months after the Tribunal determination becomes final.¹⁴⁰

8.268 The other relevant date in the acquisition process is the determination date; the date on which the acquisition of the RTM is confirmed. This will be either:¹⁴¹

- (1) the date by which the counter-notice must be served, as specified in the claim notice (this is the case if there is no dispute about the RTM company's entitlement to acquire the RTM);
- (2) if the RTM is acquired by virtue of a determination of the Tribunal, the date on which the Tribunal's determination becomes final; or
- (3) if the RTM is acquired by the landlord withdrawing the counter-notice, the date the landlord agrees in writing that the RTM company is entitled to acquire the RTM.

8.269 In the Consultation Paper, we drew attention to some problems with the framework specifying the acquisition date. First, a failure by the RTM company to specify an acquisition date in the claim notice renders the claim notice invalid, requiring the RTM company to reissue the claim notice.¹⁴² Second, an RTM company may be forced to choose between waiting many months in order to acquire the RTM at a convenient point in the service charge cycle, and acquiring the RTM sooner but being undercapitalised because the next point in the cycle is months away.

Timeframes between determination date and acquisition date

8.270 In the Consultation Paper, we proposed to retain the default minimum time period of three months between the counter-notice due-date specified in the claim notice and the acquisition date specified in the claim notice.¹⁴³

8.271 We provisionally proposed small changes to how the acquisition date is determined in cases where a negative counter-notice is issued. When the claim is determined by the Tribunal, we provisionally proposed that the Tribunal should specify an acquisition date a minimum of (rather than a fixed period of) three months after the Tribunal determination.¹⁴⁴ If the claim is determined by the counter-notice being withdrawn, the RTM company should be entitled to specify the acquisition date, subject to a three-month minimum period from the date of the landlord's written withdrawal or

¹³⁹ CLRA 2002, s 84(3).

¹⁴⁰ CLRA 2002, s 90(4).

¹⁴¹ CLRA 2002, s 91(5).

¹⁴² See *3 Kings Road Westcliff Essex RTM Co Ltd v Westleigh Properties Ltd* (27 May 2005) CAM/00KF/LRM/2005/0001 Leasehold Valuation Tribunal (unreported); *Eton House Residents Ltd v Longmint Ltd* (17 June 2011) CAM/00MD/LRM/2011/0001 Leasehold Valuation Tribunal (unreported).

¹⁴³ CP, para 7.13.

¹⁴⁴ CP, para 7.19.

agreement. Our view was that if the RTM company failed to do so, the landlord could apply to the Tribunal to set the acquisition date.

8.272 We asked consultees whether they agreed that the minimum periods between determination date and acquisition date in each of the above scenarios should be three months.

Consultees' views

8.273 These proposals were supported by a significant majority of consultees representing a range of interests.

8.274 Professor James Driscoll commented that a three-month minimum would allow “a reasonable period ... for the handover of documents and the transfer of functions”. ARMA also said that this was a sufficient period for the landlord to provide all required information should the RTM company make a request for information under section 93 of the 2002 Act.¹⁴⁵

8.275 Two consultees responding “Other” supported our proposal but suggested additional safeguards:

- (1) The Residential Landlords Association said that a three-month period would suffice, providing that RTM companies can apply to the Tribunal for an extension in extenuating circumstances. We consider this possibility below at paragraph 8.322 and following.
- (2) Millstream Management Services “welcomed” measures to increase flexibility around the acquisition date, provided that “safeguards are in place to ensure services are not effectively ‘run down’ between the date the claim has been accepted and the date the acquisition takes effect”.

8.276 The Berkeley Group Holdings plc (responding “Other”) said that in the interests of good management, the acquisition date should be the end of the service charge year or immediately before the interim service charge payment date.

8.277 Some consultees who disagreed with our proposal argued that the three-month minimum period would cause delay. They variously suggested that the period should be two months or 28 days. Shula Rich suggested that the “minimum” period should be a “maximum” period to speed up the RTM process.

8.278 Investment Technology Ltd t/a Canonbury Management noted that freeholders gain an extra four weeks’ management because the three-month minimum only commences when the Tribunal’s decision becomes final. They suggested that landlords currently exploit this.

¹⁴⁵ In Ch 9, we explain RTM companies’ rights to request information from landlords or other relevant parties to assist with the acquisition or management of the RTM.

Discussion and recommendations

8.279 While we still agree with the thrust of this proposal, we wish to add three caveats, the need for which became clear in light of consultee responses.

- (1) The guidance note accompanying the claim form should recommend to RTM companies that they choose an acquisition date which aligns with the end of the service charge year, so as to minimise (and ideally eliminate) the period during which it has the RTM but has not received any service charge monies.¹⁴⁶
- (2) It was brought to our attention that in some cases, the convenient point for acquisition, given the service charge cycle, could in fact be a few days *before* the end of a minimum three-month period. If the three-month period were enforced strictly, it could preclude the RTM being acquired at a convenient point in the service charge cycle, which would undermine our attempts to facilitate an efficient takeover of management functions.

We therefore recommend that the RTM company should be able to nominate an acquisition date in the claim notice which is earlier than the three-month minimum if the landlord has agreed to this course of action before the filing of the claim notice. There is to be no penalty or enforcement of this provision should the landlord refuse to consent: this aspect of the recommendation is designed only to streamline the process in non-acrimonious cases. We do intend for this to become yet another avenue to the Tribunal.

- (3) We also consider that in addition to the three-month minimum, there should be a maximum time period in order to ensure a basic degree of finality and speed to this process. For this reason, we consider that the acquisition date nominated by the RTM company may not be more than one year after the deadline for service of the counter-notice. This caveat would require the modification of section 80(7) of the 2002 Act to avoid ambiguity.

8.280 In addition, we think that in order to ensure that leaseholders understand this somewhat intricate aspect of the claim process, statements explaining the following should be included in the guidance notes that accompany the claim form:

- (1) A statement clarifying that the RTM company can nominate a date later than the minimum period if it would be more convenient (for example, a date which aligns with the service charge payment cycle).
- (2) A statement explaining that in some instances the more convenient acquisition date may be earlier than the three-month minimum period. The RTM company can choose to nominate this earlier date in the claim notice, but will require the landlord's consent to do so.

8.281 In Figure 3 on page 218 below, we set out the process for calculating the acquisition date.

¹⁴⁶ From para 10.203, we discuss our recommendations as to the transfer of existing service charge monies to the RTM company at the acquisition date. However, in some cases there will be little or nothing to transfer.

Recommendation 52.

8.282 We recommend that where either no counter-notice or a positive counter-notice is served, the acquisition date should be the date nominated in the claim notice.

8.283 We recommend that the acquisition date nominated in the claim notice must be either:

- (1) a date between three months and one year after the deadline for the counter-notice specified in the claim notice; or
- (2) a date less than three month after the specified deadline for the counter-notice, if the RTM company obtains the written agreement of the landlord (or person acting as their agent).

Recommendation 53.

8.284 We recommend that the following should be included in the guidance notes that accompany the claim form:

- (1) A statement clarifying that the RTM company can nominate a date later than the minimum period if it would be more convenient (for example, a date which aligns with the service charge payment cycle).
- (2) A statement explaining that where the more convenient acquisition date is earlier than the three-month minimum period, the RTM company can nominate this earlier date but will require the landlord's consent to do so.

Recommendation 54.

8.285 We recommend that if a negative counter-notice is served, the minimum period between:

- (1) either:
 - (a) the date on which that negative counter-notice is withdrawn; or
 - (b) the date on which the Tribunal's determination that the RTM company is entitled to acquire the RTM becomes final; and
 - (2) the acquisition date of the RTM
- should be three months.

Recommendation 55.

8.286 We recommend that under no circumstances may the acquisition date be more than one year after the deadline for service of a counter-notice, whether that deadline is specified in the claim notice or deemed by law.

Acquisition date is not specified in the claim notice

8.287 Our recommendations above mean that an RTM company's failure to specify the acquisition date in the claim notice will not be grounds for the landlord to challenge the validity of the claim.¹⁴⁷ Failure to specify an acquisition date will not result in invalidity of the claim notice, which it arguably does under the current law.¹⁴⁸

8.288 In the Consultation Paper, we proposed that where the claim notice does not specify a date for acquisition and in the absence of agreement between the parties, the acquisition date should be determined by the Tribunal, following an application by the RTM company or landlord.¹⁴⁹

Consultees' views

8.289 This proposal was supported by a significant majority of consultees. The Residential Landlords Association said that the Tribunal was an appropriate body to nominate the acquisition date in the absence of agreement, adding that they hoped the Tribunal would not need to step in given that RTM companies can vary the acquisition date on the claim notice.

8.290 The Law Society agreed that the alternative scenario (obtaining the RTM by default in the absence of a specified acquisition date) was problematic and unjustifiable.

8.291 Consultees who answered either "Other" or "No" did not generally suggest that a claim notice should be invalidated if the RTM company fails to specify an acquisition date. For example, Long Harbour and HomeGround, a landlord and an asset manager, said they "agree[d] that not specifying a sufficient period ought not to invalidate a claim notice".

8.292 Rather, these consultees tended to raise persistent concerns about the time and cost to parties of involving the Tribunal, and the strain that this could impose on Tribunal resources.

8.293 Three consultees said that where no acquisition date is specified, a default date would be simpler than approaching the Tribunal. Long Harbour and HomeGround proposed

¹⁴⁷ See from para 8.232.

¹⁴⁸ See *Services Charges and Management* (4th edition), Tanfield Chambers at para 26-46, citing *3 Kings Road Westcliff Essex RTM Co Ltd v Westleigh Properties Ltd* CAM/00KF/LRM/2005/0001 LVT (unreported). Note though that this Leasehold Valuation Tribunal decision preceded the decision of the Court of Appeal in *Elim Court*.

¹⁴⁹ CP, para 7.20.

a default date of three months after the date of service of the claim notice. The Right to Manage Federation said:

...[W]e would prefer the right of an RTM Company to amend a defective notice and/or the requirement on the RTM Co and the landlord to use their best endeavours to agree an acquisition date and only when the efforts are exhausted should it be referred to a Tribunal. ... [T]ribunals are already overloaded and don't need to be bogged down with trivial issues.

Discussion and recommendations

- 8.294 Although the consultees who answered “No” or “Other” were in the minority, their comments contained legitimate concerns about the cost and complexity of involving the Tribunal. We consider that these concerns are significant enough to merit deviating from our proposal.
- 8.295 We have contemplated two alternative ways to ensure certainty for both landlords and leaseholders when the claim notice fails to specify an acquisition date.
- (1) Our proposal could be amended to include an obligation that the parties use reasonable endeavours to negotiate an acquisition date before approaching the Tribunal to prescribe this date. What constitutes “reasonable endeavours” will always carry a level of uncertainty, but in our view this modification would have two benefits. First, it sends an important signal to the parties that the Tribunal should not be the first port of call. Second, it provides grounds for either party to seek relief when the other is deliberately uncooperative.
 - (2) Alternatively, we could recommend that a default acquisition date is implied by statute into the claim notice, being three months after the deadline for service of the counter-notice specified in the claim notice. If the deadline for service of the counter-notice was also not specified, that should be deemed to be one month after the service of the claim notice. The acquisition date would accordingly be deemed to be four months after the service of the claim notice.
- 8.296 Deciding between these two alternatives ultimately comes down to the merits of flexibility versus certainty. In our view, the second option is preferable. We think it is better that the process not get waylaid in the Tribunal imposing cost, delay, and uncertainty on all concerned parties. Having statutorily implied deadlines will give both parties certainty without unduly delaying the process.
- 8.297 In the Consultation Paper, where we initially contemplated a proposal of this kind, we expressed concern that:
- this could mean that the RTM is acquired by default without the knowledge of either party. This is undesirable as both parties would be unprepared for the transfer of management responsibility.
- 8.298 In light of consultee responses, we think that this scenario is unlikely to eventuate, and should not preclude reforms which streamline the RTM process and deal with minor errors in the claim form in a way which avoids Tribunal proceedings. It is unlikely that an RTM company would go through the laborious task of setting up an RTM company and doing the preparatory work necessary to serve an RTM claim notice, only to walk away from that claim and forget about it.

8.299 We therefore recommend the second of our two alternative options, instead of our proposal in the Consultation Paper.

Recommendation 56.

8.300 We recommend that where no acquisition date is specified in the claim notice and the parties do not subsequently agree an acquisition date, the acquisition date will be deemed to be three months after the deadline specified in the claim notice for service of the counter-notice.

8.301 If no deadline for service of the counter-notice has been specified, that shall be deemed to be one month after the service of the claim notice. The acquisition date will accordingly be deemed to be four months after the service of the claim notice.

8.302 We recommend that neither failure to specify the acquisition date nor failure to specify the counter-notice deadline should render the claim notice invalid.

Tribunal power to amend the acquisition date

8.303 The last aspect of our proposals for reform regarding the acquisition date was our proposal that the RTM company should have the right to apply to the Tribunal to vary the original acquisition date specified in the claim notice, if that date subsequently proves inadequate.¹⁵⁰

8.304 We did not, however, want this Tribunal route to become the more widely used route to specify a non-standard acquisition date. For this reason we proposed that notes be added to the claim form advising the RTM company that it could specify a more convenient acquisition date (for example, with respect to service charges payments), rather than subsequently commencing Tribunal proceedings to amend the acquisition date.

Consultees' views

8.305 This proposal was supported by a significant majority of consultees.

8.306 The consultees that answered "Yes" generally qualified their support for the proposal. Similarly, several consultees answering "Other" thought the Tribunal should have a power of amendment, but proposed certain restrictions and safeguards.

8.307 Three consultees said that landlords should also be able to apply to the Tribunal to amend the acquisition date. Birmingham Law Society (responding "Other") said that the Tribunal should only change the acquisition date with the consent of the landlord or where the change would not disadvantage the landlord.

8.308 The Right to Manage Federation said that the Tribunal should only have a power to amend the acquisition date as a last resort. It proposed that in the first instance, the

¹⁵⁰ CP, para 7.18.

RTM company should write to the landlord seeking agreement to change the date. It would only go to the Tribunal if the landlord “unreasonably refused”.

8.309 Numerous consultees said that the Tribunal should only be able to amend the acquisition date in certain circumstances. For example, an individual said there should be a “very good reason that would benefit both freeholder and leaseholders” and Long Harbour and HomeGround said there should be “fault, or some other exceptional reason (such as complete absence of management)”.

8.310 ARMA said that the Tribunal should not be able to override the 3-month minimum to provide a shorter timeframe. Residential Management Group Limited thought that the date should not be “materially shortened” to allow an orderly handover. Stephen Desmond (Desmond Training Ltd), who responded “Other”, said that the Tribunal should only have power to amend the acquisition date to either the end of the service charge year, or shortly before an interim service charge falls due under the leases.

8.311 An individual warned that seeking amendments from the Tribunal should not be used as a “delaying tactic”.

8.312 Church & Co Chartered Accountants disagreed with the proposal unless the amended acquisition date was at least three months away.

8.313 Investment Technology t/a Canonbury Management recommended that the three-month minimum be reduced to a two-month minimum, and that the possibility of approaching the Tribunal for an exemption should be removed.

Discussion and recommendations

8.314 We remain of the view that there should in principle be some scope for applying to the Tribunal to modify the acquisition date after the claim notice has been served. In light of the concerns raised by consultees, however, we have decided to modify our proposal in two ways.

8.315 First, we recommend an explicit clarification that parties can amend the acquisition date by agreement without approaching the Tribunal. We have been told that this sometimes occurs in practice, despite there being no grounding in the 2002 Act for this process. In reality, because both parties consent, there will be nobody to object. We think it important though that this option is made plain in statute, both for legal certainty and to make it clear to professionals in this field that this is an option which they can advise their clients to take up.

8.316 Second, we recommend a strict test that the Tribunal should apply in the case of such applications. Setting the correct threshold for allowing such an application will help to address many of the concerns that consultees raised.

8.317 We considered three possible thresholds:

- (1) allowing the amendment only if it is reasonable to facilitate good management;
- (2) allowing the amendment only if it would not be to the detriment of good management or unreasonably frustrate the acquisition of the RTM; or
- (3) a presumption in favour of the RTM company’s proposed date, rebuttable if it would cause serious detriment to the landlord or quality of the property’s management.

8.318 In our view, the first of these options is the best. Given the latitude our recommendations extend to RTM companies regarding their ability to specify the acquisition date, we think a Tribunal application of this kind should be rare, exercisable in cases where new information has come to light or where the landlord unreasonably refuses to agree a modified date.

8.319 We therefore recommend that the Tribunal only allow the amendment if it is reasonable to facilitate good management.

Should we extend this right to landlords?

8.320 In light of consultee concerns, we also considered whether we should extend this new right to landlords, recognising that both parties to the transaction should have equal access to this process. On the other hand, extending this right could create another avenue for landlords to delay acquisition of the RTM.

8.321 There are legitimate reasons why a landlord may want to amend the acquisition date (such as addressing issues involving management contracts. However, we consider that the three-month minimum timeframe provides landlords with sufficient time to address these concerns. We do not therefore recommend that landlords have the right to apply to the Tribunal to extend the acquisition date.

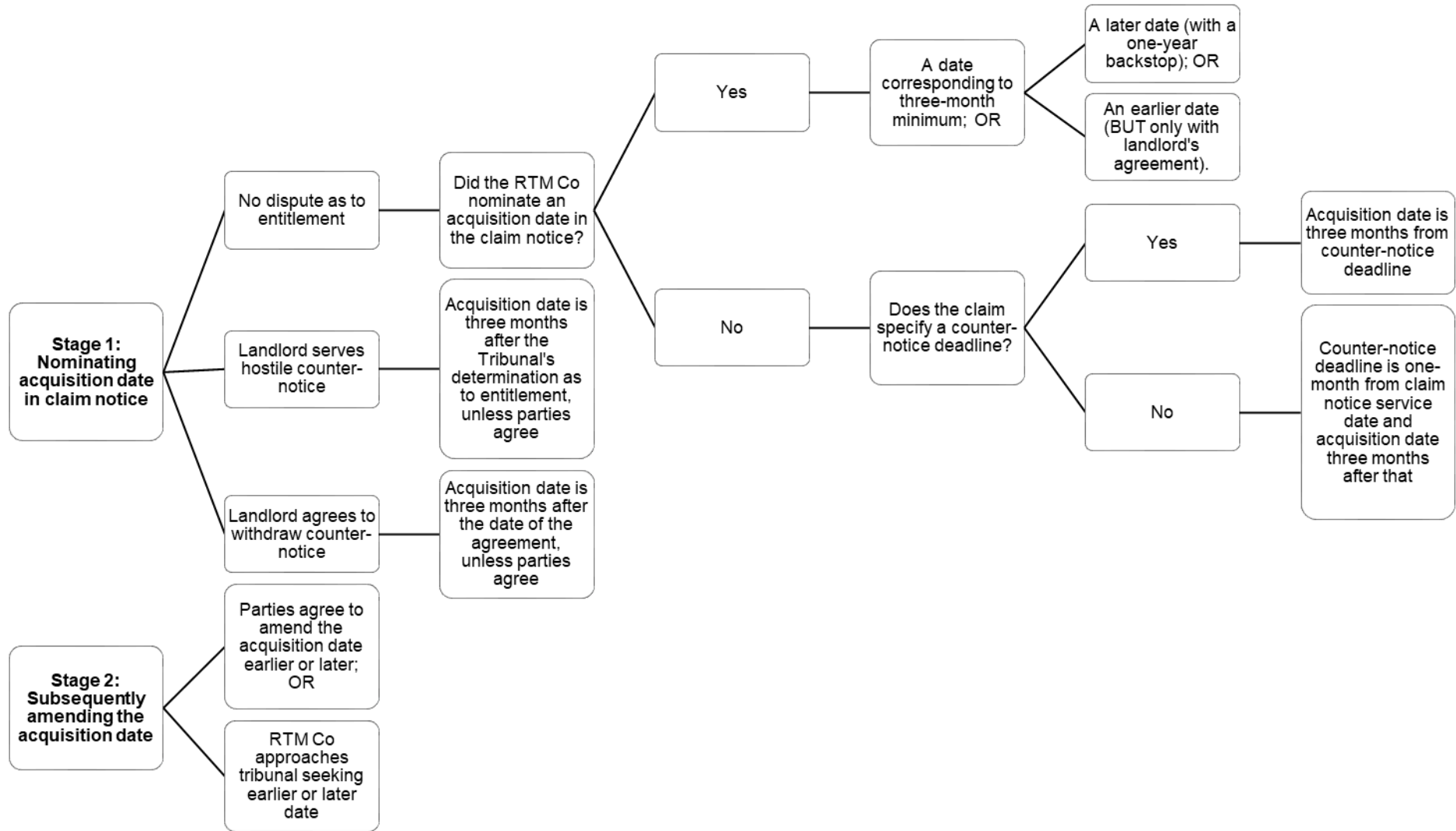
Recommendation 57.

8.322 We recommend that there be a statutory provision confirming that parties may agree to amend the acquisition date to any date earlier or later than the date originally specified in the claim notice.

8.323 We recommend that the RTM company (but not the landlord or relevant third party) should have the right to apply to the Tribunal to vary the acquisition date specified in the claim notice, if that date subsequently proves inadequate. This date may be earlier or later than originally specified.

8.324 The Tribunal should allow the amendment only if it is reasonable to ensure good management. If the RTM company has not attempted to reach agreement with the freeholder, this should weigh against the RTM company's application.

Figure 3: Calculating the acquisition date



Chapter 9: Information notices and management contracts

INTRODUCTION

- 9.1 An RTM company needs information about the premises at various stages of the RTM process. At first, leaseholders will need certain information so that they can decide whether to make the claim at all, and so that they can complete the claim notice. Once the RTM has been acquired, the RTM company will need more detailed information about the premises, and any management contracts that exist in relation to the premises. Without this information, the RTM company may not be able to manage the premises effectively, or comply with its legal obligations in relation to issues such as insurance and building safety.
- 9.2 Although landlords are already required to provide certain information to RTM companies, consultees have told us that more information is needed at an earlier stage and that RTM companies face difficulties enforcing these obligations in practice. In this chapter, we recommend giving RTM companies more comprehensive rights to request information at an earlier stage of the RTM process. We also consider how these obligations could be enforced in practice, and the impact of data protection legislation on our proposals.

RIGHTS TO INFORMATION IN ADVANCE OF AN RTM CLAIM

A new right to more extensive information before making a claim?

Current law and problems

- 9.3 Under section 82 of the 2002 Act, RTM companies have a right to obtain any information which they reasonably require to ascertain the particulars that must be included in the claim notice.¹ For example, they may want to obtain the names and addresses of qualifying tenants of flats in the premises.
- 9.4 An RTM company exercises this right by serving a notice on “any person” who is in possession or control of the information (likely to be a landlord or managing agent). The notice may request that the RTM company either be permitted to inspect the relevant document, or that they be supplied with a copy (for a reasonable fee).² The person who is served with the notice must comply within 28 days of the day on which it is given.³
- 9.5 In the Consultation Paper, we explained that this existing right to obtain information is of limited value to RTM companies. The RTM company can only obtain information which is needed to complete the claim notice, and much of that information is likely to

¹ CLRA 2002, s 82. Section 80 of the CLRA 2002 sets out the particulars that must be included in the claim notice. See discussion from para 8.28.

² CLRA 2002, s 82(2).

³ CLRA 2002, s 82(3).

already be available from publicly accessible sources (such as HM Land Registry). This information is unlikely to be of much value in helping the RTM company to ascertain the extent of the management obligations it would be taking on if it were to acquire the RTM. There are also problems with enforcing this right, which we discuss further below (see paragraph 9.75 onwards).

- 9.6 In response to our leaseholder survey, stakeholders explained that instead of making a request for information under section 82 to obtain the contact details of other leaseholders, they resorted to a range of different techniques. These included conducting searches at HM Land Registry, requesting details from other parties, using social media, door-knocking and canvassing, or posting signs around the premises.
- 9.7 Separately from the RTM regime, leaseholders can request that the landlord provide certain other information including a summary of the insurance policy,⁴ and a summary of the service charges.⁵ Although these mechanisms allow leaseholders in RTM companies to access further information this is unlikely to be sufficient to help them decide whether to claim the RTM.

Our proposals

- 9.8 In the Consultation Paper, we sought to develop a process by which RTM companies could obtain more extensive information at an earlier stage. We envisaged that this would allow RTM companies to obtain any information that they reasonably required in connection with the management of the premises,⁶ and information about the management functions actually carried out under the leases of the premises.⁷ We argued that, depending on the details of the right, this could let leaseholders make more informed choices about whether to claim the RTM in the first place, as well as the information actually needed to make the claim.
- 9.9 We outlined two options for how the process might work. Under the first option, the RTM company would be entitled to request this information as part of the claim notice. The landlord would then be required to provide the information at the counter-notice stage, even if the landlord was disputing the RTM company's entitlement to acquire the RTM.⁸
- 9.10 We indicated that this had the benefit of integrating the provision of this information into the existing claim process and suggested it might help to reduce the cost of providing information. However, we acknowledged that it did not allow RTM companies to obtain the information before serving the claim notice.
- 9.11 Under the second option, the RTM company would have a right to request information in advance of the claim notice,⁹ and the landlord would have a fixed period in which to

⁴ Landlord and Tenant Act 1985, s 30A.

⁵ Landlord and Tenant Act 1985, s 21.

⁶ CP, para 7.49.

⁷ CP, para 7.50.

⁸ CP, para 7.67.

⁹ CP, para 7.80.

respond.¹⁰ The RTM company would be able to consider the information and serve a claim notice if it wished to proceed. The RTM company might decide that managing the property was going to be more difficult than first anticipated and decide against serving a claim notice. Alternatively, the information could reassure leaseholders or encourage them to pursue the claim.

9.12 We did not think this would slow down the process of acquiring the RTM in all cases because it would not be mandatory to request the information. However, we acknowledged that it might result in RTM companies requesting information that they already had, or that turned out to be irrelevant because the RTM claim ultimately failed.¹¹

9.13 We asked consultees whether they thought that it was a good idea to allow the RTM company to request more extensive information from the landlord before finding out whether it was entitled to exercise the RTM. We asked consultees which of these two options they preferred, and why.

Consultees' views

A right to more extensive information in advance of the RTM claim?

9.14 The vast majority of consultees agreed that the early provision of information was a good idea. Consultees variously thought that early disclosure of information would:

- (1) encourage transparency and informed decision-making;
- (2) reduce obstacles to claiming the RTM, and maximise its chance for success;
- (3) save time, effort and costs later in the transaction;
- (4) help with the exercise of due diligence by the RTM company's directors; and
- (5) help ensure effective management in the first few months after acquisition.

9.15 A few leaseholders gave practical examples of how an earlier exchange of information would have benefited their RTM claim. One said that it would have been useful to know at an early stage that the landlord was claiming that commercial space represented 26% of the building. They stated that had the RTM company known this, they would have engaged a professional surveyor to verify measurements. Another leaseholder told us that they did not know that several of the flats had major service charge arrears.

9.16 Other consultees thought that the early provision of information was a good idea, but proposed certain provisos. For example, the Berkeley Group Holdings plc, a developer, thought that early disclosure should only be required once the RTM company has met the participation threshold and qualifying requirement for making an RTM claim. Similarly, the London Borough Tower Hamlets said that there should be

¹⁰ We consider the period for responding from para 9.55 below.

¹¹ CP, para 7.84.

limits on the amount of information that landlords are required to provide prior to the RTM company confirming its right to acquire the RTM.

- 9.17 Consultees who disagreed that early provision of information was a good idea emphasised the likely expense of this process. The Association of Residential Managing Agents (“ARMA”) also suggested that the scheme could be used as a ploy to acquire information for purposes unconnected with the RTM.

Process for exercising new right to obtain information at an earlier stage

- 9.18 Well over half of consultees preferred the second option. Several consultees told us that accessing information at an early stage would assist leaseholders to make informed decisions about claiming the RTM. The Property Bar Association thought that this was particularly important in complex premises. Notting Hill Genesis, a housing association, explained that:

Option two is preferred so that the RTM and landlord can have a proper exchange of documents before a claim is submitted. This would ensure that both are fully informed of and can begin discussions on future liabilities.

- 9.19 Stephen Desmond (Desmond Training Ltd) also preferred the second option because, in his view, information notices are unlikely to be required in the vast majority of cases so should not be embedded in the claim notice.
- 9.20 Although a significant minority of consultees preferred the first option, these consultees did not provide any substantial reasons for choosing this option.
- 9.21 A few consultees did not support either option. For example, Investment Technology Ltd t/a Canonbury Management, a managing agent, thought there should be more emphasis on mandating information on the acquisition date, such as making it a criminal offence not to provide data by the acquisition date.

Discussion and recommendations

Should RTM companies be entitled to more extensive information before making a claim?

- 9.22 We remain of the view that RTM companies ought to be given access to more extensive information at an earlier stage in the process, for two reasons. First, we think RTM companies require access to more comprehensive information about the nature and scale of their potential management responsibilities before making an RTM claim. This will enable leaseholders to make a more informed decision about whether to claim the RTM. In some cases, this is only possible if the RTM company has access to comprehensive information about the nature and scale of the management responsibilities that they will acquire.
- 9.23 Second, both the landlord and the RTM company will benefit from a smooth handover of management functions to the RTM company. If information is provided to the RTM company before the acquisition date, the RTM company is better equipped immediately to assume management functions on the acquisition date.

Process for obtaining information in advance of an RTM claim

- 9.24 We have concluded that the second option is preferable because it allows RTM companies to obtain information prior to issuing the claim notice. This will help to

better inform their decision as to whether to proceed with the claim which may ultimately save the parties time and costs.

- 9.25 Before serving the claim notice, the RTM company will be entitled to inspect or obtain copies of the following information:
- (1) information that the RTM reasonably requires in order to complete the claim notice (as is currently the case under section 82 of the 2002 Act); and
 - (2) information that the RTM company reasonably requires in order to ascertain whether to claim the RTM. At paragraph 9.50 below, we provide examples of the information that the RTM company might be able to obtain by exercising this new right.
- 9.26 We recognise that incorporating a “reasonableness” requirement may provide an avenue for landlords to challenge requests for information by RTM companies. However, we have concluded that this is preferable to prescribing a list of items which an RTM company can automatically request. Any such list of items would need to be extremely broad to cover all potential contingencies, and an RTM company may end up requesting and paying for something from a prescribed category which is not needed for the particular size or type of property.
- 9.27 In order to exercise this right, the RTM company will be required to give a notice to the landlord (or other person in possession or control of the information) requesting to inspect or obtain a copy of this information.
- 9.28 We envisage that RTM companies will be permitted to serve more than one notice requiring the provision of either type of information. This recognises that the information that an RTM company needs to decide whether and how to claim the RTM may evolve over time. However, there will be no obligation to provide the same information again if that information was already provided at the request of the RTM company.
- 9.29 We also consider that the information the RTM reasonably requires to decide whether to claim the RTM will necessarily extend to information that the RTM company requires to decide how it will frame any claim. For example, this could be information enabling the RTM company to determine whether it is more likely to be successful in bringing a claim in respect of a self-contained part of the building, or in respect of the building as a whole.¹²
- 9.30 In the Consultation Paper, we suggested that RTM companies would only be able to exercise this right if they could prove that they met the participation criteria.¹³ We have concluded that a requirement of this kind is undesirable. There may be circumstances where the founding members of an RTM company need access to this information to persuade others to join the RTM company. For example, they may need the information to determine whether the qualifying requirement is met and whether it is worth going to the time and effort of convincing other leaseholders to join the RTM

¹² This distinction is explained above at paras 3.42 and 3.80.

¹³ CP, para 7.80.

company. We are also concerned that imposing this hurdle could lead to disputes at a very early stage in the claims process, and potentially cause RTM companies to abandon their claim altogether.

9.31 We address the time limit that would apply to this and other information rights below.

Recommendation 58.

9.32 We recommend that in addition to information reasonably required to complete the claim form, RTM companies should be entitled to inspect or obtain a copy of any information that they reasonably require to decide whether to claim the RTM.

RIGHTS TO INFORMATION AFTER RTM CLAIM HAS COMMENCED

A new right to obtain information to assess landlord objections to the claim notice

9.33 If the landlord issues a counter-notice alleging that the RTM company is not entitled to acquire the RTM,¹⁴ the RTM company may need to request information to determine whether to apply to the Tribunal for a determination that they are entitled to the RTM.¹⁵

9.34 For example, if the landlord alleges that the RTM company is not entitled to claim the RTM because the non-residential floor space exceeds 50% of the total floor space,¹⁶ the RTM company could request plans of the building to assess the merits of that argument. If the landlord produces evidence that proves their argument, the RTM company can avoid the time and cost of applying to the Tribunal to resolve this dispute. On the other hand, if the landlord is unable to produce evidence supporting argument, or produces unconvincing evidence, the RTM company can feel more confident that applying to the Tribunal will not waste time and costs.

Recommendation 59.

9.35 We recommend that RTM companies should have a right to obtain any information they reasonably require to decide whether to apply to the Tribunal for a determination that they are entitled to the RTM.

¹⁴ CLRA 2002, s 84(2)(b). In Ch 10, we also recommend that landlords should be entitled to give a counter-notice objecting to the RTM company acquiring management functions in respect of appurtenant property which is used in common with occupiers of other premises; see from para 10.119.

¹⁵ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

¹⁶ See discussion of the non-residential limit from para 3.94.

Right to obtain information that is reasonably required to exercise the RTM

Current law and problems

9.36 Under section 93 of the 2002 Act, the RTM company can require the landlord or other relevant person to provide any information that is in their possession and control, and which the company reasonably requires in connection with the exercise of the RTM.¹⁷

9.37 In the Consultation Paper, we pointed out that section 93 does not explain the type of information that the RTM company can request using this section. In particular, it does not provide guidance on the information that could be “reasonably required in connection with the exercise of the RTM”. This gives rise to the following issues:

- (1) the lack of clarity in the section could lead to landlords refusing to provide the information requested; and
- (2) the right depends on the RTM company requesting specific information. This is problematic because RTM companies may not know what information they need to request. For example, an RTM company may not know that there had been a previous dispute with a neighbour, and therefore have no reason to request documents about the dispute.

9.38 In response to our leaseholder survey, one stakeholder told us that:

All that was handed over was a small cardboard box with random documents in it. Our new managing agent’s accountants went through everything and basically told us to start from scratch which we did.

9.39 We are concerned that similar confusion could arise in relation to the new rights to request information that the RTM company reasonably requires to decide whether to claim the RTM, and obtain information to assess landlord objections to a claim notice.

Our proposals

9.40 We asked consultees whether we should prescribe a form for the notice used by RTM companies to request information from landlords.¹⁸ We suggested that the form could include sections to request specific categories of information, plus a general section where the RTM company could ask for any further information that it reasonably requires to exercise its management functions. However, we acknowledged that it may prove difficult to prescribe a form, because the information that is reasonably required will vary significantly across properties.

Consultees’ views

9.41 Almost all consultees thought that we should prescribe the notice used by RTM companies to request information from landlords. Consultees pointed out the following benefits of a prescribed form. First, several consultees commented that a prescribed form would make the process of requesting information faster and clearer. For example, the Property Litigation Association Law Reform Committee said that a form

¹⁷ CLRA 2002, s 93(1).

¹⁸ CP, para 7.55.

“clearly identifying relevant information” would be helpful to both parties. Jane Gregory, a leaseholder, added that:

If you want to extend this right to as many people as possible, then a form can help them get the right information into a useful form.

- 9.42 Catherine Williams, a founder of the National Leasehold Campaign (responding in a personal capacity), asked whether the prescribed form could be delivered through an online process.
- 9.43 Second, a few consultees thought that using a prescribed form would reduce the cost of requesting information, such as reducing professional fees.
- 9.44 Third, the Law Society and Notting Hill Genesis thought that a prescribed form would lead to greater consistency in information gathering. For example, Notting Hill Genesis said that leaseholders would know what they might request, and landlords what they might need to provide. Similarly, a leaseholder, Helen Gibbons, suggested that including items on a prescribed form may compel landlords to provide information that they would otherwise be reluctant to provide.
- 9.45 Several consultees thought that the law should prescribe a form, but raised concerns about its style and format. For example, a few consultees emphasised that the form should be in plain English.
- 9.46 Consultees were divided on the level of detail that should be included in the form. One group thought that the form should be less detailed, because it would be impossible to make the form exhaustive. The Berkeley Group Holdings plc told us that “one form cannot be appropriate given the huge variety of buildings and estates”. Church & Co Chartered Accountants also noted the difficulty of imagining and prescribing all relevant matters regarding issues such as gyms, saunas, pools and restaurants. By contrast, Damian Greenish, a solicitor, thought that we should prescribe an over-inclusive form, and Stephen Desmond suggested that the RTM company could strike out any questions that they did not require to be answered.

Discussion and recommendation

- 9.47 We have concluded that Government should make a model form available to leaseholders who are exercising the new right to obtain information to decide whether to bring an RTM claim. However, we do not think that it should be compulsory to use the form. This will allow, for example, a leaseholder to make a more informal request in relation to a leasehold house or small block, or issue a more detailed request for a large estate. A useful analogy is the Law Society’s LPE1 form, which leaseholders can use to collect information held by landlords and managing agents.¹⁹ As a result, we refer to the form as a “model form”, rather than a prescribed form. We think that the model form should be divided into two parts.
- 9.48 Part one should provide an extensive list of categories of information that the RTM company can request from the landlord. We think that an extensive list is necessary to

¹⁹ <https://www.lawsociety.org.uk/support-services/advice/articles/leasehold-forms/>.

let RTM companies know what they would be within their rights to request, and landlords what documentation they should be prepared to provide.

- 9.49 RTM companies should select which categories are relevant to their premises, perhaps using a tick-box system. They should also be provided with a field in which to specify particular details that they require (for example, “information about the dispute between flat A and flat B”, or “details of the gardening contract”). To mitigate confusion, a warning should be included that not every category will be relevant or useful in every case.
- 9.50 We think that the following categories of information should be included in part one of the form:
- (1) the names of leaseholders, and their addresses for service;
 - (2) copies of each lease in the premises;
 - (3) information about the utilities and insurance;²⁰
 - (4) information about the layout of the premises, including exclusive and non-exclusive appurtenant property;
 - (5) details of ongoing major works and long-term agreements, along with any notices served under section 20 of the Landlord and Tenant Act 1985 (consulting on major works and long-term agreements) and responses;
 - (6) service charge accounts for the previous and current year, along with outstanding invoices, service charge arrears and payment plans;
 - (7) a list of any disputes involving leaseholders, contractors or others;
 - (8) details of management contracts in respect of the premises;
 - (9) details of employment contracts in respect of the premises; and
 - (10) health and safety information, including risk assessments.
- 9.51 Part two of the form should allow the RTM company to request any other information which did not fall into any of the categories in the first part of the form that it reasonably requires in connection with the exercise of the RTM. This mitigates concerns that the form could not include every possible contingency.
- 9.52 We think that this suggested format will allow the form to be an educative tool, rather than just a checklist of items to be disclosed. It could also help reduce costs by ensuring that RTM companies do not request irrelevant information, or a disproportionate amount. In any case, any tendency to “over request” information will be reduced by our recommendation below that RTM companies will bear the cost of

²⁰ We consider information about insurance in more detail from para 10.44.

requesting information prior to issuing the claim notice.²¹ To maximise the accessibility of the form, the form should be available electronically.

- 9.53 We think that a model form would be equally useful in relation to other information rights (namely, the rights to request information under sections 82 and 93 of the 2002 Act, and the new right to obtain information following a negative counter-notice). However, as the nature of the information being requested under each right is likely to be different and require varying levels of detail, we recommend that Government prescribe individual forms for each information right.

Recommendation 60.

- 9.54 We recommend that Government provide model forms that RTM companies can choose to use when exercising the right to obtain any information that they reasonably require in connection with the exercise of the RTM.

TIMING AND ENFORCEMENT OF INFORMATION RIGHTS

Current law and problems

- 9.55 Any person who receives a notice requiring them to provide information under section 82 or 93 of the 2002 Act must comply within 28 days of receiving that notice.²²
- 9.56 In the Consultation Paper, we said we had been told by some stakeholders, mostly representing landlord interests, that 28 days is often insufficient time to provide information in response to a request. However, it is also important that RTM companies should not have to wait a disproportionate length of time to receive the information they need to decide whether to pursue a claim, or to enable them to start managing the premises.
- 9.57 Despite the 28-day deadline that applies to requests for information under section 93, the landlord has no obligation to respond to the notice until after the acquisition date.²³ This is problematic because, if the RTM company only receives a response on the day that they assume the management functions (or potentially even later), then:
- (1) this information cannot be factored into the RTM company's decision as to whether they should claim the RTM at all; and
 - (2) the RTM company may not have been able to fully prepare for the acquisition of the management functions. This may lead to a gap in services or decline in the quality of management, which might place the RTM company in breach of its obligations under the lease.

²¹ See para 9.148 below.

²² CLRA 2002, ss 82(3) and 93(4).

²³ CLRA 2002, s 93(3).

9.58 If a person fails to provide the information within the required time, the RTM company must apply to the county court for an order requiring that person to comply within a specified time. Before making an application, the RTM company must have given notice to the defaulting party and wait for at least 14 days to elapse.²⁴ This enforcement procedure places a significant burden on RTM companies and fails to act as a significant deterrent against non-compliance with the duties to provide information under section 82 and 93 of the 2002 Act.

Our proposals

9.59 In the Consultation Paper, we tentatively suggested that landlords and other relevant persons should have 28 days to provide information after being given notice by the RTM company. We chose this time limit because landlords are already given 28 days to respond to requests for information under sections 82 and 93 of the 2002 Act. Although some stakeholders informed us that this time period was too short, we took the view that it would usually be sufficient because most information that the RTM company can request should already be in the landlord's possession as part of everyday management.

9.60 Nevertheless, we acknowledged that there may be occasions where it is not reasonably practical to respond within a 28-day period. We therefore asked consultees whether landlords and other relevant persons should have a 28-day period to respond with a possible extension from the Tribunal in exceptional circumstances, or a fixed 60-day period.

Consultees' views

9.61 The majority of consultees said that the landlord should have 28 days to respond, with a possible extension in exceptional circumstances. Many of these consultees told us that 28 days would be a sufficient period in most cases, with one leaseholder, Richard Tydeman, suggesting that this information would be readily available to a landlord who kept "proper records". The Property Bar Association agreed that a 28-day period may put the landlord under some time pressure, but that most information should be capable of production within such a period.

9.62 Several consultees thought that 28 days would always be sufficient, and that there was no need for an extension in any circumstances. Others thought that extensions should be allowed in exceptional circumstances, but that a closed list of exceptional circumstances should be developed.

9.63 Consultees who said that the landlord should have 60 days to respond fell into two groups. The first group told us that that 28 days may be insufficient where, for example, the information was in the hands of third parties or the building or estate was large and complex. Damian Greenish said that the appropriate period would depend on the nature of the building and the complexity of the services provided. He suggested that 60 days made better sense in complex cases, and that a 28-day period would lead to a rush of Tribunal applications seeking time extensions.

²⁴ CLRA 2002, s 107. In Ch 12, we recommend that jurisdiction for making orders under section 107 should transfer to the Tribunal: see para 12.38.

9.64 A second group of consultees selected this option because they supported a fixed period. For example, the Residential Landlords Association said that providing an unlimited time period for extensions could produce long-term delays and open the door to landlords frustrating the process with delays.

Discussions and recommendations

9.65 We have concluded that there should be a fixed period for responding to a request for information under any of the information rights. As some consultees pointed out, extensions could be abused by landlords to delay giving RTM companies the information they require. This might prolong the claims process, discourage the RTM company from starting or continuing with the claim, and delay the RTM company from being able to prepare to manage the premises. The cost of applying to the Tribunal to seek an extension will generate additional costs for both parties. We want to avoid unnecessary satellite litigation where possible.

9.66 We consider that different fixed time limits are justified for each of the information rights. First, in relation to the new right to obtain information to decide whether to bring an RTM claim, we consider that a 60 day or two-month period is appropriate. We think that it is preferable to prescribe a slightly longer period which is realistic in all cases (such as large developments), than a shorter period with the possibility of an extension. We recognise that two months is longer than the period which is currently given to respond to a section 82 or 93 notice. However, we think that it is fair to give the landlord a longer period to respond given that we are now enabling RTM companies to request more comprehensive information at an earlier stage.

9.67 Second, we have concluded that the landlord should have 28 days to respond to the request for information made in accordance with the other information rights. Regarding the right to obtain information to complete the claim notice (section 82), we consider that the existing 28-day period is justified. This is because the RTM company can only request limited information under this existing right (namely, information that it needs to complete the prescribed claim form).

9.68 In relation to the new right to obtain information following a hostile counter-notice, we consider that the information should have to be provided within 28 days of receiving the request. We prefer a 28-day period to a two-month period, as, once the RTM claim is on foot, we think that it should be delayed to the minimum possible extent. Further, given that this right allows the RTM company to investigate arguments put forward by the landlord in the counter-notice, it is not unreasonable to expect the landlord to have ready access to the details of those arguments within a shorter period.

9.69 In relation to the right to obtain information needed to exercise the RTM (section 93), we consider that it is in the interests of both parties that the landlord provides this information as promptly as possible. We have therefore concluded that the existing 28-day time limit should be maintained.

9.70 However, we think that two amendments to section 93 are necessary. First, the RTM company should only be able to serve the notice after the determination date. This is

the date on which it is finally confirmed that the RTM company will acquire the RTM, which will be either:²⁵

- (1) where there is no dispute about the RTM company's entitlement to acquire the RTM, the date specified in the claim notice;
- (2) where the RTM is acquired by virtue of a determination of the Tribunal, the date on which the Tribunal's determination becomes final; or
- (3) where the RTM is acquired by the landlord withdrawing the counter-notice, the date the landlord agrees in writing that the RTM company is entitled to acquire the RTM.

9.71 Second, depending on the timing of the request, the landlord may be required to comply with the request before the acquisition date. This amendment will ensure that RTM companies have advance access to the information they will need to manage the premises as soon as it is certain that the RTM will be acquired.

Recommendation 61.

9.72 We recommend that there should be a fixed time limit of two months for responding to a request for any information that is reasonably required to decide whether to acquire the RTM.

Recommendation 62.

9.73 We recommend that there should be a fixed time limit of 28 days for responding to a request for any information that is reasonably required in relation to a counter-notice alleging that the RTM company is not entitled to the RTM.

Recommendation 63.

9.74 We recommend that the existing right to obtain information under section 93 of the 2002 Act should be amended so that:

- (1) the RTM company may only serve this request on or after the determination date; but
- (2) the landlord must respond within 28 days to a request which is received on or after that date.

²⁵ CLRA 2002, s 91(5).

Enforcement

- 9.75 As we explained at paragraph 9.57 above, there are currently no real consequences if a landlord (or other third party) fails to provide information requested by the RTM company within the prescribed time. To ensure that the new information regime operates as intended, effective enforcement mechanisms are required.
- 9.76 As we indicated in the Consultation Paper, one option is imposing a financial civil sanction.²⁶ For example, if a landlord or other person failed to comply with an obligation to provide information, the RTM company could apply to the Tribunal for an order that they comply, and failing compliance, impose a penalty for breach payable to the RTM company.²⁷
- 9.77 Other enforcement mechanisms could include empowering the Tribunal to award indemnity costs, draw adverse inferences against the defaulting party, or hold the defaulting party in contempt. Alternatively, in line with our recommendations in the Enfranchisement Report, the RTM company could be permitted to apply to the Tribunal for enforcement, or proceed with the claim and rely upon its right to recover any costs wasted as a result of the failure of the recipient of the information notice to respond.²⁸
- 9.78 We note that currently, the Tribunal's power to make a wasted costs order is only engaged where unreasonable behaviour occurs within the proceedings themselves (that is, the power is only engaged once the proceedings are underway).²⁹

COPIES OF THE LEASE

Our proposals

- 9.79 In the Consultation Paper, we suggested that RTM companies should be entitled to request copies of each lease in the premises. To test whether this proposal was necessary in practice, we asked consultees:
- (1) whether under the current law, a copy of each lease is provided to or obtained by RTM companies;
 - (2) whether consultees thought that RTM companies need a copy of every lease to understand their management obligations; and
 - (3) whether consultees thought the benefits of the RTM company accessing a copy of each lease would outweigh the additional time and cost of providing these.

²⁶ The Ministry of Justice Criminal Offences Gateway Guidance notes that: A wide range of civil sanctions might be employed to create a proportionate and targeted hierarchy of enforcement mechanisms, for example improvement or compliance notices served to secure compliance with particular obligations, voluntary undertakings or civil monetary penalties. See Ministry of Justice, *Criminal Offences Gateway Guidance*, <https://www.justice.gov.uk/downloads/legislation/criminal-offences-gateway-guidance.pdf>.

²⁷ In Ch 12, we recommend that the Tribunal be given jurisdiction to enforce requirements of the RTM provisions of the CLRA 2002; see from para 12.38.

²⁸ We make a similar recommendation in the Enfranchisement Report, para 8.89.

²⁹ *Willow Court Management Company v Alexander* [2016] UKUT 0290.

Consultees' views

Do RTM companies need a copy of the lease?

- 9.80 A sizeable majority of consultees said that RTM companies need a copy of every lease to understand their management obligations. They generally noted that if the leases were substantially the same, it would be unnecessary to have a copy of every lease. A few consultees told us that on new building sites the leases are largely the same. Stephen Desmond said that “often” the leases will include a covenant by the landlord to grant all leases on “substantially similar terms”.
- 9.81 However, consultees noted that it may be necessary to see a copy of every lease, as there may be several different types of leases within a building or estate, or identical leases may have been subsequently varied. For example, the Law Society noted that:
- ... as leases may have been varied, it is important to be aware that we cannot make an assumption that all leases on a development or in a block are the same.
- 9.82 The British Property Federation thought that landlords should be able to charge “fair and reasonable costs” if they are required to provide a copy of every lease. By contrast, Stephen Desmond thought that the RTM company should be entitled to a copy of every lease free of charge.
- 9.83 Consultees who did not think the landlord should provide a copy of every lease pointed to the fact that the RTM company could download copies of the leases via the HM Land Registry at a modest cost if they felt it was necessary. Urang Property Management Limited, a managing agent, suggested that this would often be cheaper than paying the landlord’s costs of providing these documents. Alternatively, a few consultees suggested that RTM companies could obtain a representative sample of the relevant leases. Several other consultees suggested that the landlord could certify that all the leases are substantially the same, or provide a statement of truth instead of providing copies of every lease.
- 9.84 Similarly, the Property Bar Association proposed a “stepped scheme”. They suggested that where there are ten or fewer units, copies of each lease should be provided. In other circumstances, they proposed that ten sample leases should be provided alongside a certificate confirming that the leases are the same or substantially the same in form.
- 9.85 Consultees also noted the following difficulties of obtaining copies of leases, which could affect or have an impact on either party. For example:
- (1) an RTM company said that it can be difficult to obtain copies of leases which pre-date the requirement for registration;
 - (2) Cadogan Group Limited, a landlord, noted that leases are often granted by intermediate lessees, and so the managing agent would not have copies of all documents; and
 - (3) Investment Technology Ltd t/a Canonbury Management added that in practice, “no-one manages in accordance with the leases”.

Do RTM companies currently receive a copy of each lease?

- 9.86 The more common answer was that RTM companies are not provided with a copy of each lease. A few consultees told us that copies of leases are not generally provided or requested on handover to an RTM company. In contrast, Cadogan Group Limited, said that they ensure that “all documents concerned with management of a building are provided”.
- 9.87 The Right to Manage Federation told us that they generally procure a copy of one of the leases prior to making an RTM claim, and usually work on the assumption that the leases are all substantially the same. They reported that this is not usually a problem.
- 9.88 A member of an RTM company told us that, after initially being assured by the landlord that the site used a standard form lease, the leaseholders became aware that several leases existed with different obligations and responsibilities. They said:

[This has] caused many management problems that would have been avoided if we knew at the outset what the differences are.

Cost versus benefits of providing copies of the lease

- 9.89 Half of consultees thought that the benefits of the RTM company accessing a copy of each lease would outweigh the additional time and cost in preparing these. Responses to this question reflected the division already outlined above: some consultees considered the RTM company needs a copy of every lease and therefore think that the costs and time are justified, whilst others thought this would be unnecessary where the leases are identical and considered the costs disproportionate.
- 9.90 The Property Litigation Association Law Reform Committee warned that if landlords were required to redact personal details about leaseholders from leases, this would generate potentially significant costs. They suggested that where possible, RTM companies should seek agreement from the leaseholders that their information can be disclosed, and therefore minimise the need to redact documents.
- 9.91 Finally, a few consultees suggested that technology could assist this process, such as using an online portal to hold the leases or providing them in electronic copy.

Discussion

- 9.92 These responses demonstrate a tension between the usefulness of obtaining a copy of each lease and the cost of obtaining this documentation. On the one hand, viewing copies of each lease would better inform RTM companies as to the extent of their management obligations. This might be information that they reasonably require to decide whether to commence an RTM claim, or to ensure that they exercise management functions in accordance the various leases of the premises once the RTM has been acquired.
- 9.93 If RTM companies obtain only one lease, or perhaps a sample of leases, there is a possibility that they will not know the full extent of their obligations under each lease of the premises. Even similar leases may not impose identical obligations. Leaseholders may have negotiated bespoke arrangements, or standard precedents may have

changed over time. This places the RTM company at risk of breaching its obligations under the leases of the premises when the RTM is acquired.

9.94 On the other hand, if we were to mandate that the landlord provide a copy of every lease, this could be prohibitively expensive for RTM companies. Below, we recommend that the RTM company should be responsible for the landlord's reasonable costs of providing information prior to the claim notice.³⁰ This means that RTM companies would bear the landlord's costs of retrieving or obtaining copies of leases, redacting personal information, and associated legal and administrative costs. These are particularly high costs to incur before the RTM company has acquired the RTM, and will arguably have been unnecessarily incurred if the RTM claim fails.

9.95 We think that the best way to strike a balance between these competing considerations is to allow RTM companies to request copies of leases via:

- (1) the new right to request information prior to making the claim; and
- (2) the right to request information after the determination date under section 93 of the 2002 Act.

9.96 We think that this is preferable to imposing a self-standing obligation on the landlord to provide copies of some or all leases. Although RTM companies will be entitled to request a copy of every lease, they will not be obliged to make a request if it is unnecessary or disproportionate in the circumstances (for example, if the building has a small number of residential units, and all of the leaseholders provided copies of their leases to the RTM company).

9.97 We envisage that in many cases, RTM companies will request copies of all of the leases after the determination date. However, before making the RTM claim, an RTM company might only want to request one lease or a sample of leases. By contrast, other RTM companies may want to see copies of all of the leases prior to making the RTM claim, and be willing to bear the costs to obtain them at an earlier point in time.

9.98 For similar reasons, we have moved away from our view in the Consultation Paper that RTM companies should receive a list of leaseholders' names and addresses on the acquisition date.³¹ Rather than impose a standalone obligation on landlords to provide this information, RTM companies will be able to request this information using the information rights (namely, the new right to request information to decide whether to claim the RTM, or the right under section 93 to request information that the RTM company reasonably requires in connection with the exercise of the RTM). This will enable RTM companies to tailor when they receive this information, or to not request this information if they already have access to the information.

9.99 From paragraph 9.124, we consider who should bear the costs of information rights.

³⁰ See from para 9.148.

³¹ CP, para 7.114. We did not make a provisional proposal on this matter.

MATERIAL CHANGES TO INFORMATION PROVIDED

Our proposals

9.100 In the Consultation Paper, we acknowledged that the acquisition date could fall many months after the RTM company receives the information that it has requested. This is especially likely if there is a dispute about the RTM company's entitlement to claim the RTM, which may lead to Tribunal proceedings to determine the RTM company's entitlement. This means that information held by an RTM company could be outdated by the time that the RTM company takes over management. There is currently no duty on the landlord to provide updated information to the RTM company.

9.101 To address this scenario, we provisionally proposed that:

- (1) in the period between the information being provided and the acquisition date, the landlord should have a duty to inform the RTM company of any material changes to the information; and
- (2) on the acquisition date, the landlord should confirm (using a declaration form) that there are no material changes to the information already provided.

9.102 This provisional proposal was intended to apply to the new right to request information to decide whether to bring the RTM claim. However, we consider below whether it should be extended to the other information rights.

Consultees' views

9.103 The vast majority of consultees agreed with our provisional proposal. These consultees told us that this proposal was sensible and reasonable, would provide transparency, and would assist the RTM company to prepare for the acquisition of the RTM. For example, the Law Society said:

the RTM company must be kept fully informed so that they proceed with full knowledge of the facts.

9.104 Stephen Desmond noted that this was analogous to the position whereby a seller of a property is under a duty to inform the buyer if there have been material changes to representations in the replies to the standard enquiries. He referred us to a case confirming that not providing an update can lead to an award of damages for negligent misstatement or breach of contract.³²

9.105 However, some consultees who agreed with our proposal offered some additional provisos. For example, Damian Greenish suggested that:

There needs to be some cut-off date. Otherwise a claim might never be made but a landlord would find himself under this obligation for an infinite time. So, the obligation could cease if a RTM claim is not made within a period of say 6 months from the date of the response notice or (in the event of a claim being made within that period) on the date that it is held to be ineffective or is withdrawn.

³² *Morrell v Stewart* [2015] EWHC 962 (Ch), [2015] 2 WLUK 805.

9.106 Similarly, LifeCare Residences Limited, a retirement housing provider, proposed that it would be better to provide the initial information and then provide further information on the acquisition date, instead of the landlord being under an ongoing obligation.

9.107 By contrast, a few consultees thought that there should be a duty to update information earlier than the acquisition date. For example, the Right to Manage Federation stated:

The acquisition date is too late. It should ideally be 28 days and in any event at least 14 days before the acquisition date...

Discussion and recommendations

9.108 We have decided to adopt our proposals as recommendations to ensure that RTM companies have access to up-to-date information about the premises before acquiring the RTM. We do not think that this imposes a disproportionate burden on the landlord, because the landlord will only be under a duty to notify the RTM company of material changes. We do not propose to define the term material change, and think that it should be interpreted by reference to the general law. However, a material change would not include a minor or technical one.

9.109 The landlord's obligation to confirm that there have been no material changes will only arise on the acquisition date. We recognise that this is relatively late in the claims process. However, this obligation will operate alongside the continuous obligation to notify the RTM company of material changes. Therefore, the RTM company will be entitled to assume that, if it has not been notified of any material changes, none have occurred. This will then be confirmed on the acquisition date. We think that this creates sufficient certainty for the RTM company.

9.110 We agree that there should be a cut-off date on the landlord's continuous obligation to provide updates of material changes, to avoid indeterminate liability. Although the most appropriate date will usually be the acquisition date, that will not always be the case, such as where the RTM company never issues a claim notice.

9.111 Upon further consideration, we consider that the landlord's continuous obligation to provide updates of material changes should be extended to all four information rights. Due to the nature of the information being requested under each right, we have concluded that different cut-off dates should apply to different information rights.

Right to request information to complete the claim notice

9.112 In relation to the right to request information to complete the claim notice under section 82 of the 2002 Act, we think that this obligation should cease on the earlier of:

- (1) the date that the RTM company serves the claim notice; or
- (2) six months from the date on which the landlord responds to the RTM company's request for information.

9.113 We have selected the date of service of the claim notice because the purpose of requesting information under this section is to enable the RTM company to complete the claim notice. However, we recognise that there may be cases where the RTM

decides not to proceed with the claim. In this case, the six-month cut off point will prevent the landlord being encumbered with an indeterminate liability. We think that six months allows RTM companies a reasonable period in which to institute the claim, before the landlord's obligation to provide continuous updates would cease.

New right to request information to decide whether to claim the RTM

9.114 In relation to the new right to request information to decide whether to claim the RTM, we think that the landlord should have an obligation to notify the RTM company of material changes that occur between the date the information is provided, and:

- (1) if the RTM company issues a claim notice within six months of the landlord responding to the RTM company's request for information, the earlier of:
 - (a) the acquisition date;
 - (b) the date it is finally determined that the RTM company is not entitled to acquire the RTM ("the negative determination date");³³ or
 - (c) the date that the claim notice is withdrawn,³⁴ or deemed to be withdrawn.³⁵
- (2) if the RTM company does not issue a claim notice within six months of the landlord responding to the RTM company's request for information, six months from the date when the landlord responded to the request.

Right to request information following a negative counter-notice

9.115 In relation to the right to request information following a negative counter-notice, we think that the landlord's obligation should arise in relation to material changes that occur between the date the information is provided, and the earlier of:

- (1) the date it is finally determined that the RTM is entitled to acquire the RTM ("the positive determination date");³⁶
- (2) the negative determination date;³⁷ or
- (3) the date that the claim notice is withdrawn,³⁸ or deemed to be withdrawn.³⁹

9.116 In relation to (1), we have chosen the positive determination date, rather than the acquisition date, as this information right is intended to equip the RTM company to

³³ As under s 84(7) and (8) of the CLRA 2002, or following an application by a landlord to strike out the claim in accordance with our recommendations in Ch 8; see from para 8.232.

³⁴ CLRA 2002, s 86.

³⁵ CLRA 2002, s 87. See from para 8.211 above.

³⁶ CLRA 2002, s 91(5).

³⁷ As under ss 84(7) and (8) of the CLRA 2002, or following an application by a landlord to strike out the claim in accordance with our recommendations in Ch 8; see from para 8.232.

³⁸ CLRA 2002, s 86.

³⁹ CLRA 2002, s 87.

assess the landlord's claim that the RTM company is not entitled to acquire the RTM. This ceases to be a live issue after the positive determination date.

Right to request information reasonably required in connection with the exercise of the RTM

9.117 In relation to the right to request information reasonably required in connection with the exercise of the RTM, we think that the landlord's obligation should arise in relation to material changes that occur between the date the information is provided, and the earlier of:

- (1) the acquisition date;
- (2) the negative determinate date;⁴⁰ or
- (3) the date that the claim notice is withdrawn⁴¹ or deemed to be withdrawn.⁴²

Enforcement of the landlord's obligation

9.118 As in relation to the primary information rights above, we urge Government to give serious consideration to how the landlord's obligation to update an RTM company about material can be enforced.⁴³ For example, it will be essential to address the scenario where a landlord failed to update an RTM company, and the RTM company acted in reliance on out of date information. The options that we outlined above could also be potentially applicable in this scenario.

9.119 There will of course be cases that do not reach the Tribunal because, for example, the claim is discontinued, when the updated information would have resulted in the claim being pursued. We accept that these cases may occur, but do not think that there is an obvious and proportionate mechanism for enforcement in this scenario.

Recommendation 64.

9.120 In relation to information requested under section 82 of the 2002 Act (information required for purposes of completing a claim notice), we recommend that the landlord should have an obligation to notify the RTM company of material changes that occur between the date the information is provided, and the earlier of:

- (1) the date that the RTM company serves the claim notice; or
- (2) six months from the date on which the landlord responds to the RTM company's request for information.

⁴⁰ As under s 84(7) and (8) of the CLRA 2002, or following an application by a landlord to strike out the claim in accordance with our recommendations in Ch 8.

⁴¹ CLRA 2002, s 86.

⁴² CLRA 2002, s 87.

⁴³ See para 9.75 above.

Recommendation 65.

9.121 In relation to the new right to request information to decide whether to claim the RTM we recommend that:

- (1) If the RTM is acquired, the landlord should confirm on the acquisition date that there are no material changes to the information already provided.
- (2) The landlord should have an obligation to notify the RTM company of material changes which occur between the date that the information is provided and:
 - (a) if the RTM company issues a claim notice within six months of the landlord responding to the RTM company's request for information, the earlier of:
 - (i) the acquisition date;
 - (ii) the negative determination date; or
 - (iii) the date that the claim notice is withdrawn or deemed to be withdrawn; or
 - (b) if the RTM company does not issue a claim notice within six months of the landlord responding to the RTM company's request for information, six months from the date when the landlord responded to the request.

Recommendation 66.

9.122 In relation to the right to request information following a negative counter-notice, we recommend that the landlord's obligation should arise in relation to material changes that occur between the date the information is provided, and the earlier of:

- (1) the positive determination date;
- (2) the negative determination date; or
- (3) the date that the claim notice is withdrawn or deemed to be withdrawn.

Recommendation 67.

9.123 In relation to the right to request information reasonably required in connection with the exercise of the RTM under section 93 of the 2002 Act, we recommend that the landlord's obligation should arise in relation to material changes occurring between the date the information is provided, and the earlier of:

- (1) the acquisition date;
- (2) the negative determination date; or
- (3) the date that the claim notice is withdrawn or deemed to be withdrawn.

COSTS OF COMPLYING WITH INFORMATION RIGHTS

Current law and problems

9.124 Under section 82 of the 2002 Act, RTM companies may be asked to pay a reasonable fee for copies of a document containing any information that they reasonably require to complete the claim notice.⁴⁴ No fee may be charged if the RTM company merely wants to send someone to inspect those documents in person.

9.125 The RTM company is also required to pay any reasonable costs incurred by a landlord or other relevant party in consequence of a claim notice being given by the RTM company (we refer to these as "non-litigation costs").⁴⁵ This would include reasonable costs which are incurred by the landlord or other relevant person in providing information which is requested by the RTM company under section 93 of the 2002 Act.

Our proposals

9.126 In the Consultation Paper, we noted concerns from stakeholders that more robust and comprehensive duties to provide information would increase costs to landlords and other relevant persons. If RTM companies were required to meet those costs then they could prove to be prohibitive.

9.127 We outlined three potential costs regimes that could apply to any duties to provide information to RTM companies:⁴⁶

- (1) The landlord could incur the cost directly, without being able to pass this onto the RTM company. We said that although this was a significant departure from the general position on costs, it is arguable that the landlord should already hold the information being requested.

⁴⁴ CLRA 2002, s 82(2)(b).

⁴⁵ CLRA 2002, s 88.

⁴⁶ CP, para 7.97.

- (2) The RTM company could pay the reasonable costs incurred by the landlord in providing the information. However, we noted that the amount charged by landlords can vary significantly and can therefore be unpredictable, and that challenging the reasonableness of the landlord's costs can generate satellite litigation.
- (3) Both parties could contribute to the costs of providing the information on a fixed price-per-unit basis, or up to a capped cost, which could be reviewed periodically by the Secretary of State. We raised concerns that this option could encourage landlords to provide inadequate responses.

9.128 We asked consultees how they thought that costs should be allocated, and to estimate the cost and impact of the different options.⁴⁷

9.129 We also asked whether consultees thought that landlords should be exempted from providing information which they cannot reasonably provide without incurring disproportionate expense, whether these costs are met by the RTM company or the landlord.

Consultees' views

Allocation of costs

9.130 Only a relatively small number of consultees commented on their preferred allocation of the costs of the information notice, and these consultees were extremely divided.

9.131 Several consultees said that the RTM company should bear the costs of disclosure. Damian Greenish said that he preferred this option because RTM is a no-fault right. However, the Property Bar Association and the British Property Federation added that these costs must be "reasonable".

9.132 A lease owners' association said that each party should bear its own costs. Similarly, a residents' association suggested that the costs should be split 50/50. Another residents' association said that the parties should agree who bears the costs of early disclosure in advance.

9.133 A few consultees proposed a staggered regime, whereby different parties would be responsible for costs at different stages of the process. BPL Solicitors Limited and Birchall Blackburn Law both said that RTM companies should be responsible for the reasonable costs until the counter-notice, whereupon the landlord should be responsible. Cadogan Group Limited said that landlords should be responsible for the cost of disclosing information required to accurately complete the claim notice. However, they suggested that the landlord should levy an administration fee if other information is requested.

An exception for disproportionate expense

9.134 Just over half of consultees thought that landlords should be exempted from providing information that they cannot reasonably provide without incurring disproportionate expense, whether these costs are to be met by the RTM company or the landlord.

⁴⁷ CP, para 7.88.

Long Harbour and HomeGround, a landlord and an asset manager, also supported expanding the proposed exception to other managers providing information to the RTM company, such as residents' management companies and managing agents.

- 9.135 However, a number of consultees suggested caveats to the exemption. For example, Stephen Desmond agreed if the information was not in the landlord's possession and control, and the RTM company is likely to have the same chance of obtaining the information as the landlord. The Property Bar Association suggested RTM companies should be able to obtain excluded information at its own expense if it believes it to be necessary. It suggested that the Tribunal could be empowered to make orders to enable this.
- 9.136 By contrast, a few consultees were concerned that an exemption for "disproportionate expense" would create a loophole for landlords, which could be used to prevent the exchange of information. As a result, several consultees recommended that we narrow the information covered by the exception. Some argued that information should be provided no matter the cost where it is necessary for an RTM transfer to take place, needed for an effective transfer, or reasonably required for effective management. By contrast, a few consultees suggested that the Tribunal could adjudicate on whether the costs would be disproportionate.
- 9.137 Consultees disagreed on the actual cost to the landlord of providing information. On the one hand, several consultees doubted that providing information could constitute a disproportionate expense. For example, Helen Gibbons thought that if a property qualifies for RTM, a landlord can reasonably expect that leaseholders would invoke this right, and should have the relevant information at hand. Conversely, ARMA told us that the information will often be easily available to the landlord if management is in line with good practice. However, it said that there may be information that has not been made available to the landlord, such as developer's plans.

Discussion and recommendations

- 9.138 We have carefully considered who should be responsible for paying the landlord or other relevant person's costs of providing information in accordance with the existing and new duties we have outlined above. We have concluded that the answer should vary based on the point at which the relevant information right is being exercised. We consider that:
- (1) prior to the RTM company issuing the claim notice, the RTM company should pay the landlord's reasonable costs of complying with their duties to provide information; and
 - (2) after the RTM company issues the claim notice, the landlord should bear its own costs of complying with their duties to provide information.

Costs of providing information before the RTM claim is made

- 9.139 The costs of providing information before a claim notice has been issued are incurred at a time when the RTM claim is still hypothetical or speculative. An RTM company could request information, and then decide not to claim the RTM on the basis of this information or for other reasons. We think it would be unfair for the landlord to bear

the cost of providing information before the RTM company has confirmed its intention to proceed by issuing the claim notice.

9.140 We are also mindful that:

- (1) we are recommending that the limit on the number of RTM companies that can exist in relation to any premises should be removed,⁴⁸ which means that landlords or other relevant persons could receive requests for information from more than one RTM company; and
- (2) we are not recommending that RTM companies should have a minimum number of qualifying tenant members before being entitled to make an information request.

9.141 We consider that there are two safeguards which will mitigate the risk of RTM companies having to incur excessive costs in obtaining information before making an RTM claim. First, it is not compulsory for the RTM company to request information prior to the claim notice, and an RTM company will have complete flexibility over which information it chooses to request. RTM companies can take a view about the potential benefits of obtaining particular information relative to the potential costs they will incur. To reduce the risk of RTM companies over-requesting information, especially through use of the “tick-box” system outlined above,⁴⁹ we suggest that the model form for requesting information prior to an RTM claim has been issued should include a reminder to leaseholders that they will bear the cost of requesting information from the landlord.

9.142 Second, RTM companies will only be required to pay the landlord’s “reasonable” costs of providing information, and can refuse to pay any costs which they consider to be unreasonable. We do not think that landlords should be able to refuse to provide information until their costs have been met. The onus would therefore be on the landlord to bring Tribunal proceedings for a determination as to its reasonable costs in circumstances where the RTM company refused to pay because it considered those costs unreasonable.

9.143 Although we recognise that the term “reasonable” carries a level of uncertainty, we think that it is preferable to imposing a cap on the landlord’s expenses. In our view, a cap is unworkable because requests for information could vary significantly in terms of size and complexity.

Costs of providing information after the RTM claim is made

9.144 In Chapter 12, we recommend that RTM companies should not be liable to contribute to landlords’ and other relevant persons’ non-litigation costs.⁵⁰ We consider that RTM companies should likewise have no liability to contribute towards any costs incurred by landlords and other relevant persons in providing information to RTM companies once a claim notice has been given. We explain in more detail in Chapter 12 why we consider that RTM companies should not be liable for landlords’ and other relevant

⁴⁸ See para 6.37.

⁴⁹ See para 9.49.

⁵⁰ See para 12.95.

persons' non-litigation costs generally. In particular, we are concerned that requiring RTM companies to pay such costs may act as a significant deterrent to claiming the RTM given that RTM companies are likely to be in a weaker financial position than landlords.

9.145 We also consider the following to be relevant in relation to the costs of providing information once an RTM claim has been given. First, in relation to the new right to obtain information following a negative counter-notice, we think that requiring the landlord to bear their own costs will incentivise landlords to provide more comprehensive information at the counter-notice stage. Providing this information to RTM companies may also benefit landlords with valid grounds for alleging that an RTM company is not entitled to the RTM. RTM companies may be less likely to proceed with an RTM claim if they are better informed as to why the landlord considers their claim to be invalid. It may also help to deter landlords from relying on weak grounds to challenge entitlement to the RTM because they will be made to bear the costs of providing further information to the RTM company to justify those grounds.

9.146 Second, in relation to the right to obtain information to exercise the RTM under section 93 of the 2002 Act, we consider that it is in the landlord's interest that the RTM company has sufficient information to manage the premises effectively. The right to request this information will only be exercisable once it is confirmed that the RTM is to be acquired. This can be contrasted with information which must be provided in response to a request made before the claim notice has been given. As explained above, at this stage the claim is at a speculative stage and may never materialise. Therefore, there is stronger justification for the RTM company bearing the costs of obtaining the relevant information.

9.147 We have considered whether, as a result of the different costs regimes that will apply before and after the claim notice is issued, RTM companies may decide to issue a claim notice before they are ready to do so, and without the information needed to inform their decision, to benefit from the more favourable costs regime that will apply. We accept that this is a risk in some cases. Notwithstanding, we believe that the benefits outweigh these risks because:

- (1) The alternative is requiring landlords to pay the costs of responding to the pre-claim information notice. For the reasons set out above, we do not think that this is a fair outcome at an early and speculative stage of the claims process.
- (2) If RTM companies issue claim notices without information to inform their decision, their costs are likely to be higher in the medium to long-term. This is especially likely in cases where the RTM claim fails, and information would have revealed in advance that this would happen. We hope that (with advice), RTM companies will realise that although requesting information upfront is more expensive, it will save costs in the long-term.

Recommendation 68.

9.148 We recommend that:

- (1) prior to service of the claim notice, the RTM company should bear the landlord or other relevant person's reasonable costs of complying with their duties to provide information; and
- (2) after service of the claim notice, the landlord or other relevant person should bear their own costs of complying with their duties to provide information.

SUMMARY OF INFORMATION RIGHTS

Obligation to provide information

Up to and including claim notice			
<p>Content of request:</p> <p><i>New pre-claim right</i> Information reasonably required to decide whether to claim the RTM.</p> <p><i>Section 82 right</i> Information reasonably required to complete the claim notice.</p>		<p>Content of request:</p> <p><i>New right to information about objections</i> If the landlord has served a counter-notice alleging RTM company not entitled to RTM, RTM company can request any information reasonably required to decide whether to apply for Tribunal determination that RTM company is so entitled.</p>	<p>Content of request:</p> <p><i>Section 93 right</i> Information reasonably required in connection with the exercise of the RTM.</p>
<p>Timing:</p> <p><i>New pre-claim right</i> RTM company may request information before giving claim notice. Landlord or other relevant person must respond within two months of receiving the request.</p> <p><i>Section 82 right</i> Landlord or other relevant person must respond within 28 days of receiving the request.</p>		<p>Timing:</p> <p><i>New right to information about objections</i> RTM company can make request after counter-notice has been given, but before the determination date (as defined at paragraph 9.70 above). Landlord or other relevant person must respond within 28 days of receiving the request.</p>	<p>Timing:</p> <p><i>Section 93 right</i> RTM company can serve section 93 notice at any time on or after determination date. Landlord must respond within 28 days of receiving the request. Depending on when the RTM company serves the section 93 notice, this may fall after the acquisition date.</p>
<p>Costs:</p> <p><i>New pre-claim right</i> RTM company pays the landlord or other relevant person's reasonable costs of responding to request.</p> <p><i>Section 82 right</i> RTM company pays the landlord or other relevant person's reasonable costs of responding to the request.</p>		<p>Costs:</p> <p><i>New right to information about objections</i> Landlord or other relevant person bears their own costs of responding to the request.</p>	<p>Costs:</p> <p><i>Section 93 right</i> Landlord or other relevant person bears their own costs of responding to the request.</p>

Obligation to notify the RTM company of material changes to information provided

Method for requesting information		
Section 82 right	Date the information is provided.	Earlier of: 1. The date that the RTM company serves the claim notice; or 2. Six months from the date on which the landlord responds to the RTM company's request for information.
New pre-claim right	Date the information is provided. On the acquisition date, the landlord should confirm that there are no material changes to information already provided.	Did the RTM company issue a claim notice within six months of the RTM company responding to the RTM company's request for information? If yes, the earlier of: 1. The acquisition date; 2. The negative determination date; or 3. The date that the claim notice is withdrawn or deemed to be withdrawn. If no, six months from the date when the landlord responded to the request.
New right to information about objections	Date the information is provided.	Earlier of: 1. The positive determination date; 2. The negative determination date; or 3. The date that the claim notice is withdrawn or deemed to be withdrawn.
Section 93 right	Date information is provided.	Earlier of: 1. The acquisition date; 2. The negative determination date; or 3. The date that the claim notice is withdrawn or deemed to be withdrawn.

IMPACT OF DATA PROTECTION LEGISLATION ON INFORMATION RIGHTS PROPOSALS

9.149 In the Consultation Paper, we noted that the procedure for information sharing would need to be compatible with data protection legislation. In addition, a number of stakeholders queried whether RTM companies or landlords that collected and processed information about leaseholders or third parties would be satisfying their data protection obligations.

9.150 Article 5 of the General Data Protection Regulation 2016/679 EU ("GDPR")⁵¹ requires controllers to process data "lawfully, fairly and in a transparent manner".⁵² To comply with the obligation to process data "lawfully", the controller (in this case, the landlord or other third party) must satisfy one of the six grounds for lawful processing in article

⁵¹ General Data Protection Regulation 2016/679 EU, art 1(1).

⁵² General Data Protection Regulation 2016/679 EU, art 5.

6(1), including that the processing is necessary to comply with a legal obligation to which the controller is subject.⁵³

9.151 We have concluded that the information rights will satisfy the “legal obligation” ground for processing. Sections 82 and 93 of the 2002 Act already impose legal obligations on the landlord (or other third party who receives a request for information) to provide the information to the RTM company within a prescribed period. We envisage that the legislation implementing our proposals on the new information rights (the right to obtain information to decide whether to bring an RTM claim, and the right to obtain information following a hostile counter-notice) will include a similar legal obligation to respond to a request within a prescribed period. Each of these legal obligations will be further strengthened by our recommendation that Government consider how to enforce instances of non-compliance.

9.152 In our view, these legal obligations to respond to requests for information are compatible with leaseholders’ rights under article 8 of the European Convention of Human Rights (“ECHR”).⁵⁴

PROVISION OF INFORMATION ABOUT MANAGEMENT CONTRACTS

Current law and problems

9.153 Before the RTM is acquired, it is likely that the landlord will have entered into management contracts (such as with managing agents, gardeners or security companies) to perform their management functions under any leases of the premises. When the RTM is acquired and the RTM company becomes responsible for exercising those functions, the RTM company is not automatically bound by any management contracts which have been agreed with third-party contractors. The RTM company may choose to enter into new contracts with those third parties, or it might decide to procure the services of other third-party contractors. In response to our leaseholder survey, several stakeholders indicated that flexibility to choose new contractors (particularly new managing agents) was a common motivation for claiming the RTM.

9.154 The 2002 Act prescribes the procedure for notifying relevant parties about management contracts when the RTM is acquired. The landlord must provide the RTM company with details of any management contracts (by providing a “contract notice”), and notify the contractors that the RTM is to be acquired by an RTM company (by providing a “contractor notice”).⁵⁵

9.155 The 2002 Act prescribes the content of both notices,⁵⁶ including mandating that the notices include the following statements:

⁵³ General Data Protection Regulation 2016/679 EU, art 6(1)(c).

⁵⁴ See the discussion in the CP, para 7.113.

⁵⁵ CLRA 2002, ss 91 and 92.

⁵⁶ CLRA 2002, s 92(3).

- (1) in a contract notice: that should the RTM company wish for the contractor to provide the same services to the RTM company as it did to the landlord, it is advised to contact the contractor at the address given in the notice,⁵⁷ and
- (2) in a contractor notice: that should the contractor wish to provide the same services to the RTM company as it did to the landlord, it should contact the RTM company at the address given in the notice.⁵⁸

9.156 The 2002 Act also prescribes the timeline for service of the notices. Both notices must be provided on the determination date, or as soon as practicable after this date.⁵⁹ If the landlord enters into any management contracts between the determination date and the acquisition date, these notices must be provided on the date of the contract, or as soon as possible afterwards.⁶⁰ However, we were told that in practice, notices are sent much later, including after the acquisition date in some cases. This prevents RTM companies from being able to understand how the premises are currently managed, consider whether to continue these arrangements, or explore making alternative arrangements.

9.157 The 2002 Act does not address how the landlord should terminate existing management contracts, if the RTM company decides to use new contractors. In the Consultation Paper, we noted that management contracts with short notice periods could be terminated in the transition period between the date when the RTM company becomes entitled to the RTM, and the acquisition date.⁶¹ By contrast, it may not be possible to terminate fixed-term management contracts, contracts with long notice periods or short-term contracts that do not allow for early termination before the RTM company takes over management. For example, we have been told that entry phone systems and lift maintenance contracts are usually concluded for five or 10 years. In such cases there might be a substantial penalty to pay for early termination or default.

9.158 In the Consultation Paper, we explained that there were two main views on the impact of the RTM on management contracts.⁶² On one view, the landlord would be in breach of these contracts. On another view, these contracts are frustrated. Frustration occurs where performance of a contract becomes effectively impossible:

without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.⁶³

⁵⁷ CLRA 2002, s 92(7)(b).

⁵⁸ CLRA 2002, s 92(3)(e).

⁵⁹ CLRA 2002, s 91(5).

⁶⁰ CLRA 2002, s 92(2).

⁶¹ CP, para 7.131.

⁶² CP, para 7.135.

⁶³ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729.

9.159 The question of breach or frustration falls to be answered by the normal operation of contract law, and may differ in different circumstances and different contract wording. We concluded that because the risk of the RTM being acquired is “incidental” or “inherent” to land ownership, the parties could be expected to address this contingency in their management contracts. As a result, we thought that it was unlikely that a court would find that a management contract was frustrated upon acquisition of the RTM, if the contract was entered into after the 2002 Act came into force.⁶⁴ This means that the landlord would be liable to the contractors for their loss. We noted that in some cases, the landlord may seek to recover any fees and damages through the service charges, which could be unfair to leaseholders.

Our proposals

9.160 We provisionally proposed a more transparent and timely system for dealing with management contracts. We suggested that the following process should be completed before the acquisition date:

- (1) The landlord should send (as part of the information notice or with the counter-notice) a list of all management contracts and contractors with contact details, and a copy of the contracts or details of the management contracts.
- (2) At the same time, the landlord should serve notice on the contractors advising that the contract will be terminated on the acquisition date, if the RTM company and contractor do not agree the contractor should continue to provide services.
- (3) The RTM company should consider whether it may wish to continue involvement with any contractor, and:
 - (a) as soon as reasonably practicable, contact any contractor parties with which it might wish to commence negotiations and advise the landlord of any agreement reached; and
 - (b) within one month of the determination date, respond to the landlord identifying which contractors it does not wish to or cannot agree terms on which to maintain a contractual relationship.
- (4) On receipt of the RTM company’s notice, the landlord should within 14 days:
 - (a) notify those contractor parties with which the RTM company does not wish or cannot agree to maintain a relationship, and indicate that the landlord considers the contract terminated as a matter of law; and
 - (b) notify those contractor parties with which the RTM company wishes to maintain a relationship, but indicate that the landlord considers the contract terminated as a matter of law.

9.161 We asked consultees whether they considered that these additional requirements would provide sufficient clarity and certainty for all parties.

⁶⁴ CP, para 7.143.

Consultees' views

9.162 The vast majority of consultees agreed with our provisional proposal. A few members of RTM companies noted that they had experienced difficulties under the current law, and thought that our proposal would make the acquisition of the RTM more effective. For example, one told us that:

In my situation the previous management company, [named company], failed to provide any information to our new management company which caused numerous problems. There was no system of complaint or redress. This needs to change to make it compulsory to provide information to new management companies.

9.163 A few consultees agreed with our proposals, but suggested further provisos. For example, a few consultees queried how our proposals would be enforced. Stephen Desmond asked whether penalties would be imposed if a deadline is missed. The Right to Manage Federation suggested that landlords commonly neglect to serve contract and contractor notices, but that applying to the Tribunal or county court to enforce these obligations is “pointless” because the application is unlikely to be heard before the acquisition date. They suggested that instead, penalties should be imposed for failures to comply.

9.164 A few consultees suggested that the landlord should not be involved in notifying the contractors of whether the RTM company wished to take over the management contracts or not. ARMA suggested that the RTM company should inform both the landlord and the contractor where they wish to move the contract into the name of the RTM.

9.165 By contrast, consultees who opposed our proposal said that existing provisions for the exchange of information on management contracts was sufficient. Urang Property Management Limited said:

The current system works very well, with all contracts deemed terminated at handover. It would be useful to have details of contracts early but the RTM company can then tell the contractors if it wants to keep them on – no need to involve the landlord in this, who will not be incentivised to do this well or possibly at all.

9.166 Long Harbour and HomeGround also thought that our proposal was disproportionate. They suggested that if an RTM claim is to proceed, the presumption should be that all contracts with the landlord are terminated as at the acquisition date, and that the RTM company needs to enter its own agreements with the contractors it wishes to retain.

Discussion and recommendations

9.167 While our proposal was strongly supported by consultees, we have concluded that more timely provision of information about management contracts is better achieved by improving on the existing process under the 2002 Act rather than by replacing it entirely. We are also concerned that our proposed process failed to address management contracts which are entered into after the determination date. We also think that it is potentially confusing and inappropriate for landlords to be made responsible for informing contractors about whether the RTM company will be procuring their services.

- 9.168 We have instead concluded that two changes ought to be made to the current process to ensure that the RTM company, and third-party contractors, are giving timely information in advance of the RTM being acquired.
- 9.169 First, for contracts entered into prior to the determination date, we think that the landlord's obligation to provide the contract and contractor notices "as soon as possible after the determination date" should be subject to an outer limit of 14 days. This will increase the speed of the acquisition process by imposing a "hard" deadline on the landlord, may encourage compliance, and will make it simpler to identify when the landlord is in breach of their obligation to provide information.
- 9.170 For management contracts entered between the determination date and acquisition date, the contract and contractor notices would still need to be given on the day the contract is entered, or as soon as is reasonably practicable after that date. This is to ensure that this information is provided as soon as possible given that the RTM is at this stage soon to be acquired. In any event, the notices should not be given after the acquisition date. We think that as a matter of good practice, landlords should consult the RTM company before entering into any management contracts after the determination date because at this stage it is clear the RTM will be acquired.
- 9.171 Second, we agree with consultees who have raised concerns that the current law does not provide a sufficiently robust enforcement mechanism to ensure that landlords comply with their obligations to provide notices about management contracts in adequate time. The RTM company must currently apply to the county court for an order requiring the landlord to provide information about the management contracts within the required time if they have failed to so.⁶⁵ This method of enforcement is unlikely to be effective because it does not act as any real disincentive against non-compliance and the RTM will likely have already been acquired by the time the application is heard.
- 9.172 As we discussed above in relation to enforcement of the information rights,⁶⁶ we recognise the need for strong enforcement of the landlord's obligation to provide a contract notice within the relevant deadlines. We urge Government to consider what enforcement mechanisms could be employed here, including exploring the option of civil penalties.
- 9.173 We also proposed that the landlord should notify the contractor that it considers the contract to be terminated as a matter of law.⁶⁷ However, upon further consideration we think that the better view is that in general, the acquisition of the RTM will constitute a "supervening illegality" causing the contract to be frustrated.⁶⁸ This is because when the RTM is acquired, the RTM company becomes responsible for management functions under the lease,⁶⁹ and the landlord is legally disabled from performing its

⁶⁵ CLRA 2002, s 107. Before making such an application the RTM company must give notice to the landlord requiring that the information be provided. In Ch 12 we recommend that the county court's jurisdiction in relation to such proceedings should transfer the Tribunal.

⁶⁶ See para 9.76 above.

⁶⁷ CP, paras 7.135 to 7.143.

⁶⁸ *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), [2019] Landlord and Tenant Reports 14 at [170].

⁶⁹ CLRA 2002, s 96(2).

obligations under the management contract. This renders the required performance “radically different” from that envisioned at the time of the contract. By contrast, in the cases cited in the Consultation Paper, performance by the party arguing frustration was far more onerous than envisaged at the time the contract was made, but performance was nevertheless still possible.⁷⁰

9.174 There are some particular circumstances in which, we think that a court could still conclude that a management contract was breached, rather than frustrated, including:

- (1) when the landlord knows of the possibility of an imminent RTM claim before entering into a management contract (as a party cannot plead frustration in circumstances where they were aware of the probability of the frustrating event⁷¹); and
- (2) if the management contract specifically provided for the possibility that leaseholders could claim the RTM in the future, and set out the consequences of this event occurring.

9.175 We therefore consider that, contrary to the proposal outlined at paragraph 7.160(2) above, the landlord should provide the contractors with notice of the imminent acquisition of the RTM. This notice will not by itself constitute a purported termination of the relevant management contract.

Recommendation 69.

9.176 We recommend that, for management contracts entered into prior to the determination date, the landlord’s obligation to provide the contract notice and contractor notice “as soon as possible after the determination date” should be subject to an outer limit of 14 days.

Recommendation 70.

9.177 We recommend that, for management contracts entered into between the determination date and acquisition date, the landlord should be required to provide the relevant notices on the date the contract is entered into, or as soon as is reasonably practicable after that date, and in any event before the acquisition date.

⁷⁰ *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274; *E. Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400.

⁷¹ *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274.

Chapter 10: Management functions

INTRODUCTION

- 10.1 On acquisition of the RTM, management functions exercised under any leases relating to the whole or any part of the premises become the responsibility of the RTM company. The definition of management functions is broad and could include functions relating to the provision of regulated health and social care. The RTM company also acquires management functions under the lease with respect to the premises and any appurtenant property (for example, a garden or car park), including in situations where that property is used in common with occupiers of other premises.
- 10.2 The landlord must transfer any service charges it holds to the RTM company immediately on acquisition of the RTM, or as soon as it is reasonably practicable to do so, after deducting any service costs it has incurred before the acquisition date. After the acquisition date, the RTM company is entitled to any service charges payable under a lease in respect of the costs of performing its management functions.
- 10.3 In this chapter, we make recommendations on:
- (1) the type of management functions acquired by RTM companies, including whether they should include functions relating to the provision of regulated activities, such as health and social care;
 - (2) various issues which arise in consequence of RTM companies acquiring functions with respect to insurance;
 - (3) the extent to which RTM companies should be able to acquire management functions in respect of any appurtenant property;
 - (4) a power for the Tribunal¹ to vary leases to resolve issues caused by the acquisition of the RTM;
 - (5) the handover of the service charge fund to the RTM company; and
 - (6) the RTM company's right to recover certain management costs through the service charge following the RTM acquisition.

MANAGEMENT FUNCTIONS – GENERAL

Current law and problems

- 10.4 The 2002 Act provides that the RTM company acquires any management functions which relate to the whole or any part of the premises, and which are exercised by a landlord or third party under a lease of the whole or any part of the premises.²

¹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

² CLRA 2002, s 96(1) to (3).

Management functions are defined as functions with respect to services, repairs, maintenance, improvements, insurance and management.³ As we discuss in the next chapter, the RTM company also acquires functions relating to the grant of approvals under long leases of the premises.⁴

10.5 Certain functions are excluded from the definition of management functions, in particular:⁵

- (1) functions which relate only to a part of premises consisting of a flat or other unit which is not held under a lease by a qualifying tenant; or
- (2) functions relating to re-entry or forfeiture.

10.6 The landlord must not undertake any management functions which the RTM company is empowered or required to undertake, unless the parties agree otherwise.⁶

10.7 In the Consultation Paper, we said that there may be some cases where it is unclear whether a function performed by the person managing the premises is acquired by the RTM company.⁷ However, we noted that the management functions acquired by the RTM company needed to be defined in broad terms to cater for the many different situations which might arise. We did not think it was desirable or even realistic to devise a comprehensive list of the management functions that might be acquired. We did however suggest that guidance might be provided if consultees were having significant difficulties with applying the definition.⁸

Our proposals

10.8 In the Consultation Paper, we asked whether any amendments ought to be made to the statutory definition of “management functions”, or whether more information should be provided by way of guidance to improve clarity and certainty.⁹

Consultees’ views

10.9 A sizeable majority agreed that clarity and certainty might be improved using one or other of these methods.

10.10 Consultees highlighted various matters which might benefit from further clarification. For example, Notting Hill Genesis, a housing association, the Property Bar Association and Anchor Hanover, a retirement housing provider, all suggested a clarification that only management functions under the lease are acquired by the RTM company.

³ CLRA 2002, s 96(5).

⁴ CLRA 2002, s 98. See also from para 11.3 below.

⁵ CLRA Act 2002, s 96(6).

⁶ CLRA 2002, s 97(2).

⁷ CP, para 8.19 to 8.23.

⁸ CP, para 8.17.

⁹ CP, para 8.32.

10.11 Relatively few consultees thought the best way to achieve clarity and certainty was through an amendment to the statutory definition of management functions. The Wellcome Trust, a charity landlord, were among the few consultees who thought that a change to the statutory definition might be of some value:

We consider that the definition could be expanded and made more detailed to provide greater clarity as to what is intended to be included within the meaning of Management Function.

10.12 In general, consultees tended to prefer the use of guidance to provide greater clarity as to the management functions, rather than statutory definitions. For example, the National Leasehold Campaign said that "...more information could be provided in the form of guidance – this must be written in plain English". The Law Society suggested that guidance might be combined with the training which we proposed for RTM directors to help them better understand their duties.¹⁰

10.13 Some consultees had reservations about the practical difficulties of trying to legislate to prescribe in greater detail the management functions which might be conferred under any individual lease. It was also suggested that a more prescriptive definition might have the unintended consequence of narrowing the scope of the functions which are acquired by RTM companies.

10.14 Finally, some consultees commented that the definition of management functions ought to specify the extent of the landlords' and RTM companies' responsibilities under relevant health and safety legislation.

Discussion and recommendations

10.15 The current definition of management functions is framed in broad terms as it must cater for a range of different premises and leases. As suggested in the Consultation Paper, we do not consider it feasible or desirable to come up with a more prescriptive definition. A more detailed definition is unlikely to be comprehensive, would be less capable of addressing unanticipated situations, and could be subject to technical challenges by landlords and others.

10.16 Many aspects of the definition which were said to require further clarification concerned matters which would be better addressed by the introduction of guidance or training. For example, as set out above, it was said that we should clarify that only management functions under a lease are acquired by the RTM company. Section 96 of the 2002 Act already makes this clear so the problem appears to be more that there is a lack of awareness or understanding of the effect of the current legislation.

10.17 We recommend in Chapter 7 that training resources should be made available to RTM directors free of charge and that training should be strongly encouraged for at least one director per RTM company.¹¹ We think that the training and any accompanying materials should cover the scope of the management functions which are acquired by the RTM company on acquisition of the RTM. This could be accompanied by

¹⁰ CP, para 5.130.

¹¹ See from para 7.3.

examples to illustrate the types of functions that might fall to be exercised by the RTM company.

10.18 This training would never be a substitute for obtaining legal advice because it will ultimately depend on what functions are to be exercised under any leases of the premises. However, we think that training, when combined with our recommendations on the early provision of information to RTM companies,¹² will make leaseholders more aware of the scope of the management functions the RTM company will be responsible for exercising when the RTM is acquired.

10.19 Importantly, any guidance and training should also address the extent of the RTM companies' responsibilities under any relevant health and safety legislation. A lack of awareness in relation to accountability and responsibility in respect of these issues following RTM acquisition has led to concerns about compliance by RTM companies. Government has recently carried out a review of the building safety regulatory regime, which will be enacted through the Building Safety Bill.¹³ Under the new regime, each building will have an "accountable person" who is legally responsible for ensuring that they understand fire and structural risks in their buildings, and for taking appropriate steps and actions to mitigate and manage these risks on an ongoing basis. The accountable person will be required to appoint a building safety manager, to support them in carrying out the day-to-day functions.

10.20 Government has indicated that the accountable person will be the individual, partnership or corporate body with the legal right to receive funds through service charges or rent from leaseholders and tenants in the building. Where the RTM has been acquired, that person will be the RTM company. We understand that Government also intends to introduce a mechanism to allow the accountable person to recover building safety costs via the service charge. Building and fire safety is a serious responsibility for RTM companies to acquire, which affects the safety and wellbeing of building residents, and it is therefore very important that it is covered by the director training we recommend.¹⁴

Recommendation 71.

10.21 We recommend that guidance on the definition of "management functions" should be included in the training and resources which are provided to RTM directors.

¹² See Ch 9.

¹³ Ministry of Housing, Communities and Local Government, *A reformed building safety regulatory system: Government response to the 'Building a Safer Future' consultation* (April 2020), p 21.

¹⁴ See from para 7.26.

MANAGEMENT FUNCTIONS – REGULATED ACTIVITIES

Current law and problems

10.22 The RTM company may acquire management functions which require specific expertise. For example, if the RTM is acquired over specialist housing for older people, management functions might include the provision of health and social care on the basis that it is a “service”¹⁵ under one or more leases of the premises.¹⁶ The provision of health and social care is regulated by the Care Quality Commission (“CQC”).¹⁷ Providers of these regulated activities must be registered,¹⁸ and failure to register is a criminal offence.¹⁹ RTM companies may not have the knowledge or resources to take on responsibility for the provision of health and social care. This could have significant consequences for both the RTM company and vulnerable leaseholders, and may deter leaseholders from acquiring the RTM.

Our proposals

10.23 In the Consultation Paper, we considered the following four options in relation to the treatment of regulated activities on acquisition of the RTM:²⁰

- (1) excluding any regulated activities from the definition of “management functions”, leaving the landlord to continue managing the regulated activities;
- (2) providing that any management function constituting a regulated activity is transferred only once the RTM company has met the requirements of the relevant regulatory bodies;
- (3) maintaining the current position, whereby all management functions transfer to the RTM company on the acquisition date, regardless of whether they are regulated, but ensuring that RTM companies are better educated as to their obligations; or
- (4) providing for a presumption that a regulated activity is excluded from the management functions to be transferred, unless the RTM company specifically wishes to acquire it and either the landlord agrees or the Tribunal makes a determination to this effect.

¹⁵ CLRA 2002, s 96(5).

¹⁶ CLRA 2002, s 96(2) and (3).

¹⁷ <https://www.cqc.org.uk/>.

¹⁸ The definition of regulated activities is broad. In England, see: Health and Social Care Act 2008, ss 8 and 9; Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014 No 2936), sch 1. In Wales, see: Regulation and Inspection of Social Care (Wales) Act 2016, s 165; Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017, s 8; Education (Wales) Act 2014 s 8. It should be noted that the legislation for England refers to “regulated activities” and legislation for Wales refers to “regulated services”. We have used “regulated activities” to refer to the regulated functions in question under both sets of legislation to avoid ambiguity with the “services” aspect of the definition of management functions.

¹⁹ Health and Social Care Act 2008, s 10; Regulation and Inspection of Social Care (Wales) Act 2016, ss 5, 6, 44 and 51.

²⁰ CP, para 8.40.

10.24 Our provisional view was that regulated activities ought to be excluded from the management functions which are acquired by the RTM company. We asked whether consultees agreed or, if not, whether any other changes were needed to the current law.

10.25 Finally, we asked whether there were regulated activities other than the provision of health and social care for which an RTM company should not, or might not want to, acquire responsibility.

Consultees' views

Should RTM companies acquire functions relating to the provision of regulated health and social care?

10.26 The majority of consultees who responded thought that we should exclude regulated health and social care functions from the management functions which are acquired by the RTM company, but a substantial minority disagreed.

10.27 Some consultees commented that excluding regulated health and social care from the management functions acquired by the RTM company would make it easier for leaseholders to exercise the RTM and protect vulnerable people who rely on such services. For example, Notting Hill Genesis commented that this would allow leaseholders to exercise the RTM “without having the burden of providing these services and give customers ... continuity of service by a regulated provider”.

10.28 Consultees also noted that it would be unlikely that RTM companies would have the expertise to provide regulated health and social care. Peabody, a landlord, explained:

We believe it is unlikely that an RTM company will possess the requisite skills and competencies to manage these services, and ultimately this could put vulnerable people at risk.

10.29 A few consultees who disagreed with the proposal thought that the RTM company should become responsible for all the management functions under the lease. Some consultees raised concerns about allowing the RTM company to pick and choose the management functions acquired. For example, the Associated Retirement Community Operators said:

The proposal as it stands would allow new operators to “cherry-pick” only those services they saw as more straightforward or more profitable. For example, they might not be willing to take on loss-making care services from the operator (which might be subsidised by the existing operator, and recouped via deferred fees).

This in turn would be likely to significantly reduce the certainty and quality of services enjoyed by residents and would be likely to undermine future investment decisions.

10.30 Several consultees pointed out that RTM companies would be able to contract with care providers to deliver these services. Urang Property Management Limited, a managing agent, explained:

There is no reason why an RTM could not buy such services in, but there may be good reasons to want to make it optional whether the RTM wants to take this on or not.

10.31 Millstream Management Services, a retirement housing managing agent, proposed that RTM companies should be required to select a service provider who is a member of an approved body or regulatory regime. McCarthy & Stone Retirement Lifestyles Limited, a retirement housing provider, told us that they would prefer there to be a presumption that regulated health and social care is excluded unless the RTM company specifically wishes to acquire this. They thought the landlord's agreement or a Tribunal determination should also be required in such a case (as mooted in the Consultation Paper).

Are any other changes to the current law needed?

10.32 Very few consultees thought it would be necessary to make other changes to the current law in the event that regulated activities were not excluded from the management functions acquired by the RTM company. We did not receive many substantive comments in response to this question and consultees did not generally elaborate on their answers.

10.33 The Society of Licensed Conveyancers suggested that the RTM company should be able to choose their own provider as long as the provider is regulated. Millstream Management Services made the same point.²¹ Birmingham Law Society suggested that the RTM company should be required to "hive off" the obligations for regulated activities whilst retaining oversight.

Are there any other regulated activities which RTM companies should not acquire?

10.34 Only a few consultees thought that there were regulated activities other than the provision of health and social care which RTM companies should not or might not want to acquire.

10.35 Some consultees referred to functions which are not regulated activities but which in their view ought to be excluded from the definition of management functions. The Right to Manage Federation said that functions relating to the assignment of leases was something that RTM companies may not wish to acquire:

The expertise in handling resales (assignment of leases) is not a regulated activity as such but it is an area of expertise that some RTM's struggle with as it involves giving certifications to solicitors and the Land Registry. This may be a function that some RTM's may wish to transfer back to the landlord.

10.36 Peabody said that health and safety functions should not be within the responsibility of the RTM company. Consultees have raised concerns relating to the discharge of health and safety or building safety obligations by RTM companies in response to other questions in the Consultation Paper. We discuss the allocation of these obligations above in paragraphs 10.19 and 10.20.

²¹ See above at para 10.31.

10.37 The Property Bar Association referred to instances where the landlord is responsible for placing more extensive insurance than simply insuring the premises for leaseholders, such as providing contents insurance. In these circumstances, the landlord may be acting as agent for the leaseholders and consequently carrying out a financial service subject to regulation by the Financial Conduct Authority.²² However, they noted that they were not aware of any instances of such an arrangement in practice.

Discussion and recommendations

10.38 A failure to carry out regulated health and social care activities properly and in compliance with the applicable regulatory regime could give rise to severe consequences for RTM companies and vulnerable leaseholders relying on such services. There are also questions around the appropriateness of allowing leaseholders access to information about the care needs of their neighbours. We have therefore concluded that regulated health and social care functions which are provided under a lease ought to be excluded from the management functions acquired by RTM companies. We think the potential consequences of these functions being performed badly justifies an outright exclusion rather than a presumption that could be overcome by agreement between the RTM company and landlord.

10.39 Whilst this will restrict the management functions which can be acquired by RTM companies, it will also make the RTM more accessible to leaseholders who have no wish to take on the burden of managing the provision of regulated health and social care but who would like to have control over other management functions relating to the premises.

10.40 We do not consider that this exclusion allows RTM companies to “cherry pick” management functions as there will be no scope for the RTM company to choose whether it will acquire these functions or not. We are simply recommending that the provision of regulated health and social care should be excluded; the RTM company would still acquire all other management functions.

10.41 In any case, it is only management functions provided under a long lease of the premises, or a document collateral to it, that are acquired by the RTM company. We have been told that, in practice, regulated health and social care at leasehold schemes for older persons is provided for under an agreement independent of the lease. Notwithstanding the rarity of its application, we think it is still worth making the recommendation to ensure that regulated health and social care functions do not pass to the RTM company as part of its management functions under any circumstances.

10.42 We think it is important that any exclusion operates as narrowly as possible to avoid unnecessarily restricting leaseholders’ rights to manage their homes, and to avoid needless fracturing of management. We are not persuaded that there are any other regulated activities which ought to be excluded from management functions in addition to those involving or connected to the provision of regulated health and social care.

²² Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001 No 544), art 10. See also FCA Handbook, *PERG The Perimeter Guidance Manual*, PERG 5, <https://www.handbook.fca.org.uk/handbook/PERG/>.

Recommendation 72.

10.43 We recommend that management functions which involve or are connected to the provision of regulated health and social care should be excluded from the definition of management functions which are acquired by RTM companies.

MANAGEMENT FUNCTIONS – INSURANCE

RTM companies' right to obtain information about insurance

Current law and problems

10.44 On acquisition of the RTM, the RTM company takes over any functions with respect to insurance under any leases of the premises.²³ The leases will make provision as to the insurance which must be taken out, and the costs of insuring the building will typically be recoverable from leaseholders as part of the service charge under the leases. Landlords and other relevant third parties retain the right to continue insuring the premises at their own expense once the RTM has been acquired.²⁴

10.45 As discussed in Chapter 9, RTM companies have limited rights to obtain information before acquiring the RTM. Before the acquisition date, RTM companies are only able to obtain the information needed to complete the claim notice.²⁵ Landlords and relevant third parties have a duty to provide on request any information a RTM company reasonably requires to exercise their management functions, but that duty currently only applies once the management has been acquired.²⁶ This means that the RTM company may not be able to obtain accurate quotations for insurance cover before acquiring the RTM, nor have the necessary insurance in place from the acquisition date.

Our proposals

10.46 In the Consultation Paper, we provisionally proposed that before the acquisition date the landlord should provide the RTM company with a copy of the current insurance policy, the insurance claims history, and a copy of the last reinstatement valuation.²⁷ We asked consultees whether they thought that our proposal would lower the cost of securing insurance for RTM companies and if so, to estimate how much could be saved.

Consultees' views

10.47 Almost all consultees agreed with our provisional proposal, predominantly for the reasons set out above. Settlers Court RTM Company Limited expressed a preference for the provision of this information to be discretionary rather than mandatory. They

²³ CLRA 2002, ss 96(2) and (5).

²⁴ CLRA 2002, s 97(3).

²⁵ CLRA 2002, s 82. See also our recommendations on information notices in Ch 9.

²⁶ CLRA 2002, s 93(3). See discussion of the current law from para 9.35.

²⁷ CP, para 8.73.

thought it would be undesirable to impose further burdens on the RTM company and landlord during the acquisition process.

- 10.48 Some consultees, including legal industry stakeholders and the Association of Residential Managing Agents, responded to this question to suggest the length of insurance claims history that the landlord should be required to provide.
- 10.49 Well over half of consultees considered that our proposal would reduce the cost of insurance for RTM companies. Consultees who thought that our proposal would result in lower insurance costs for RTM companies included leaseholders, RTM companies and managing agents. Several consultees provided us with estimations of the potential saving that could be achieved by an RTM company, which ranged from 10% to 50%. Michael Byrne, a leaseholder, explained:

Insurance companies cannot accurately quote without this information, so I don't know how getting insurance would work without it. My guess is that we will save a third off insurance when we get the RTM if we have this information.

- 10.50 However, it was not always clear whether consultees thought that this saving would be the result of the RTM company possessing the information we proposed or whether this was based on RTM companies taking responsibility for placing the insurance instead of the landlord.
- 10.51 We were told that our proposal would have other non-monetary benefits, such as ensuring that the level of cover provided under the insurance is adequate. Leasehold Advisory Service ("LEASE") thought that the provision of these documents would:
- ...empower the RTM company in the insurance market place and that without the claims history the choice of insurance products would be limited.
- 10.52 Finally, there were some consultees who did not think that our proposal as to the provision of information would lower the cost of insurance for RTM companies. Long Harbour and HomeGround, a landlord and an asset manager, and Peabody told us that a large landlord may benefit from preferential offers or economies of scale when insuring multiple premises under one single policy. The Right to Manage Federation told us that insurers already had access to information about the claims history when offering cover to RTM companies.

Discussion

- 10.53 In Chapter 9, we recommend that RTM companies should have a new right to obtain any information they reasonably require to decide whether to acquire the RTM.²⁸ This right could be used to obtain information about insuring the premises insofar as it is reasonably required for them to decide whether to acquire the RTM. We think that RTM companies should be able to request this information so that they have a better understanding of the insurance obligations they will be taking on if they acquire the RTM.

²⁸ See para 9.32.

10.54 We have also recommended in Chapter 9 that from the determination date – the date on which it is confirmed that the RTM will be acquired – RTM companies should be able to obtain whatever information they reasonably require to be able to exercise their management functions.²⁹ This will enable RTM companies to obtain more extensive information about the insurance obligations they will be taking on so that they are in a position to properly discharge those obligations when the RTM is acquired. We envisage that this right could be used, for example, to obtain information about the insurance claims history for the premises.

10.55 We have not therefore considered it necessary to make further recommendations in addition to those which were made in Chapter 9. We think that the benefits of RTM companies being able to obtain such information outweigh any administrative inconvenience which might result for landlords. It is clear from the responses we received that RTM companies would find it useful to have access to this additional information at an earlier stage even if it does not ultimately reduce the costs of obtaining the insurance.

Ensuring RTM companies can properly exercise their insurance functions

Current law and problems

10.56 There are two potential difficulties which may arise when an RTM company is exercising insurance functions under a lease of the premises.

10.57 First, it is generally accepted that an insurance contract is void if the insured does not have an insurable interest in the subject matter of the insurance.³⁰ To have an insurable interest, the person taking out the insurance must gain a benefit from the preservation of the subject matter of the insurance or suffer a disadvantage should it be lost. In relation to buildings insurance, this will generally be satisfied if the policyholder has a legal or equitable interest in the subject matter of the policy. For example, the policyholder owns or has a legal right arising out of a contract in respect of the property insured.³¹

10.58 However, an insurable interest may also exist in respect of property a party does not own if that party is responsible for, or would suffer loss in the event of, damage to the subject matter of the insurance policy.³² Put differently, despite holding no rights in the property, an insurable interest may be present in circumstances where there is a real probability that the policyholder will suffer a loss or incur a liability on the occurrence

²⁹ See para 9.35.

³⁰ CP, para 8.63.

³¹ See, for example, *Lucena v Craufurd* (1806) 2 Bosanquet & Puller's New Reports, Common Pleas 269; *Macaure v Northern Assurance Co Ltd* [1925] AC 619. See also Insurance Contract Law: Post Contract Duties and Other Issues (2011) Law Commission Consultation Paper No 201; Scottish Law Commission Discussion Paper No 152, para 10.1. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/cp201_ICL_post_contract_duties.pdf.

³² *Colinvaux's Law of Insurance* (12th ed 2019) para 4-027. See also Insurable Interest (2008), Law Commission Issues Paper 4, para 5.18(3).

of the insured peril.³³ The courts have been flexible in their approach to insurable interests, generally looking to find that one exists if at all possible.³⁴

10.59 It is not entirely clear in the current law whether RTM companies have an insurable interest, because they do not have a legal or equitable interest in the premises. We consider that the better view is that they do have an insurable interest because they have legal obligations in respect of the premises, in particular the obligations to insure and to repair. However, the courts have not considered this type of interest before, and in the Consultation Paper we said it would be helpful for the position to be clarified.

10.60 Second, buildings insurance policies are contracts of indemnity, which means that the policyholder can only recover what they have actually lost.³⁵ The management functions which are acquired by the RTM company do not include reinstating the premises in the event they are destroyed, as “repair” is not generally taken to include reinstatement.³⁶ If the RTM company has no obligation to reinstate the premises it is not likely to be regarded as having suffered any recoverable loss in the event that the premises are destroyed. An insurance policy taken out by the RTM company may not therefore pay out in the event of total destruction.

10.61 In summary, the position regarding insurance of the premises is as follows. The landlord clearly has an insurable interest in the premises and would suffer a loss if the premises were destroyed. However, in the event that the landlord still wishes to insure the property after the RTM has been acquired, this will be at its own expense.³⁷

10.62 This may lead to a gap where neither the RTM company nor landlord procures adequate or valid insurance to address the risk of the premises having to be reinstated in the event they are destroyed. While the RTM company may take out insurance cover including full reinstatement, as it is not obliged to reinstate the premises, the policy may not pay out in the event of a claim being made. The landlord may not insure the premises because it will have to do so at its own expense.

Our proposals

10.63 In the Consultation Paper we proposed that provision be made to clarify that the RTM company has an insurable interest in the premises over which the RTM is acquired.³⁸

10.64 We considered a number of options to address the potential gap identified above in relation to insurance taken out against the risk of reinstatement.³⁹ We provisionally

³³ Insurance Contract Law: Post Contract Duties and Other Issues (2011), Law Commission Consultation Paper No 201; Scottish Law Commission Discussion Paper No 152, para 11.68.

³⁴ Above, para 11.95.

³⁵ CP, from para 8.62.

³⁶ *Lurcott v Wakeley & Wheeler* [1911] 1 KB 905.

³⁷ CLRA 2002, s 97(3).

³⁸ CP, para 8.86.

³⁹ CP, paras 8.80 to 8.85.

proposed that the RTM company should acquire the function of reinstating the building under leases of the premises.⁴⁰

10.65 As an alternative, we asked consultees whether the landlord should exercise insurance functions to the extent that those functions relate to reinstatement of the premises, with the RTM company carrying out all other insurance functions under any leases of the premises.⁴¹

Consultees' views

Clarifying that RTM companies have an insurable interest in the premises

10.66 The majority of consultees agreed that it should be clarified that the RTM company has an insurable interest in respect of the premises over which the RTM has been acquired; very few consultees disagreed. A number of consultees thought that this would provide greater certainty for all parties. For example, RSA Insurance Group plc said:

It is important to everyone that the legal position regarding RTM and insurance is clear. Parties need to be able to establish who is entitled to insure a property and who is entitled to an indemnity under the insurance. For the benefit of consumers, third parties and insurers, reputable insurers wish to avoid disputes over which insurance operates in any particular case and avoid costly disputes.

10.67 Birmingham Law Society suggested that the RTM company should only have an insurable interest for as long as it is exercising the management functions. Once the RTM ceases, the RTM company would no longer stand to suffer a loss if the premises were destroyed because it would not be obliged to rebuild the premises.

10.68 Another consultee, Damian Greenish, a solicitor, queried whether stating the existence of the insurable interest would act to the exclusion of the landlord's interest in the building or whether this would be retained.

10.69 One consultee who wished to remain anonymous opposed our proposal on the basis that it was unnecessary. They thought that the RTM company possessed an insurable interest because the leaseholder members have a financial interest in the building.

Reinstatement policies

10.70 Most consultees agreed with our provisional proposal that the RTM company should acquire functions relating to reinstatement under any leases of the premises.

10.71 Several consultees expressed concerns about the risk of inadequate insurance being taken out in respect of the premises. Consultees who agreed with our proposal considered that giving RTM companies any functions with respect to reinstatement under any leases of the premises would encourage them to ensure that adequate insurance cover existed. The Association of British Insurers told us that:

⁴⁰ CP, para 8.87.

⁴¹ CP, para 8.88.

Underinsurance will be detrimental to all parties (landlords, RTM company and tenants) as it could mean they will not be fully covered in the event of a loss.

Giving RTM companies the duty to reinstate the building may help to reduce the risk of the sums insured being inadequate.

10.72 However, a few consultees made strong representations that RTM companies will not have the same resources to reinstate the premises in the event that they fail to take out adequate insurance against that risk. For example, Damian Greenish said:

We have to remember that the RTM [company] has no assets and so cannot reinstate save to the extent that it receives the insurance monies. So, if it has under-insured (or decided that the property should be insured only to the limited extent required by the lease) what happens then? If you take a London Estate landlord, he will have the resources to re-instate regardless of what is recovered through the insurance policy; a RTM company has no assets.

10.73 Just under half of the consultees who responded disagreed with the alternative solution we suggested. A number of those consultees who disagreed told us that it would increase complexity, costs and would be impractical. Birmingham Law Society noted that:

Split insurance between [the] landlord and RTM company is likely to create litigation between insurance companies seeking to avoid liability.

Discussion and recommendations

Clarifying that RTM companies have an insurable interest in the premises

10.74 We have concluded above that the better analysis of the law is that an RTM company already has an insurable interest in the premises over which it is exercising the RTM. Although we think there would be benefits to making this clear in legislation, we recognise that legislation is not generally used for clarificatory purposes and we do not therefore go so far as to make a recommendation on these terms.

10.75 The landlord's reversionary interest in a building gives rise to a separate insurable interest,⁴² which is not extinguished by the creation of the RTM company's insurable interest when it acquires legal obligations relating to management. The landlord will continue to be able to insure the premises in their own right and at their own expense.

Reinstatement policies

10.76 Although consultees generally agreed with our proposal that the RTM company should acquire functions with respect to reinstatement, we accept the arguments made by some that the possibility of the RTM company being under-insured would present serious financial risks to the landlord and leaseholders. If there were no or insufficient insurance, the landlord and leaseholders would be left completely exposed. The RTM company has no assets, so a landlord enforcing the obligation to reinstate the building would be fruitless. At least where the reinstatement obligation is

⁴² Prof J Birds, S Milnes, B Lynch, *MacGillivray on Insurance Law* (14th ed 2018) para 1-153; Prof R M Merkin, *Colinvaux's Law of Insurance* (11th ed with supplement 2018) para 20-028.

with the landlord, the landlord may have other assets. We have therefore concluded that this issue should not be resolved by the imposition of reinstatement obligations on the RTM company.

10.77 The most effective means of obtaining suitable insurance would be for the RTM company and the landlord to agree on a policy which is then procured in the names of both parties. However, we can only encourage such good practice and cannot mandate this.

10.78 We appreciate that landlords and RTM companies working together may well prove challenging in practice, particularly where relations are difficult. We are conscious that this would leave the parties vulnerable to having unsuitable and/or inadequate insurance in place, exposing all parties to unacceptable risk. We have therefore sought to devise a means through which a party can formally escalate the issue of insurance cover if this cannot be agreed. We think that the Tribunal is the appropriate forum for this.

10.79 We suggest that that the approach set out below should be adopted by landlords and RTM companies as good practice. Where issues of insurance cannot be agreed upon, the parties can seek a determination from the Tribunal as to implementing a suitable policy in the names of both the landlord and the RTM company, reducing the risks associated with not having adequate cover in place. The suggested procedure is:

- (1) Early on in the RTM claim process, the RTM company should request information regarding the current insurance policy in place in respect of the premises (using our recommended rights as to the early provision of information).⁴³ We acknowledge that this would incur a cost for the RTM company before it is known the RTM will definitely be acquired. However, we think this is justified to enable the RTM company to fully appreciate the insurance obligations it would acquire as part of the management functions. We envisage that this ought to include a copy of the current policy, claims history and reinstatement valuations and any other documentation relevant to insuring the premises in any given case. Following the provision of information, RTM companies and landlords should discuss the requirements of post-acquisition insurance before the acquisition date and seek to agree on a policy to be procured in the names of both parties, to commence on the acquisition date.
- (2) Where agreement is not possible, either party will have the right to apply to the Tribunal. The Tribunal would make a determination as to the procurement of a suitable insurance policy in the names of both the landlord and the RTM company. In making the determination, the Tribunal would consider the insurance requirements of the premises in light of the lease terms, reinstatement valuations, previous policies and any other relevant information (including expert evidence). The Tribunal's power to require a particular form of insurance policy would be akin to its existing powers to impose management agreements on parties to a lease where a manager is appointed under the Landlord and Tenant Act 1987 ("the 1987 Act").

⁴³ See Ch 9, particularly from para 9.22, and from para 10.44 on insurance information.

- (3) Application to the Tribunal could be at any point following the determination date. Parties would be at liberty to apply to the Tribunal for a determination at any point in the course of the RTM company having management functions. This is important as insurance considerations may change over time. For example, leaseholders of other buildings may join the RTM in accordance with our multi-building RTM recommendations in Chapter 5, resulting in the RTM company being responsible for insuring additional non-exclusive appurtenant property over which it acquires management functions.
- (4) If an application has been made to the Tribunal and no determination has been made by the acquisition date, then the landlord should be required to maintain insurance up to the implementation of any determination, so that all parties can take comfort that suitable insurance is in place in the interim. The costs of the insurance would be recovered via the service charge in the usual way and assuming the leases permit recovery. We acknowledge that providing for the landlord to continue insuring the premises after the RTM is acquired is unlikely to be popular with leaseholders. Leaseholders' concerns regarding insurance are often key drivers behind RTM acquisition. However, the landlord continuing to insure the premises would be for a limited time only and, crucially, this approach would mean that a fit for purpose insurance policy is in place, which is likely to pay out in the event of a claim being made.
- (5) The ability to apply to the Tribunal if the parties cannot agree on insurance gives landlords a new opportunity to force the RTM company to incur costs, and to keep control of the insurance obligations for longer. In light of this, we think the landlord should meet the full costs of any application (subject to the Tribunal's existing powers to award costs where one party has acted unreasonably). We acknowledge that this represents a departure from our general recommendations in Chapter 12 that parties should meet their own costs of the RTM process. However, we think it is justified as an incentive for landlords to engage in meaningful and productive dialogue with RTM companies.

Recommendation 73.

10.80 We recommend that:

- (1) Landlords and RTM companies should seek to work together to procure suitable insurance cover in joint names.
- (2) Where no agreement is reached, the Tribunal should have jurisdiction to make determinations as to the insurance cover to be implemented, on the application of either party.
- (3) In the event of an application being submitted to the Tribunal, the landlord will continue to insure the premises up to the implementation of the determination.

Landlords' right to obtain information about insurance

Current law and problems

10.81 Landlords of units not held by qualifying tenants are required to pay service charges to the RTM company in certain circumstances.⁴⁴ Under the Landlord and Tenant Act 1985 ("the 1985 Act"), those landlords are entitled to request certain information relating to insurance if they are required to pay a service charge towards the RTM company's costs of taking out insurance.⁴⁵ In particular, the landlord has rights to inspect any insurance policy or associated documents (or to take copies or extracts of them), subject to giving notice to the RTM company.⁴⁶

10.82 Arguably landlords would always be entitled to request information about insurance taken out by RTM companies by virtue of their reversionary interest, irrespective of whether or not a landlord is required to contribute towards the insurance costs. However, as the legislation only sets out this entitlement where a landlord has to contribute towards the service charge for units not held by qualifying tenants, disputes as to a landlord's entitlement could arise and insurance information could be withheld.

Our proposals

10.83 In the Consultation Paper we proposed that the right to request copies of any insurance policies should not be restricted to landlords who pay a service charge, and should instead be available to all landlords. We proposed that the RTM company should have to provide this information within 21 days of a request from the landlord.⁴⁷

Consultees' views

10.84 The vast majority of consultees agreed with our proposal. Consultees who agreed with our proposal, including those representing both landlord and leaseholder interests, acknowledged the importance to the landlord of knowing that the building is properly insured.

10.85 Investment Technology Ltd t/a Canonbury Management, a managing agent, opposed our proposal. They thought that this would create unnecessary work for an RTM company when the landlord has no reason to require a copy of the insurance contract.

10.86 Some consultees queried whether our proposal should be an annual duty for the RTM company to comply with, instead of a right exercisable at the landlord's request. They also suggested that the RTM company should have to update the landlord when amendments are made or the policy is renewed.

Discussion and recommendations

10.87 We consider that any landlord under a lease of the premises should benefit from the existing rights under the 1985 Act to request a written summary of the insurance cover taken out in relation to the building, and to inspect any relevant policy and associated

⁴⁴ CLRA 2002, s 103. The circumstances in which a landlord must make such a contribution are set out in that provision.

⁴⁵ Landlord and Tenant Act 1985, s 30A and sch, as modified by CLRA 2002, sch 7 para 5.

⁴⁶ Landlord and Tenant Act 1985, sch, para 3, as modified by CLRA 2002, sch 7 para 5.

⁴⁷ CP, para 8.91.

documents. We do not think that those rights should be restricted to landlords who are obliged to pay a service charge towards the costs of taking out that insurance. This will help landlords to decide whether they consider it necessary to place additional insurance at their own expense in relation to the premises.

10.88 We do not consider that this places significant additional burdens on RTM companies. There is already a statutory obligation for RTM companies to provide such information at the request of leaseholders and landlords who do pay service charges towards insuring the premises. The RTM company would be able to recover its expenses,⁴⁸ and would not be obliged to comply with more than a reasonable number of requirements imposed by any one person.⁴⁹

10.89 We hope that our recommendation above in relation to landlords and RTM companies working together to procure suitable insurance in joint names will encourage a practice of information sharing and collaboration between the parties.

Recommendation 74.

10.90 We recommend that when the RTM is acquired any landlord under a lease of the premises should have the rights under the 1985 Act to request a written summary of the insurance cover in place in relation to the premises, and to inspect or be sent a copy of the policy and associated documents.

Enforcing RTM companies' compliance with insurance obligations

Current law and problems

10.91 Once the RTM has been acquired, landlords continue to have a right to insure the premises but must do so at their own expense.⁵⁰ In the Consultation Paper, we explained that we had been told by stakeholders that a key concern of landlords in connection with RTM claims is the concern that the RTM company will not properly insure the premises.⁵¹ This is not a ground on which landlords may oppose the RTM. However, landlords sometimes seek to oppose the acquisition of the RTM on the grounds available, such are their concerns regarding insurance of the premises post-RTM acquisition.

Our proposals

10.92 In our Consultation Paper, we proposed a new right for landlords to be able to apply to the Tribunal for a determination that the RTM company has under-insured the

⁴⁸ Landlord and Tenant Act 1985, sch, paras 3(5) and (6).

⁴⁹ Landlord and Tenant Act 1985, sch, para 5.

⁵⁰ CLRA 2002, s 97(3).

⁵¹ CP, para 8.57.

premises.⁵² We said that we thought this might reduce opposition to RTM claims from landlords.

10.93 We provisionally proposed that where the Tribunal finds that the RTM company has under-insured the Tribunal should be able to direct that the RTM company must pay the landlord's costs of taking out insurance to make good the failure, or direct the RTM company as to insurance it must take out.

10.94 Finally, we asked consultees whether they had experience of landlords purchasing additional insurance because they considered an RTM company had failed to secure comprehensive insurance, and how much the additional insurance had cost.

Consultees' views

Applying to the Tribunal

10.95 A majority of consultees agreed that landlords should have a new right to apply to the Tribunal for a determination that the RTM company has under-insured. It was acknowledged that the landlord should be able to protect their reversionary interest and that ensuring there is adequate insurance in place is in the best interests of all parties.

10.96 Two leaseholders who disagreed considered that it would be in the best interests of the RTM company to appropriately insure the building and opposed our proposal as unnecessary on this basis. Two other consultees, Investment Technology Limited t/a Canonbury Management and Shula Rich (Brighton Hove and District Leaseholders Association and FPRA), opposed our proposal because it did not also give leaseholders the right to challenge the adequacy of the insurance.

10.97 A number of consultees said they were unclear as to what would amount to under-insurance, and when the Tribunal would therefore be able to make a determination that the RTM company had under-insured the premises. A few consultees provided views on who should bear the costs of applying to the Tribunal for a determination.

Remedies for under-insurance

10.98 The vast majority of consultees agreed with the remedies we proposed to make available to the Tribunal when they make a determination that the RTM company has under-insured the premises. A number of consultees acknowledged the necessity of ensuring that adequate insurance is in place and the importance of rectifying under-insurance.

10.99 However, several consultees raised concerns about the suggestion that the Tribunal could make a direction for the future insurance of the building to be procured by the RTM company. For example, the Property Bar Association said it:

... would represent something of an unusual power for the [tribunal] to exercise as it would amount to an order for specific performance. Further, absent some form of effective enforcement mechanism, it may be somewhat meaningless and/or force a

⁵² CP, para 8.97.

landlord to take the matter so far that the RTM company loses the RTM (eg through insolvency).

10.100 Some leaseholders raised concerns about the possibility of a landlord misusing the power to recover the costs of “top up” insurance from the service charge to penalise the RTM company by securing the most expensive insurance cover. Paul Robertson, an insurance broker, told us that landlords may not be able to obtain cover for only the specific element of insurance that the RTM company has omitted to include. This could lead to complex arguments about the extent of the “top-up” insurance premiums recoverable by the landlord where, for example, they have taken out a comprehensive buildings insurance policy to provide insurance against one risk that the RTM company’s policy omits. This would be a disproportionate cost compared to the likely cost of the RTM company simply amending their current insurance policy to include this.

10.101 The Property Bar Association, Damian Greenish, and Peabody all suggested that where the RTM company has under-insured, the management functions should revert to the landlord either wholly or just in respect of the insurance functions.

Purchasing additional insurance

10.102 Very few consultees reported experience of landlords purchasing additional insurance where an RTM company had failed to insure the premises comprehensively. Those who did report such experience were mainly landlords.

10.103 The Church Commissioners for England told us they had taken out additional insurance because disputes between members of the RTM company and financial difficulties had led to a failure to adequately insure the premises. Notting Hill Genesis explained that they had taken out additional insurance where one RTM company’s policy did not cover certain perils:

A scheme for which NHG retains the landlord interest as freeholder is managed by an RTM company that has employed agents to ensure the cost of insurance is kept to a minimum. As a result, their insurance does not provide cover for subsidence, heave and landslip or for terrorism and wet perils whilst covered are subject to very high excesses. Whilst the insurance cover obtained by the RTM company’s agent might be acceptable to the RTM, [it] is not acceptable to our lenders and so we have had to arrange contingency cover for the scheme.

The cost is greater than the actual buildings premium would have been if insured by the landlord. The 2018 premium was some £5,623. The contingency policy is not recoverable from the RTM nor any of the leaseholders within the scheme and therefore has become a non-recoverable annual expense to the landlord.

Discussion

10.104 While our proposals were supported by consultees, we have concluded on reflection that a new right for landlords to apply to the Tribunal for a determination that the RTM company has under-insured the premises is not needed.

10.105 We set out above the complexities underlying the procurement of insurance by the RTM company, particularly in the context of reinstatement.⁵³ We took the view that landlords and RTM companies ought to work together to procure a suitable insurance policy in both names to ensure that all parties are adequately protected in the event of a claim being made.⁵⁴ To provide protection for the interests of all parties, though particularly leaseholders, we have recommended that a new right for parties to approach the Tribunal be created for a determination as to the form of insurance policy to be procured if this cannot be agreed.

10.106 This new jurisdiction of the Tribunal would go beyond applications which are currently possible under section 107 of the 2002 Act in respect of compliance with requirements imposed by that Act. The Tribunal would not simply be assessing whether insurance is in place and whether it is for a sufficient sum. The jurisdiction of the Tribunal would be for a wider examination of the insurance requirements in the post-RTM legal context, to the point of imposing a requirement to insure in a specific way.

10.107 We are persuaded that the concerns raised by consultees in respect of the purchase of additional insurance by the landlord lessen the attractiveness of a specific right to apply to the Tribunal in relation to under-insurance. Issues of under-insurance could be addressed via the new jurisdiction we are recommending for the Tribunal to make determinations as to the insurance policy to be procured.

10.108 It is important to note that the current enforcement actions available to landlords when an RTM company breaches its insurance obligations (or any other obligation) under any leases of the premises will remain available. For example, a landlord can bring a claim against the RTM company for failing to comply with the insurance covenant under the lease if the RTM company does not properly insure the premises.⁵⁵ As with any other breach of covenant the remedies available to the court may include awarding damages or ordering specific performance. Alternatively, landlords can make an application to the county court under section 107 of the 2002 Act,⁵⁶ on the grounds that the RTM company has failed to comply with a requirement of the 2002 Act.⁵⁷ In response to such an application, the county court could make an order for specific performance, compelling the RTM company to put insurance in place. Finally, the landlord could apply for the appointment of a manager or to have the RTM terminate under Part 2 of the 1987 Act on the grounds that the RTM company is in breach of an obligation under the lease.⁵⁸ These enforcement mechanisms are also available to leaseholders of the premises. However, we envisage that our new, wider jurisdiction for the Tribunal to make determinations as to

⁵³ See paras 10.56 to 10.180 above.

⁵⁴ See paras 10.56 to 10.180 above.

⁵⁵ As a result of the operation of CLRA 2002, ss 96(2) and (3) and ss 97(1) and (2).

⁵⁶ In Ch 12, we recommend that the Tribunal should have jurisdiction for hearing such applications.

⁵⁷ CLRA 2002, s 97(1) provides that any obligation owed by the RTM company to a leaseholder under a lease is also owed to a landlord under that lease.

⁵⁸ Landlord and Tenant Act 1987, s 24(2)(a) as modified by CLRA 2002, sch 7, para 8.

the insurance policy to be put in place will result in fewer applications being made for existing enforcement actions in the context of insurance obligations.

Reinstatement valuations

Current law and problems

10.109 The current law does not require RTM companies to obtain regular reinstatement valuations.⁵⁹ Equally, no such requirement exists in respect of landlords or managing agents although we understand that landlords or their agents may be signed up to guidance or codes of practice published by professional bodies which require or recommend regular valuations.⁶⁰

10.110 Conducting regular reinstatement valuations helps to ensure that the sum for which the building is insured is adequate and that it covers the likely cost of rebuilding the premises.

Our proposals

10.111 In the Consultation Paper we proposed that the RTM company should be required to obtain reinstatement valuations periodically, as part of our provisional proposals designed to provide protection for the landlord's interest in the premises.⁶¹ We did not specify how frequently they should be obtained, but noted that this could be every three to five years or in line with recommendations made by relevant institutions or professional bodies.⁶²

10.112 We also asked consultees for their experience of the cost of obtaining a reinstatement valuation.

Consultees' views

10.113 The vast majority of consultees agreed with our proposal and very few disagreed. Consultees agreed that our proposal would ensure that RTM companies do not under-insure the premises and would avoid unnecessary Tribunal applications by landlords under our new proposal. However, Stephen Desmond, of Desmond Training Ltd, was concerned that this requirement might unfairly disadvantage RTM companies:

Bearing in mind that RTMs tend to be run by lay volunteers, would this involve penalising the RTM company if it fails to do so? If so, this would put them at a disadvantage, as compared with other landlords and management companies that are not subject to such a legal duty.

10.114 Some consultees said that the legislation should specify the frequency with which reinstatement valuations should be obtained. Other responses highlighted the difficulty

⁵⁹ A reinstatement valuation estimates the cost of reinstating a building on a particular date following total loss or such substantial damage that the entire structure requires demolition and rebuilding. It is used to determine the value of the property insurance required for a particular building.

⁶⁰ See for example Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code* (3rd ed 2016) para 12.4.

⁶¹ CP, para 8.99.

⁶² CP, para 8.95.

of making a rule that would be suitable for all premises: we were told that reinstatement valuations should be obtained within differing frequencies starting from once a year up to once every 10 years.

10.115 The most frequently cited cost of obtaining a reinstatement valuation was £1,000. However, we understand that the frequency with which reinstatement valuations are obtained and the type of reinstatement valuation undertaken will differ for different premises, which may affect the cost incurred. Many of the responses we received from professional organisations distinguished between the costs of commissioning a desktop review and a site visit assessment, with the latter incurring greater costs. We were told that the cost of a desktop review will be no less than £85-95, and that a site visit assessment would cost at least £350 for a small site. Larger premises may be subject to a pricing structure based on the number of flats in the building.

Discussion

10.116 Upon further review, we have concluded that it would be inappropriate to impose this requirement upon RTM companies through legislation. We note that landlords and other managing parties are not subject to a legal obligation to obtain regular reinstatement valuations, although we accept that this is common practice.⁶³ It would, however, be good practice for RTM companies to obtain regular reinstatement valuations. We consider that with the good practice of landlords and RTM companies collaborating on post-RTM insurance matters being adopted, agreements could hopefully be reached on the frequency with which a reinstatement valuation is to be obtained. If agreement is not possible, this is a further issue the Tribunal could determine under the new jurisdiction we recommend.

10.117 A couple of consultees queried whether the costs of obtaining reinstatement valuations would be recoverable from the leaseholders through the service charge. At the end of this chapter, we recommend that the management costs of the RTM company should be recoverable through the service charge.⁶⁴ The cost of obtaining reinstatement valuations would be recoverable as part of the RTM company's management costs as a cost that is reasonably necessary or desirable for the exercise of the RTM.⁶⁵ This would be subject to the existing rules on reasonableness of service charges.⁶⁶

10.118 The Association of British Insurers suggested that, more generally, there should be "adequate information" for RTM companies to understand their duty and role in placing insurance, as well as the importance of ensuring that insurance cover meets their needs. We agree that further guidance would be useful to RTM companies.

⁶³ See for example Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code* (3rd ed 2016) para 12.4, which encourages reinstatement valuations to be undertaken regularly.

⁶⁴ See from para 10.204 onwards.

⁶⁵ See from para 10.208.

⁶⁶ Landlord and Tenant Act 1985, s 19.

Information on insurance obligations should be part of our recommended training provided for RTM company directors that we discuss in Chapter 7.⁶⁷

MANAGEMENT FUNCTIONS – APPURTENANT PROPERTY

Current law and problems

- 10.119 When an RTM company acquires the RTM it automatically acquires management functions which relate to the premises specified in the claim notice (“the subject premises”), and any appurtenant property.⁶⁸ Appurtenant property means any garage, outhouse, garden, yard or other appurtenances which belong to, or are usually enjoyed with, the subject premises.⁶⁹ Leaseholders of the subject premises may have the exclusive right to use appurtenant property (“exclusive appurtenant property”), or may share rights of access and use in common with occupiers of other premises (“non-exclusive appurtenant property”).
- 10.120 The current position regarding management functions in respect of appurtenant property was determined by the Court of Appeal decision in *Gala Unity Limited v Ariadne Road RTM Co Ltd* (“*Gala Unity*”).⁷⁰ The Court of Appeal held that the management functions acquired by the RTM company are not restricted to exclusive appurtenant property and that an RTM company is also entitled to acquire management functions relating to non-exclusive appurtenant property.
- 10.121 This gives rise to practical difficulties. First, the RTM company effectively acquires dual responsibility for managing the non-exclusive appurtenant property along with landlords or management companies of other buildings. This could lead to duplication of effort or even conflict if the RTM company and the other party or parties cannot agree on who should manage the property, or how it should be managed. The occupiers of other buildings have no say over how the RTM company manages that property, nor will leaseholders of the subject premises have any say over how the non-exclusive appurtenant property is managed by the other party.
- 10.122 Second, the RTM company has no power to demand a service charge contribution towards the non-exclusive appurtenant property from occupiers of other buildings who are entitled to use it. This could lead to difficulties in funding the management of the non-exclusive appurtenant property if the RTM company cannot work together with others responsible for managing it.
- 10.123 As we set out in the Consultation Paper, the *Gala Unity* decision has proved to be controversial.⁷¹ The consequence of *Gala Unity* and subsequent case law is that RTM companies have had no choice but to acquire management over non-exclusive

⁶⁷ See from para 7.3.

⁶⁸ And as explained earlier in this chapter, those functions must be conferred on the landlord or other third party under a lease of the whole or part of the premises. CLRA 2002, ss 72(1) and 96(1) to (3).

⁶⁹ CLRA 2002, s 112(1).

⁷⁰ *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372. In *Firstport Property Services Ltd v Settlers Court RTM Co Ltd* [2019] UKUT 0243 (LC), the Upper Tribunal held that *Gala Unity* had not been decided per incuriam.

⁷¹ CP, paras 4.106 to 4.108.

appurtenant property irrespective of whether they have claimed it.⁷² Since the publication of the Consultation Paper, this issue has been appealed to the Supreme Court on the basis that *Gala Unity* was wrongly decided.⁷³ We have not yet had the benefit of the Supreme Court's views on the matter.

Our proposals

10.124 In the Consultation Paper, we put forward provisional proposals which would effectively reverse the effect of *Gala Unity*, because of the problems it has caused and has the potential to cause.⁷⁴ We provisionally proposed that RTM companies should not automatically acquire management functions relating to non-exclusive appurtenant property. We proposed that RTM companies should only be entitled to acquire management functions in relation to such property if the landlord or relevant third party agrees or if the Tribunal makes a determination to that effect.

Consultees' views

10.125 A sizeable majority of consultees, representing both leaseholder and landlord interests, agreed with our proposal. The Property Bar Association considered that *Gala Unity* was wrongly decided. Long Harbour and HomeGround commented that the Court of Appeal's decision "left landlords and RTM companies on shared estates often at loggerheads."

10.126 There were however a significant number of consultees opposed to our proposal. Some consultees were concerned that our proposal would significantly reduce the extent of the property which could be managed by an RTM company and so undermine the usefulness of claiming the RTM. The Right to Manage Federation commented that:

... On most multi-block estates the appurtenant property is common parts, it is shared non-exclusively. That is the norm. It is difficult to think of an estate where this is not the case. So this would in most cases eliminate appurtenant property from RTM completely...

10.127 Settlers Court RTM Company Limited said that:

...it does not fully achieve the overriding objective of giving tenants the right to manage their own affairs. On an estate, a significant element of the service charges is likely to relate to estate common parts. If the proposal is implemented, tenants will be unable to have any right to control this element of service charges...

10.128 Some consultees were concerned about the practical implications of our proposal regarding the collection of service charges. Consultees said that if the RTM company did not acquire management functions over any non-exclusive appurtenant property then leaseholders would have to pay service charges to both the RTM company and

⁷² *Pineview Limited v 83 Crompton Street RTM Co Ltd* [2013] UKUT 0598 (LC) at [59]; *Campbell Park (Columbia Place) RTM Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* (05 December 2013) CAM/00MG/LRM/2013/0023 & 0024 First-tier Tribunal Property Chamber (unreported) at [25].

⁷³ An appeal on *Firstport Property Services Ltd v Settlers Court RTM Co Ltd* [2019] UKUT 0243 (LC).

⁷⁴ CP, from para 4.110

the person managing the non-exclusive appurtenant property. There was a concern that this would cause confusion and undermine the value of acquiring the RTM as a means of reducing the service charges payable by leaseholders.

10.129 A small number of consultees suggested that the current law should be maintained, though with a written agreement between the parties in place when the RTM is acquired detailing how the non-exclusive appurtenant property will be jointly managed.

Discussion and recommendations

10.130 We remain of the view that management functions in respect of non-exclusive appurtenant property should not be automatically acquired by the RTM company, but that it may be appropriate for the RTM company to manage such property in some circumstances.

10.131 As was explained in the Consultation Paper, the current law causes significant practical difficulties. The RTM company may disagree with others managing the property as to how their shared responsibilities ought to be performed. The occupiers of other premises may refuse to contribute towards the RTM company's costs of managing the property. We do not think it is in anybody's interests for RTM companies automatically to acquire management functions over non-exclusive appurtenant property if the RTM company is likely to find itself in a situation where it cannot manage that property satisfactorily.

10.132 A number of consultees were concerned that if the RTM company was prevented from acquiring management functions in relation to appurtenant property, it would significantly undermine the value of acquiring the RTM in the first place. However, it is important to point out that the RTM company would still automatically acquire management functions in respect of the subject premises, and any *exclusive* appurtenant property. This would include any appurtenant property which is demised under a lease of the premises, or other appurtenant property that is not used in common with occupiers of other premises. In addition, our recommendations in respect of multi-building RTM claims in Chapter 5 will mean the issues concerning appurtenant property are diminished, as it would be possible for the RTM company to claim the RTM over a whole estate including all estate property.

10.133 In addition, RTM companies would still be able to acquire management functions over non-exclusive appurtenant property provided that certain requirements are met that are aimed at ensuring that the RTM company will be able to manage the property fairly and effectively. Specifically, we think that the RTM company should be able to acquire management functions over non-exclusive appurtenant property provided that such property has been specified in the claim notice, and either:

- (1) the landlord does not object to the acquisition of the RTM in respect of that appurtenant property; or
- (2) the landlord does object but subsequently withdraws the objection, or the Tribunal determines that it is appropriate for the RTM to be acquired over the non-exclusive appurtenant property, and makes directions as to how it should be managed.

10.134 We consider each of these cases below.

Landlord does not object to the acquisition of the RTM

10.135 In the Consultation Paper, our initial view was that the RTM company should not acquire management functions in relation to non-exclusive appurtenant property simply as a consequence of the landlord not submitting a counter-notice.⁷⁵ We thought that there might need to be some sort of express agreement which adequately addressed how the property would be managed by the parties.⁷⁶

10.136 However, on reflection we do not think it is feasible to try to prescribe a form of agreement which would ensure non-exclusive appurtenant property is managed effectively by the parties in all situations. The issues which might need to be addressed by any such agreement are likely to vary significantly depending on the circumstances.

10.137 We have considered whether RTM companies should have to apply to the Tribunal for a determination whenever they wish to acquire the RTM over non-exclusive appurtenant property. This would have the advantage of ensuring that the RTM company only acquires management functions over non-exclusive appurtenant property where the Tribunal is satisfied that sufficient arrangements are in place to ensure the property can be managed effectively.

10.138 However, we are concerned that if leaseholders are required to apply to the Tribunal whenever they wish to manage non-exclusive appurtenant property, it could add considerable delays and expense to the process of claiming the RTM. As some consultees have pointed out, appurtenant property may often be used in common with occupiers of other premises. We are reluctant to force leaseholders to go to the time and expense of applying to the Tribunal whenever they wish to acquire the RTM over such property.

10.139 We have concluded that RTM companies should acquire management functions over non-exclusive appurtenant property without involving the Tribunal only if either:

- (1) the property in question has been specified in the claim notice and the landlord does not object to this; or
- (2) the landlord does object, but subsequently withdraws the objection.

10.140 We think that the fact the landlord has not expressed any opposition to the RTM being acquired in relation to the non-exclusive appurtenant property indicates that there is scope for the parties to work together in managing the property.

10.141 There is of course a risk that disagreements may subsequently arise between the RTM company and landlord as to how the non-exclusive appurtenant property should be managed and how the service charges in respect of it should be collected. To address this, we think that either of the parties should have the right to apply to the Tribunal after acquisition of the RTM for directions as to how the non-exclusive

⁷⁵ CP, paras 6.75 and 6.76.

⁷⁶ CP, para 4.113.

appurtenant property should be managed. The Tribunal would have broad powers to decide how the property ought to be managed in given circumstances. This will ensure that there is a mechanism for resolving practical difficulties which may emerge at a later date.

Landlord objects to the acquisition of the RTM

10.142 It will be necessary for the RTM company to apply to the Tribunal if the landlord objects to the acquisition of the RTM in respect of the non-exclusive appurtenant property and such objection is not subsequently withdrawn. We think that in this situation the additional time and expense involved in having to apply to the Tribunal is justified to ensure that the property can be managed effectively by the RTM company.

10.143 We think the Tribunal should be given broad discretion to decide whether and how the non-exclusive appurtenant property should be managed by the RTM company and other parties based on what it considers to be just and convenient in the circumstances. The Tribunal might take into account different factors such as the nature of the appurtenant property, the management functions performed in respect of it, the extent to which the occupiers of other premises are entitled to use it and what they pay towards its maintenance. In respect of the non-exclusive appurtenant property, the Tribunal could determine that either:

- (1) the RTM company ought to be the only manager;
- (2) the RTM company should have joint responsibility for managing the property in accordance with such directions as the Tribunal considers appropriate; or
- (3) the RTM company should not acquire management functions at all.

10.144 The Tribunal would also be able to provide for such incidental or ancillary matters as it saw fit. We envisage that this would include a power to vary the leases of leaseholders entitled to use the non-exclusive appurtenant property to ensure that the costs of the other block managing that property are fairly apportioned between those entitled to use it. We discuss our recommendations as to lease variations below.⁷⁷

⁷⁷ From para 10.147 to 10.154.

Recommendation 75.

10.145 We recommend that an RTM company should be able to acquire management functions over non-exclusive appurtenant property if such property has been specified in the claim notice, and either:

- (1) the landlord does not submit a counter-notice objecting to the acquisition of the RTM in respect of that appurtenant property; or
- (2) the landlord does submit such a counter-notice objecting to the acquisition, which is subsequently withdrawn, or the Tribunal determines that it is appropriate for the RTM company to acquire management functions in respect of the non-exclusive property.

10.146 Where the Tribunal determines that the RTM company is to acquire management functions in respect of non-exclusive appurtenant property, the Tribunal may make directions as to how that property should be managed.

A POWER TO VARY LEASES

Current law and problems

10.147 As we have emphasised elsewhere in this Report, the management functions acquired by the RTM company are those in the relevant leases, and what the RTM company can do is both enabled and limited by the leases. When the RTM is acquired, the RTM company may have difficulty exercising its management functions because of the terms of the leases. For example:

- (1) There may be conflicting or inconsistent covenants in different leases – for example, the service charge provisions in the leases may not add up to 100% across all leases.
- (2) If the RTM is acquired over one building on an estate and the service charge provisions for leases in all the buildings are interlinked, this may cause problems regarding the liability for and apportionment of service charges.
- (3) Where the RTM company acquires management of non-exclusive appurtenant property, lease variations may be required to set out the management arrangements or ensure the RTM company can recover the costs from owners or leaseholders in other buildings (alternatively, this may be done through a management agreement).

Variation of leases under Part 4 of the Landlord and Tenant Act 1987

10.148 Part 4 of the 1987 Act enables a party to a lease (and, post-acquisition, the RTM company) to apply to the Tribunal to vary the lease on the grounds that the lease fails to make satisfactory provision as to various specified matters.⁷⁸ These include the

⁷⁸ Landlord and Tenant Act 1987, s 35.

maintenance and repair of the premises, the insurance of the building or the calculation of the service charge. In some cases, the RTM company may be able to apply to vary a lease under these provisions – for example if the service charge provisions in all the leases in a building do not add up to 100%.⁷⁹

10.149 However, a term of a lease will not be regarded as having failed to make satisfactory provision in relation to a particular matter if the term is clear and workable.⁸⁰ The statutory lease variation mechanisms in the 1987 Act were not drafted with the RTM in mind, and may not be sufficient in all cases where a problem is caused or exacerbated by the acquisition of the RTM. It is not clear, for example, that the Tribunal could vary a term of a lease which is of itself clear and workable, but which no longer works simply because the RTM has been claimed. We envisage that this will be a particular issue in more complex scenarios involving multi-building RTM claims and management of non-exclusive appurtenant property.

Our proposals

10.150 In the Consultation Paper, we provisionally proposed that the Tribunal should have powers to vary leases in different circumstances. These included where the RTM is claimed over a building owned by multiple landlords and different leases contain conflicting covenants⁸¹ and where the RTM terminates and the manager under the lease no longer exists.⁸² We discuss consultees' responses to our proposals at the relevant parts of this Report. In general, our proposals were well-supported.

Discussion and recommendations

10.151 We consider that the Tribunal should have a more general, but targeted, power to vary a lease where the acquisition of the RTM causes difficulties for the management of premises. We think the application to the Tribunal would usually be made by the RTM company, but could also be made by a party to a relevant lease or any other party whose interests are affected. We envisage that any order made by the Tribunal in such a case would last only as long as the RTM is being exercised. If there are different options for varying the leases, the Tribunal should select the option which has the least impact on the parties' existing rights and obligations.

10.152 Parties whose rights would be affected, such as the landlord, freeholders of other buildings on an estate and leaseholders of both the RTM and non-RTM buildings will have the opportunity to join in such applications.

10.153 In some cases, the issue might be more appropriately dealt with by imposing a management agreement between the RTM company and another party rather than a lease variation. We envisage that this would be akin to the Tribunal's current powers in the context of appointing a manager under the 1987 Act. For example, where the RTM is claimed over only part of an estate, the Tribunal might set out the terms of a

⁷⁹ The landlord could also have made such an application but may have decided, for example, that it would just make up the additional funds if it was only 1 or 2%. The RTM company would not be in a position to do this and it may therefore become a priority to rectify the leases.

⁸⁰ *Camden LBC v Morath* [2019] UKUT 193 at [16].

⁸¹ CP, para 4.113.

⁸² CP, para 11.8.

management agreement between the RTM company and the party responsible for managing the rest of the estate. Such an agreement could make provision for payment of service charges in respect of non-exclusive appurtenant property, for example, by the RTM company to the other party or vice versa.

Recommendation 76.

10.154 We recommend that the Tribunal should have the power to order a variation to a lease if the acquisition of the RTM makes management of premises in accordance with the leases unworkable. This applies both to premises over which the RTM has been claimed and to other premises affected by the acquisition of the RTM.

THE SERVICE CHARGE “POT”

Current law and problems

10.155 When the RTM is acquired, the landlord (or a relevant third party such as a management company or managing agent) may be holding service charges which have been paid to them by leaseholders. The current law requires the landlord or relevant third party to pay to the RTM company any accrued uncommitted service charges which are held by them on the acquisition date.⁸³ The amount of the accrued uncommitted service charges is calculated by taking the total service charges which the landlord holds,⁸⁴ then deducting any relevant costs incurred by the landlord but not yet paid at the acquisition date.⁸⁵ The RTM company is therefore entitled to the service charges collected from the leaseholders by the landlord which have not been spent.

10.156 If the amount of the uncommitted service charges is disputed, either party may make an application to the Tribunal for a determination as to the amount which should be paid to the RTM company.⁸⁶

Delays in receiving the uncommitted service charge monies

10.157 There is currently no deadline by which the landlord must transfer any accrued uncommitted service charges to the RTM company. The landlord is required to do so either on the acquisition date or as soon as is reasonably practicable afterwards.⁸⁷ Delays in receiving these funds can significantly undermine an RTM company's ability to carry out management functions following the acquisition date, particularly if the

⁸³ CLRA Act 2002, s 94(1). Throughout the remainder of this section on costs incurred before the acquisition date, we use “landlord” to refer to the landlord or the relevant third party, unless otherwise stated.

⁸⁴ CLRA 2002, s 94(2). This includes any investments which represent those sums (and any interest which has accrued on them).

⁸⁵ CLRA 2002, s 94(2). “Relevant costs” are costs in respect of matters for which the service charges were payable.

⁸⁶ CLRA 2002, s 94(3).

⁸⁷ CLRA 2002, s 94(4).

lease does not allow it to demand service charge contributions from leaseholders for some time after the acquisition date.⁸⁸

10.158 In some cases, there may be good reasons why the landlord cannot immediately determine the amount of uncommitted service charges to be transferred to the RTM company. For example, the landlord may be waiting for invoices to be submitted by third-party contractors for repairs carried out shortly before the acquisition date. In other cases, there will be no good reason why the landlord is unable to determine the amount of uncommitted service charges to be transferred to the RTM company, and we have been told of RTM companies suffering long delays in obtaining funds for no apparent reason.

Service charge arrears

10.159 The RTM company is only entitled to receive what is “held by” the landlord on the acquisition date; that is, what is actually in the service charge account on the relevant date.⁸⁹ Where one or more leaseholders still owe service charges to the landlord on the acquisition date (in other words, they are in arrears with their service charge payments), there is no requirement or obligation for the landlord to pursue the service charge arrears and the RTM company has no right to take recovery action in respect of service charges which have fallen due before the acquisition date.⁹⁰ Because the landlord simply hands over what it actually has in the service charge pot, less the amounts it needs to retain in order to cover expenses already incurred but not yet paid, the landlord is not currently required to take into account what each individual leaseholder has paid or whether any leaseholders are in arrears.

10.160 The landlord may be owed service charges on the acquisition date which it does not require to cover actual expenditure. If the landlord decides to pursue the leaseholders for the outstanding service charges, it will have to pay them over to the RTM company. Therefore, landlords have no incentive to pursue any unpaid service charges because they already have sufficient sums to cover the actual expenses incurred. The landlord is pursuing the unpaid sums simply to hand them over to the RTM company. We illustrate this with the following example:

Four leaseholders exercise the RTM for their building which has four flats, each paying 25% of the service charge. At the RTM acquisition date, the service charge pot contains £750. The landlord has incurred a £50 charge for gardening in the week before the RTM company acquires management functions but has not yet paid this charge. The landlord does not need to consider which leaseholders have paid their service charges and which have not as the sum in the service charge pot is sufficient to cover the costs incurred by the landlord prior to the acquisition date. The

⁸⁸ In Ch 8 we make recommendations which are aimed at giving RTM companies greater flexibility to acquire the RTM on a date which better aligns with the service charge cycle under the leases of the premises. This will help to avoid a situation where, for example, service charges are demanded in January and July in each year and the RTM company acquires the RTM in February, meaning it cannot demand further sums by way of service charge until July of that year.

⁸⁹ CLRA 2002, s 94(1).

⁹⁰ CLRA 2002, s 97(5); *OM Ltd v New River Head RTM Co Ltd* [2010] UKUT 394 (LC), [2011] 1 Estates Gazette Law Report 97.

landlord retains the £50 to cover the gardening charge, and is obliged to hand over the remaining £700 to the RTM company.

10.161 It may be the case that only some of the leaseholders have contributed correctly to the service charge expenditure in accordance with the relevant percentage in their leases.⁹¹ This means that some leaseholders may have supplemented the service charge pot to the advantage of other leaseholders who have not paid. The advantage arises because the actual expenditure may be met using the sums in the service charge pot, and those sums were paid by only some of the leaseholders. Consider the full service charge year in which the RTM is claimed for the same block of flats in the example above:

At the beginning of the service charge year, on 1 January 2021, the balance in the service charge account is £0. The landlord's budget for the year anticipates £4,000 of expenditure.

The landlord therefore demands £1,000 from each leaseholder as service charges on account of expenditure to be incurred.⁹² Leaseholder 1 pays £0. Leaseholder 2 pays £300. Leaseholder 3 pays £600. Leaseholder 4 pays £1,000. The total collected by the landlord is £1,900.

The RTM company exercises the RTM. The acquisition date is 1 August 2021.

Before the acquisition date, the landlord incurs costs of cleaning, insurance and gardening totalling £1,200. Deducting the actual costs of £1,200 (including the £50 gardening which the landlord has not yet paid) from the £1,900 collected by the landlord, that leaves the £700 in the service charge pot on the acquisition date. Each leaseholder's actual contribution towards those costs should be 25% of the £1,200, or £300. However, this is not what has actually happened. Instead, Leaseholder 1 has underpaid as against actual expenditure by £300. Leaseholder 2 has paid the exact amount required. Leaseholder 3 has effectively overpaid by £300. Leaseholder 4 has overpaid by £700.

The landlord is only obliged to hand over the £700 in the service charge pot to the RTM company. The RTM company has no right to collect the underpayment of £300 from Leaseholder 1. The landlord has no incentive to collect it because they have already covered the actual expenditure using the funds received from Leaseholders 3 and 4, and so would have to give any money recovered from Leaseholder 1 to the RTM company. Leaseholder 3 should have a credit on their account for £300 and Leaseholder 4 should have a credit of £700 on their account (reflecting their overpayments) but the RTM company cannot show this because it has only received £700 from the landlord. Leaseholder 1 should have a debit on their account of £300

⁹¹ Which might occur either because the landlord has not demanded the appropriate level of service charge, or because some leaseholders may not have paid what has been demanded of them.

⁹² For the purposes of this example we have assumed that the service charge accounting year runs from 1 January to 31 December. In practice, leases might provide for different dates. We have also assumed that the leases permit the landlord to make just one demand for the payment of service charges in advance per year, on 1 January. In practice, leases differ as to the numbers of demands which can be made and the dates on which the demands can require payment from leaseholders. Often leases will provide for advance service charges to be paid in two equal half-yearly instalments.

(reflecting the underpayment) but the RTM company cannot show this because they cannot recover that £300 from Leaseholder 1. Leaseholders 3 and 4 have effectively subsidised Leaseholder 1.

10.162 This unfairness as between leaseholders could even incentivise leaseholders to bring an RTM claim to avoid having to meet their outstanding service charge obligations.

10.163 It also means that the RTM company potentially loses out on receiving money. This is because the RTM company only receives whatever is left in the service charge account after the landlord has deducted all the service charge expenditure incurred prior to the acquisition date. In our example above, if the landlord had recovered at least the £300 from Leaseholder 1 to cover actual costs incurred, there would have been an additional £300 in the service charge pot to be handed over to the RTM company.

Our proposals

10.164 In the Consultation Paper, we provisionally proposed that landlords should be required to pay half of the estimated uncommitted service charges to the RTM company at the latest on the acquisition date, with the remainder payable within six months of that date.⁹³

10.165 We also provisionally proposed that landlords 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.

Consultees' views

Delays in receiving uncommitted service charge monies

10.166 A sizeable majority agreed with our provisional proposal that landlords should be required to pay half of the estimated uncommitted service charges to the RTM company at the latest on the acquisition date, with the remainder payable within six months of the acquisition date.

10.167 A number of consultees who agreed with our proposal pointed out that it would provide greater certainty to the RTM company as to when it would receive uncommitted service charge monies from the landlord. Some consultees said that they thought landlords ought to be able to comply with our proposal. For example, the Residential Landlords Association said that:

We feel that it is reasonable to summons the landlord to pay 50% of the estimated uncommitted service charge and the remainder in six months. We feel this would be sufficient time to ensure the amount held is the amount collected and to simultaneously ensure that landlords can respond.

10.168 However, some consultees disagreed with our proposal or thought that it ought to be modified in some way. It was pointed out that six months was too long a period to allow the landlord to retain 50% of the accrued uncommitted service charge arrears, especially in circumstances where there was no legitimate reason to delay making the

⁹³ CP, para 8.114.

transfer. It was suggested that all or a greater proportion than half of the uncommitted service charges should be transferred to the RTM company, either immediately or in less than six months.

- 10.169 Other consultees told us that it would not always be possible to determine the amount of uncommitted service charges by the acquisition date for reasons such as contractor delays in providing invoices for costs incurred by the landlord.

Service charge arrears

- 10.170 A sizeable majority of consultees agreed with our provisional proposal that landlords should be required to use reasonable endeavours to pursue service charge arrears relating to costs incurred prior to the acquisition date, and to pay any recovered funds to the RTM company.

- 10.171 Some leaseholders considered our provisional proposal to be sensible since the service charge arrears accrued while the premises were managed by the landlord. Other consultees agreed with our provisional proposals but thought it would be difficult to determine whether the landlord had used “reasonable endeavours” to recover the arrears. Some consultees suggested that the landlord should be able to deduct their costs of recovery before transferring the recovered sums to the RTM company. Church & Co Chartered Accountants pointed out that “debt recovery is very time consuming and has lots of risks associated with it”.

- 10.172 Consultees who disagreed with our proposal queried whether it was a practical solution. For example, the Property Bar Association told us that:

It is likely to lead to disputes between the parties that will be difficult to resolve – for instance, where a landlord says it is not taking further steps to recover arrears because of perceived likely defences that it may consider unmeritorious but that commercially prevent it being worthwhile to pursue. A ‘mini-trial’ of the likely defences to establish ‘reasonable endeavours’ would be time-consuming and expensive in circumstances where residential service charge arrears are often comparatively modest.

- 10.173 Two alternative approaches were suggested by consultees. The first was that a more onerous obligation might be imposed on landlords to recover the service charge arrears. Specifically, it was suggested that the landlord ought to be required to use “best endeavours”. For example, LEASE said:

the requirement should be to require the landlord to use “best endeavours” which would include going so far as taking steps to forfeit the lease...

- 10.174 Alternatively, several consultees suggested that the right to pursue any service charge arrears ought to be assigned to the RTM company. This would allow the RTM company to pursue the service charge arrears and remove their reliance on the activism of the landlord. The Property Litigation Association Law Reform Committee said:

The Commission should in our view consider further a mechanism for the assignment of the rights to pursue such arrears to the RTM, and the ability to bring

into any such proceedings the landlord if defended on grounds in relation to which the RTM has insufficient knowledge.

10.175 The Property Bar Association similarly thought that service charge arrears might be assigned to the RTM company but acknowledged there were some drawbacks with this approach:

...the reality is that it would be very difficult for an RTM company to pursue such arrears absent cooperation from the landlord in the event that such claims were defended, and it would be unfair to expect a landlord to commit money and other resources to such litigation given the no-fault basis inherent in the RTM regime.

10.176 A number of individual leaseholders and RTM companies told us that in their experience it was rare for service charge arrears to be recovered by the landlord and transferred to the RTM company. For example, a leaseholders' association said that such arrears were "seldom [recovered] and opposed all the way".

10.177 Consultees told us that the impact on the financial security of the RTM company is potentially severe and can impede effective management. Investment Technology Limited t/a Canonbury Management explained:

They have a lacuna in their finances until they are able to issue new service charge demands. This sometimes results in demands being made outside of the legal ability to do so afforded by the lease.

10.178 However, other consultees suggested that the recovery of service charge arrears was common. Urang Property Management Limited said that "most landlords agree to assign the right to collect arrears to the RTM company" but that where the landlord does not it is "very rare that they bother to collect them themselves".

Discussion

Delays in receiving uncommitted service charge monies

10.179 It is important that RTM companies are given access to any available service charge funds as soon as possible after the RTM is acquired. RTM companies will otherwise be dependent on voluntary contributions by leaseholders, particularly if the lease does not allow the RTM company to demand service charges immediately. Our proposal that at least half of the estimated uncommitted service charges should be transferred by the acquisition date was intended to provide RTM companies with early access to some uncommitted service charge funds. Our proposal also sought to ensure that landlords could retain some funds whilst they collected in any invoices for expenses incurred prior to the acquisition date and finalised their accounting records.

10.180 However, we agree with those consultees who have pointed out that a six-month delay in transferring the remaining service charge funds could significantly undermine the finances of the RTM company and their ability to manage the premises, and in some cases, will leave RTM companies in a worse position than they would be if the current law continued to apply.

10.181 We also recognise that there may be legitimate reasons why landlords are unable to immediately determine the costs that have been incurred prior to the acquisition date,

for example, because the relevant third-party contractor has not yet issued an invoice. If landlords are unable to calculate those costs, it is not possible to calculate the full sum of the uncommitted service charges funds - and it is therefore just as difficult for the landlord to calculate 50% of them. Having said this, we are of the view that landlords have plenty of time to prepare for handover to the RTM company from the date they receive a claim notice, and should therefore begin reviewing their accounting records sooner rather than later. By the time the acquisition date arrives, the only missing piece of information should relate to expenditure which has been incurred but not yet invoiced by any service provider or contractor. However, the landlord should know which contractors they are still waiting to hear from and what the approximate cost of their services is likely to be.

10.182 We therefore wish to strike a balance between ensuring that RTM companies have the necessary funds to carry out their management functions from the acquisition date, whilst also giving landlords the opportunity to deduct expenditure which has been incurred prior to the acquisition date. We consider that any well-organised landlord should be in a position to transfer all, or almost all, of the uncommitted service charges to the RTM company on the acquisition date, and our recommendation below reflects this. We consider that our recommendation will have the benefit of encouraging good practice in service charge management and accounting generally.

Service charge arrears

10.183 The current law has the advantage of being relatively simple to apply in practice, but it can result in unfairness between leaseholders (as we have set out above). Because the landlord is able to pay any outstanding invoices from whatever is in the service charge pot at the date of acquisition, the effect can be that leaseholders who have paid their service charges end up subsidising leaseholders who have not.

10.184 We have concluded that in practice, it is too difficult to address this problem by requiring landlords to make reasonable endeavours to pursue any service charge arrears once the RTM has been acquired. As some consultees pointed out, it is unclear what a duty to use "reasonable endeavours" would entail, and we sympathise with the concerns raised about whether prompting landlords to pursue the service charge arrears would be effective in practice. We are concerned that any obligation to use "best endeavours" would likely to pose similar issues. We note that leases do not usually contain an obligation on landlords to demand any service charges from leaseholders and, without any demand, landlords will not have the right to pursue arrears.

10.185 We also think that there are significant difficulties with the suggestion that the right to pursue any service charge arrears should be assigned to the RTM company, either automatically or at the election of the RTM company. If such a right were assigned, the RTM company would presumably have to take on the landlord's liability to pay any relevant service charge expenditure which has been incurred prior to the acquisition date, otherwise the landlord would be left out of pocket. However, we do not think RTM companies should be required to take on liability for expenditure incurred by the landlord. That might lead the RTM company to become insolvent early on; in addition, such a requirement could result in landlords seeking to abuse the position by incurring large, unnecessary expenditure prior to the acquisition date for which the RTM

company would then become liable. The RTM company would also be reliant on the landlord's involvement in the recovery process to provide, for example, evidence of expenditure and of valid service charge demands. We are concerned that these factors could significantly undermine the attractiveness of acquiring the RTM.

10.186 Therefore, we have devised a process which requires a reconciliation exercise to be undertaken by the landlord to establish the sums which each leaseholder has paid into the service charge pot, and to avoid an outcome whereby some leaseholders who have paid their service charge end up subsidising those leaseholders who have not.

Recommendations

Delays in receiving uncommitted service charge monies

10.187 We think that landlords should be liable to pay all “uncommitted service charges” to the RTM company on the acquisition date.⁹⁴ We think it is important to have a clear deadline at which the liability arises. This will entitle RTM companies to apply to the Tribunal, as they can under the current law, as soon as they wish after the acquisition date to recover these sums if the landlord has not transferred them.

10.188 Well-organised landlords will be able to comply with this provision. They will use the time from receipt of the claim notice to collate the information needed to ensure a handover of funds can occur in time. Where the landlord fails to do so, the RTM company may make an application to the Tribunal to have the amount due to be handed over determined.

10.189 There may be cases where the landlord has a reasonable excuse for not being in a position to calculate the exact amount of uncommitted service charges on the acquisition date because, for example, they are awaiting invoices from third-party contractors. In these circumstances, the landlord will have to deduct a reasonable estimate, but that should be based on evidence. Once the actual costs are known, the landlord should provide proof of the actual costs to the RTM company and transfer any excess funds over to the RTM company.

Uncommitted service charges monies and treatment of arrears

10.190 As noted above, we think that the definition of “uncommitted service charges” should be revised. Under our recommended scheme, this term refers to the sums which *should* be in the service charge pot on the assumption that the landlord has collected enough money from each leaseholder to cover their share of the actual service charge expenditure incurred. It does not necessarily represent only what is actually in the service charge pot. As under the current law, it includes any reserve funds.

10.191 The landlord will need to undertake a reconciliation exercise to determine:

- (1) how much each leaseholder has paid;
- (2) each leaseholder's share of actual expenditure; and

⁹⁴ See para 10.203 below, where we recommend a revision to this definition.

- (3) whether each leaseholder's service charge payments exceed (or are less than) their share of actual expenditure.

10.192 Any positive balances for any leaseholder should be paid over to the RTM company as uncommitted service charges. Any negative balance for any leaseholder remains on the landlord's books, and the landlord can choose to pursue the debt if able to do so (in other words, if they have served valid demands to enable recovery).

10.193 If the total positive balances for leaseholders are greater than the amount left in the service charge pot (because too many other leaseholders have a negative balance), the landlord will have to pay the RTM company out of their own pocket. However, the landlord can still pursue any deficit from leaseholders who have paid insufficient sums to cover their share of the actual expenditure.

10.194 We think this outcome is justified for two reasons. First, our recommendation addresses unfairness between leaseholders, as sums paid by the leaseholders whose contributions have exceeded their share of actual expenditure cannot be used by the landlord to cover deficits attributable to other leaseholders who have not paid their share of actual expenditure. Second, it also means the RTM company receives the money that some leaseholders have paid and which exceeds their share of actual expenditure, and is able to utilise those funds immediately following the acquisition date. The RTM company will then give credits to the relevant leaseholders at the end of the first service charge year following the acquisition date.

10.195 The reconciliation exercise which the landlord will be required to undertake may be broken down into the following steps.

- (1) Ascertain the landlord's actual expenditure.
- (2) Ascertain (by reference to the leases) how much each leaseholder is liable to contribute towards that actual service charge expenditure.
- (3) From those individual amounts, deduct the amount actually paid by each leaseholder.⁹⁵
- (4) For each leaseholder with a positive balance (so that the sums paid exceed the amount which the relevant leaseholder is liable to contribute towards actual service charge expenditure), an amount of money equivalent to the positive balance is handed over to the RTM company.
- (5) For each leaseholder with a neutral or negative balance (so that the sums paid are the same as, or less than, the amount which the relevant leaseholder is liable to contribute towards actual service charge expenditure), no funds are handed over to the RTM company. Where there is a negative balance, the landlord can recover this from the relevant leaseholder if they wish and are able

⁹⁵ At stages 1 and 2 the landlord looks at expenditure for that year. At stage 3, in calculating the amount actually paid by each leaseholder, credit will be given for any credit on the account from previous years, and deductions made for any arrears from previous years.

to do so. The landlord cannot use any positive balances to 'off-set' any negative balances.

10.196 In the event the landlord's records show any leaseholder owing service charge arrears, the landlord will not be under any obligation to pursue those arrears. Those arrears might be needed to pay for the actual expenditure incurred, in which case the landlord will be incentivised to collect them. However, the arrears may not be needed by the landlord to pay for actual expenditure. In this case, the landlord is unlikely to want to collect these sums – particularly since the landlord will be liable to pay any sums recovered following the acquisition date to the RTM company, to the extent they exceed the relevant leaseholder's share of actual expenditure. In other words, such sums are to be treated as a positive balance as per step 4 above.

10.197 Returning to the example introduced above at paragraph 10.160:

- (1) *Under the current law the landlord is required to hand over the sum of £700 to the RTM company, as that is the money in the pot (£1,900 received from leaseholders, less £1,200 spent). The full explanation is included in the example above.*
- (2) *Under our recommendation the landlord instead undertakes the following reconciliation:*
 - (a) Leaseholder 1
 - (i) *Share of actual service charge expenditure £300.⁹⁶*
 - (ii) *Amount received: £0.*
 - (iii) *Balance is a deficit of £300.*
 - (b) Leaseholder 2
 - (i) *Share of actual service charge expenditure: £300.*
 - (ii) *Amount received: £300.*
 - (iii) *Balance is neutral.*
 - (c) Leaseholder 3
 - (i) *Share of actual service charge expenditure: £300.*
 - (ii) *Amount received: £600.*
 - (iii) *Balance is a credit of £300.*
 - (d) Leaseholder 4

⁹⁶ Calculated as 25% (the share required by the lease) of £1,200 (the actual expenditure).

- (i) *Share of actual service charge expenditure: £300.*
 - (ii) *Amount received: £1,000.*
 - (iii) *Balance is a credit of £700.*
- (3) *The landlord is required to hand over to the RTM company the total sum of £1,000 (being the credit balances for Leaseholders 3 and 4). The landlord can choose whether to seek to recover the deficit balance from Leaseholder 1 (but will be left out of pocket if they do not, as they have to pay to the RTM company £300 more than he holds in the service charge pot). The RTM company will then be able to use the funds of £1,000 to cover any expenditure which it incurs from the acquisition date until the end of the accounting year on 31 December 2021.*
- (4) *The RTM company is able to use the funds of £1,000 to cover any expenditure which it incurs from the acquisition date of 1 August 2021 to the end of the accounting year on 31 December 2021.*
- (5) *During that period, the RTM company incurs £800 of expenditure on cleaning, insurance and gardening. Each leaseholder's share of this actual expenditure is therefore £200.⁹⁷*
- (6) *At the end of the year, the RTM company produces a service charge account and consider whether it needs to raise any balancing charge.⁹⁸ The position of each leaseholder is as follows:*
- (7) *Leaseholder 1*
- (a) *Share of service charge expenditure: £200.*
 - (b) *Amount due: £200 (there is no credit balance carried forward in respect of funds received from the landlord).*
- (8) *Leaseholder 2*
- (a) *Share of service charge expenditure: £200.*
 - (b) *Amount due: £200 (there is no credit balance carried forward in respect of funds received from the landlord).*
- (9) *Leaseholder 3*

⁹⁷ Calculated as 25% of the RTM company's total actual expenditure of £800.

⁹⁸ Alternatively, if the lease did permit service charges to be demanded in two half-yearly sums, and the acquisition date pre-dated the second payment date, the RTM company could give the credit to Leaseholders 3 and 4 by reducing the mid-year on-account demand for those leaseholders. The reconciliation does not necessarily have to wait until the end of the year. We have made recommendations in Ch 8 to make it easier for leaseholders to align the acquisition date with the payment dates specified in the lease.

- (a) *Share of service charge expenditure: £200.*
 - (b) *Amount paid: £300 (the amount of the credit balance paid to the RTM company by the landlord on the acquisition date).*
 - (c) *Credit balance carried forward: £100.*
- (10) Leaseholder 4
- (a) *Share of service charge expenditure: £200.*
 - (b) *Amount paid: £700 (the amount of the credit balance paid to the RTM company by the landlord on the acquisition date).*
 - (c) *Credit balance carried forward: £500.*

This example is illustrated in Figure 4, on page 302 below.

10.198 We consider that this is the fairest way of dealing with service charges held by, and owed to, landlords when the RTM is acquired. Landlords are required to ensure they begin to collate the information needed to be able to undertake the reconciliation exercise well before the acquisition date, so they are in a position to transfer funds to the RTM company on the acquisition date. If, at the acquisition date, the landlord has not transferred the funds the RTM company considers should have been paid, the RTM company can apply to the Tribunal for a determination of the sums due to be handed over.

10.199 We did consider an alternative proposal requiring the landlord to pay to the RTM company any monies which *should* be in the service charge account, on the same assumption that positive balances for some leaseholders must be handed over and cannot be used to cover negative balances of others, but also on the assumption that the landlord had collected all service charges actually demanded (even if not paid). In the end, we preferred the solution set out above, which places less of a burden on the landlord because it is based on what would have been in the service charge pot if the leaseholders had paid enough to cover actual expenses – not everything demanded.

10.200 We recognise that our recommended approach appears to be more complex than under the current law. However, the exercise we have described is similar to the accounting exercise which landlords would usually be expected to undertake following the end of each service charge year.

10.201 Our recommendation provides for RTM companies to have access to some immediate funds on the handover date if funds are available, which may include the sums which leaseholders have paid in excess of their contributions to actual expenditure. Our recommendations also address some of the unfairness between leaseholders which can occur under the current law. If a leaseholder has a negative balance at the date of the RTM acquisition and the landlord chooses not to pursue the debt, that leaseholder has benefited from the acquisition of the RTM compared to other leaseholders whose service charge payments were up to date. However, this is not just an issue caused by the acquisition of the RTM, but occurs in any situation where a landlord chooses not to pursue outstanding service charges.

10.202 We acknowledge that enforcement of the service charge handover remains an issue. If the landlord fails to undertake the reconciliation exercise and/or fails to hand over uncommitted service charges, the RTM company will have recourse to the Tribunal which will have the power to determine the amount of uncommitted service charges which should be handed over.

Recommendation 77.

10.203 We recommend that landlords should be required to transfer any uncommitted service charges to the RTM company on the acquisition date. The term “uncommitted service charges” should mean:

- (1) the sums which should be in the service charge pot on the assumption that the landlord has collected sufficient sums from each leaseholder to cover their share of the actual service charge expenditure incurred; plus
- (2) any sums by which each leaseholder’s actual service charge contributions exceed their share of actual expenditure.

RECOVERY OF MANAGEMENT COSTS THROUGH THE SERVICE CHARGE

Current law and problems

10.204 From the acquisition date onwards, any obligations to pay service charges to a landlord or a management company in relation to exercising management functions under the lease are instead owed to the RTM company.⁹⁹ This would include any obligation to make a payment in respect of the landlord or management company’s costs of management.

10.205 If the lease does not provide for the management costs of the landlord or management company to be recoverable from the leaseholder, it will follow that those costs are not recoverable by the RTM company either. In *Wilson v Lesley Place (RTM) Co Ltd*,¹⁰⁰ the Upper Tribunal held that:

The liability of the tenant to the landlord in respect of service charges is to be ascertained purely by reference to the terms of the lease, and the fact that the management functions are exercisable by an RTM company does not affect the construction of the lease under these provisions.

10.206 In that case, the RTM company was unable to recover the “costs of establishing and running the RTM company” (such as secretarial fees, companies house and hall hire, and directors’ and officers’ liability insurance (“D&O insurance”) from leaseholders

⁹⁹ CLRA 2002, s 97(4).

¹⁰⁰ [2010] UKUT 342 (LC) at [15].

because it was held that these were not costs of “dealing with the general management of the blocks” (which the lease specified were recoverable).¹⁰¹

10.207 RTM companies are therefore unable to recover their general management costs from leaseholders unless the lease permits them to do so. In the absence of voluntary contributions from leaseholders, this may put RTM companies in a position where they are unable to fund routine expenditure and create a risk they will become insolvent. It is unfair to expect a subset of leaseholders to meet those costs voluntarily.

Our proposals

10.208 In the Consultation Paper we proposed that provision should be made to allow RTM companies to recover their management costs as if the lease made express provision for those costs to be recoverable by the person exercising management functions in respect of the premises.¹⁰² We said that those costs would be recoverable from both leaseholders, and also landlords of excluded units who were required to contribute service charges under section 103 of the 2002 Act.

Consultees' views

10.209 The vast majority of consultees agreed with our proposal. For example, a residents' association agreed that “it is only fair” that the costs incurred with running the company are shared by all the leaseholders. Professor James Driscoll called this a “very sensible and fair proposal”.

10.210 Several consultees noted the practical impact of the current law on RTM companies. For example, Anthony Molloy, a leaseholder, said:

At present only the leaseholders undertaking the process pay for the costs. This needs to change.

10.211 Similarly, J Gardner, a leaseholder, told us that:

This is a major issue for us. We have only just been made aware by our solicitor that we may not be able to recover all our costs via the service charge. This came as a big shock to us, as our only source of income is the service charge. It means the RTM directors either have to pay out of our own pockets or the RTM becomes insolvent. It will also deter any potential directors from joining the board if they believe they may be personally liable in this way.

10.212 Some of the consultees who agreed with our proposal thought that we should go further by delineating the costs that are recoverable. They suggested: the cost of D&O insurance, the costs of acquiring the RTM, legal fees, enforcement costs, and professional fees (such as accountancy or company secretarial fees). Baroness Gardner of Parkes suggested that the definition should cover “all costs that [an] RTM incurs in going about its business including getting advice on what it can or cannot do”.

¹⁰¹ *Wilson v Lesley Place (RTM) Co Ltd* [2010] UKUT 342 (LC) at [15].

¹⁰² CP, from para 5.156

10.213 By contrast, other consultees who agreed with our proposal sought to limit the costs that the RTM company could recover. For example, a few consultees thought that there should be a mechanism to prevent abuse of the RTM company's ability to recover costs. Other consultees also suggested that the fees should be capped or submitted for the leaseholders' approval. Consultees who marked "Other" suggested similar caveats. For example, consultees said costs should be recoverable if they are "reasonable"¹⁰³ or "stated as part of an upfront agreement"¹⁰⁴.

10.214 Consultees who disagreed with our proposal thought that the RTM company should cover its own administration costs. The Right to Manage Federation distinguished between:

- (1) the costs involved in setting up the RTM company and acquiring the RTM, which it thought should be recoverable against members; and
- (2) the annual costs associated with the RTM company, which it thought the RTM company should bear itself.

10.215 In the Consultation Paper, we also asked whether consultees thought 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.

10.216 Just over half of consultees agreed that our proposal would reduce litigation. Several consultees suggested that it would provide greater certainty, and prevent leaseholders querying the legality of the RTM company recovering these costs. However, Stephen Desmond noted that disputes could still arise over whether management costs were reasonable.

10.217 Further, we were told by several consultees that the recovery of management costs through the service charge is rarely pursued as an action in its own right. Instead, this is often part of a more complex bundle of issues to be litigated. As a result, our proposal may not necessarily reduce litigation in many cases.

Discussion and recommendations

10.218 We have concluded that provision is needed to enable RTM companies to recover their costs of management in circumstances where the lease does not provide for this to happen. To exercise its management functions, the RTM company needs to be able to meet its basic running costs. Without these costs being recoverable through the service charge, the RTM company will be at risk of insolvency without voluntary contributions.

10.219 We view the recovery of the RTM company's running costs as effectively an extension of the service charge, which all units must contribute towards, irrespective of whether there was participation or not, including those non-qualifying units for which the landlord must pay a contribution in accordance with section 103 of the 2002 Act. We appreciate that some of the occupants of buildings subject to the RTM may not

¹⁰³ Daniel Watney, surveyor, on behalf of Dame Alice Owen's Foundation, the Charity of Richard Cloudesley and the Dulwich Estate (landlords).

¹⁰⁴ Jeremy Bragg.

welcome an obligation to pay an additional service charge. However, it would be inconsistent to legislate that all units in a building can have the benefit of the RTM, though depending on whether a leaseholder qualified or not, or participated or not, some costs will be met by some occupants and not by others.

10.220 We therefore think that it is in the best interests of the building's occupants (including those who are not qualifying tenants) for the RTM company to be able to recover these costs under the lease. The RTM company has no other source of funds so if the lease does not make provision for such costs to be recoverable and none is implied by statute, the RTM will not be sustainable.

10.221 The RTM company will only be able to recover its costs of management once the RTM has been acquired. We do not suggest that the RTM company should have a retrospective power to recover costs incurred before the RTM was acquired. Instead, those costs would need to be met by the leaseholders who are initially involved in setting up the RTM company and making the claim.

10.222 Any leases of the premises would be treated as including a provision enabling the RTM company to recover their costs of management from the leaseholder. We envisage that the various statutory protections in place in relation to service charges¹⁰⁵ would likewise apply to charges which were then demanded by the RTM company in respect of their costs of management. For example, as under section 19 of the 1985 Act any costs of management would need to have been reasonably incurred by the RTM company.¹⁰⁶

10.223 We agree with consultees that there could be a risk of abuse as to the costs recoverable by the RTM company in respect of management costs. We think that the costs recoverable should be set out in a prescribed list. We envisage that the following categories of costs should be recoverable in respect of the RTM company's costs of management:

- (1) the costs of D&O insurance policies and potentially public liability insurance;
- (2) the costs of having a general meeting and associated administration;
- (3) Companies House filing fees and company secretarial support; and
- (4) professional fees including legal and surveyors' fees, accountancy costs and insurance valuations.

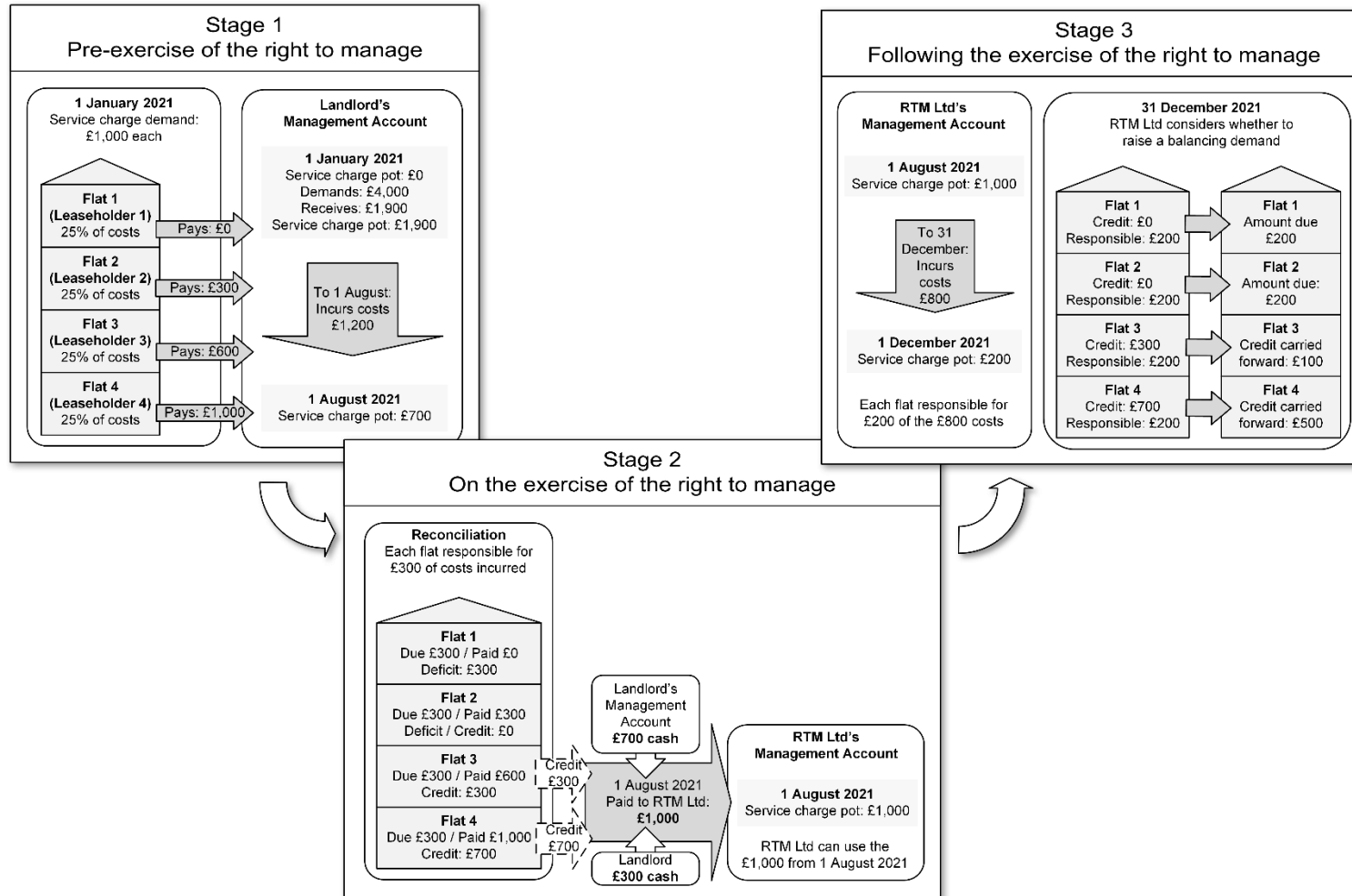
¹⁰⁵ The definition of which refers to an amount payable by a leaseholder for the landlord's costs of management.

¹⁰⁶ Landlord and Tenant Act 1985, s 19.

Recommendation 78.

10.224 We recommend that RTM companies should be permitted to recover certain prescribed costs of management as an additional service charge in circumstances where the lease does not provide for this to happen.

Figure 4: The service charge “pot”



Chapter 11: Post-acquisition rights and obligations

INTRODUCTION

11.1 This chapter discusses certain rights and obligations which an RTM company has from the acquisition date. We make recommendations to:

- (1) improve the process by which approvals under leases of the premises are granted, including the extent to which the RTM company and the landlord are involved;
- (2) clarify whether the RTM company has the right to waive breaches of absolute covenants, or to grant retrospective approvals in relation to qualified covenants; and
- (3) confirm that RTM companies should not be required to include the landlord's name and address in any demand they issue to leaseholders for sums payable under the lease.

11.2 Finally, we discuss consultees' experiences in relation to employees which have transferred to the RTM company following the acquisition of the RTM.

PROCESS FOR GRANTING APPROVALS

Current law and problems

11.3 Leases will often contain qualified covenants prohibiting leaseholders from doing something without the landlord or management company's approval. Leases often provide that the landlord or management company must not unreasonably withhold consent, or that approval should not be unreasonably delayed. Some leases also make provision for payment of an administrative charge in relation to an application for consent.

11.4 Leaseholders are also given some degree of statutory protection in relation to approvals under their leases. Administration charges are only recoverable so far as they are reasonable.¹ If the approval relates to assignment, underletting, charging or parting with possession (referred to collectively in this chapter as "alienations"), the landlord must not unreasonably withhold consent,² and has a statutory duty to provide a decision within a reasonable time.³

11.5 In relation to the making of improvements to the premises, where there is a requirement to obtain the landlord's consent, there is a duty not to unreasonably withhold consent.⁴ However, unlike for alienations, there is no statutory duty to

¹ CLRA 2002, s 158, sch 11, para 2.

² Landlord and Tenant Act 1927, s 19(1).

³ Landlord and Tenant Act 1988, s 1(3).

⁴ Landlord and Tenant Act 1927, s 19(2).

respond within a reasonable period of time to applications for consents to improvements. Very limited or no statutory protection is given in relation to other types of approval, for example, approval to paint the front door or to apply for planning permission.

Lease approvals once the RTM is acquired

- 11.6 Before acquisition of the RTM, applications for approvals are made to whoever is responsible for granting those approvals under the lease. When the RTM is acquired, leaseholders must apply to the RTM company, which can only grant an approval under the lease after having given notice to the landlord.⁵ The notice period is 30 days for approvals relating to assignment, underletting, charging, parting with possession, structural alterations or improvements, or alterations or use, and 14 days in all other cases.⁶
- 11.7 The landlord may object to the grant of the approval by giving notice to the RTM company and leaseholder.⁷ The landlord may only object if they could have done so before the acquisition of the RTM, and any requirement (whether in the lease or imposed by statute) not to unreasonably withhold consent will apply.⁸ If the landlord does object, the RTM company cannot grant the approval unless the landlord subsequently agrees, or the Tribunal⁹ determines that the RTM company may do so.¹⁰

Delays

- 11.8 The requirement for the RTM company to notify the landlord, and the landlord's right to object, can lead to additional delays in leaseholders obtaining consents. The statutory duty to determine applications for consent to alienations within a reasonable time only has effect once the RTM company has notified the landlord and they have not objected within the relevant period.¹¹ RTM companies have no incentive to act expeditiously in providing notice to the landlord. They may wait weeks or months before notifying the landlord of their decision to approve the application. This could have significant adverse consequences if the leaseholder is trying to sell or let their property.
- 11.9 If the landlord objects to the application, the leaseholder or RTM company must apply to the Tribunal for a determination. This adds further delays and costs to the process. The landlord may object to the application in the knowledge that the leaseholder and RTM company have limited resources to pursue an application to the Tribunal, and the potential sale or let may fall through by the time the Tribunal has heard the application.

⁵ CLRA 2002, s 98(4).

⁶ CLRA 2002, s 98(4).

⁷ CLRA 2002, s 99(4).

⁸ CLRA 2002, s 99(2).

⁹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

¹⁰ CLRA 2002, s 99(1).

¹¹ *Reiner v Triplark Ltd* [2018] EWCA Civ 2151, [2019] 1 Weekly Law Reports 2003.

Administration charges

- 11.10 The acquisition of the RTM may also result in additional costs for leaseholders in obtaining approvals under their lease, assuming there are provisions for administration charges to be imposed for this. The leaseholder may be asked to pay a charge to both the RTM company (for deciding whether to grant the consent), and the landlord (for deciding whether to object to a grant of an approval by the RTM company).
- 11.11 Besides the potential double-charging of administration charges in the context of the RTM, the question of administration charges and their reasonableness more generally is beyond the scope of this Report. The Regulation of Property Agents Working Group, chaired by Lord Best, recently considered whether the administration charges imposed by landlords were justified, or whether they ought to be capped, or banned.¹² It recommended that Government considers consulting on prescribed lists of fees or tariffs which could apply in new or existing leases.¹³ The Housing, Communities and Local Government Select Committee also looked into the administration charges imposed by landlords and recommended that legislation be introduced to restrict administration charges.¹⁴

Our proposals

- 11.12 In the Consultation Paper, we considered whether the process for granting lease consents could be improved. We focussed on who should be responsible for granting approvals and the costs payable by leaseholders for them.¹⁵
- 11.13 We acknowledged that it was a difficult area with no straightforward solutions. We considered four options:¹⁶
- (1) that either the RTM company or landlord should be responsible for granting consents under the lease (but not both) (option one);
 - (2) that the RTM company and landlord should be given responsibility for different types of approvals (option two);
 - (3) that the RTM company and landlord should be required to appoint joint advisors when considering an application for an approval to reduce the costs which are incurred (option three); or
 - (4) that modifications be made to the existing process to mitigate some of the problems identified, for example, by having the leaseholder submit its application to the landlord and RTM company in parallel, imposing fixed time

¹² Ministry of Housing, Communities and Local Government (MHCLG), *Protecting consumers in the letting and managing agent market: Government response*, April 2018, para 125.

¹³ *Regulation of Property Agents Working Group – Final Report*, July 2019, Annex 1, para 49.

¹⁴ Leasehold Reform, HC 1468, Twelfth Report of 2017-19, 19 March 2019, para 137.

¹⁵ CP, para 9.30.

¹⁶ CP, paras 9.32 to 9.36.

limits or fixing or capping the administration charges which are payable (option four).

11.14 We asked for consultees' views on whether they considered there to be a practical solution to the issues we had identified in relation to the current procedure. We decided against pursuing option one on the basis that we considered both parties to have legitimate interests in deciding whether an approval should be granted.¹⁷ We ruled out option two on the basis that we did not consider it viable to distinguish between different categories of lease consents.¹⁸

11.15 We asked consultees whether they considered that options three or four, or some other alternative model, would best address those issues. In relation to option four, we asked whether consultees agreed that there should be a limited period for the RTM company and/or landlord to respond to the leaseholder's request for approval, how long that period should be (we suggested 30 days), and how costs might best be minimised.¹⁹

11.16 Finally, we asked consultees to tell us about their experience of delays and duplication of costs when requesting lease consents under the RTM regime, and the extent of the costs they had incurred.²⁰

Consultees' views

Is there a practical solution?

11.17 A sizeable majority of consultees considered that there was a practical solution to the issues identified and very few disagreed. Many consultees simply commented that they did consider there was a practical solution of some kind to the issues we had identified without further elaborating.

11.18 Mark Chick and Damian Greenish, both solicitors, noted the complexities of finding a practical solution. Mark Chick said:

I think that the question is difficult because the freeholder cannot be excluded from proprietary consents (particularly those outwith the scope of the lease, that the parties may in fact wish to agree). This does cause a problem in practice.

11.19 Some consultees suggested solutions to the problems we had identified which we consider below.

How should the identified issues be resolved?

11.20 The majority of consultees were in favour of option four, with a significant minority in favour of option three, and some consultees in favour of another model.

11.21 Under option four, we proposed that the existing process should be speeded up by requiring the leaseholder to seek consent from the RTM company and landlord

¹⁷ CP, paras 9.37 and 9.38.

¹⁸ CP, para 9.39.

¹⁹ CP, para 9.41.

²⁰ CP, para 9.42.

concurrently, or requiring the RTM company to pass the request to the landlord within a set period of time. Some consultees, for example the Property Litigation Association Law Reform Committee, thought that this would protect the interests of both parties whilst speeding up the current process. Residential Management Group Limited, a managing agent, considered the making of concurrent applications to be the “fairest” approach. Notting Hill Genesis, a housing association, also thought that this approach would give the leaseholder requesting consent greater control of the process.

11.22 However, other consultees identified disadvantages associated with option four. For example, the Association of Residential Managing Agents noted that there would still be delays if the landlord and RTM company have differing views on whether consent should be granted. Investment Technology Ltd t/a Canonbury Management, a managing agent, highlighted that this model still duplicates requests for consent and would not therefore reduce costs. We were also told by Stephen Desmond (Desmond Training Ltd) that option four may add further complexity as leaseholders may be unaware of the need to make concurrent applications.

11.23 Under option three, the RTM company and landlord would be required to appoint joint advisors to minimise the costs to be met by the leaseholder. A few leaseholders told us that this approach would achieve time and cost savings. However, the Property Litigation Association Law Reform Committee, Cadogan Group Limited, a landlord, and Notting Hill Genesis all considered that the process of agreeing, appointing and instructing an expert advisor would result in additional delays. Birmingham Law Society said that there would be a conflict of duties for the agents. The Berkeley Group Holdings plc, a developer, also thought that there would inevitably be conflicts of interest between the RTM company and the landlord. The Property Litigation Association Law Reform Committee told us that not all applications for consent would warrant an expert opinion.

11.24 Other consultees considered that the issues we had identified could be solved using another model. For example, it was suggested that:

- (1) only the RTM company or landlord should deal with approvals (our option one);
- (2) the landlord should only be able to object to approvals which significantly affect the landlord’s reversionary interest, such as structural alterations or improvements (a form of our option two);
- (3) the RTM company should grant all approvals, but the Tribunal should have the power to determine otherwise if the RTM company fails to exercise this function properly;
- (4) the RTM company should be subject to costs sanctions if it delays notifying the landlord about an approval; or
- (5) the RTM company and the landlord should agree a protocol setting out the parties’ responsibilities which ought to be available to leaseholders.

Time limits and costs

11.25 The vast majority of consultees agreed that either or both the RTM company and landlord should have a limited period within which to respond, and only one consultee disagreed.

11.26 A number of consultees said that this was more likely to ensure that lease consents were dealt with promptly by the parties. One leaseholder said: "...without deadlines there is the possibility of trailing the process on forever". However, Cadogan Group Limited and Shula Rich (Brighton Hove and District Leaseholders Association and FPRA) thought that sufficient protection was given to leaseholders by virtue of the statutory requirement that certain consents must not be "unreasonably withheld".

11.27 Damian Greenish thought that there were inherent difficulties in introducing fixed periods for RTM companies or landlords to decide applications for approvals:

...an application for permission to keep a pet should certainly be dealt with within 30 days; however, an application for consent to carry out major structural alterations (such as digging out a basement) requiring advice from a structural engineer, is likely to take significantly longer.

11.28 Several consultees agreed with our suggestion that the fixed period for deciding applications should be limited to 30 days. Some consultees suggested that this period should be shortened to 14 or even 7 days. A leaseholder suggested that 45 days might be more appropriate during holiday periods where the request concerns structural alterations. Some consultees, mainly representing landlord interests, considered that 60 days would be more appropriate.

11.29 Some consultees, mainly leaseholders, told us that costs could be kept down by either regulating the recovery of the landlord's costs for granting consents or by preventing this completely. Alternatively, we were told that placing responsibility for consent with only one party, either the RTM company or the landlord, would help to reduce costs. A few consultees suggested that requiring the parties jointly to instruct one single adviser under our option three would help reduce costs.

Consultees' experience

11.30 Many consultees commented that they did not have any relevant experience.

11.31 The Right to Manage Federation told us that after the RTM has been acquired, many landlords no longer have the resources to handle applications for approvals because these would previously have been dealt with by the managing agent. Investment Technology Ltd t/a Canonbury Management also reported that it is common for landlords to fail to respond which adds an unnecessary 30-day delay to consents where the flat is to be sold.

11.32 Mark Chick said that where consent is required from both parties:

[t]here is almost inevitably a double layer of costs and both sides may require in a complex case legal and surveying advice. Where this has worked well some professionals (such as an architect) have provided joint liability statements and then worked for both the RTM and the Freeholder.

- 11.33 The British Property Federation similarly thought a more complicated process is “an inevitable consequence of RTM with split responsibility for lease consents”.
- 11.34 A leaseholder, J Gardner, explained that when a leaseholder requested consent, the RTM company received confusing legal advice as to who was responsible for granting the consent, with the landlord engaging little in the matter. Damian Greenish similarly told us that delays arise in general due to confusion between the parties as to how the process is supposed to work:
- My experience is that delays tend to arise through ignorance of the procedure by all the parties. The leaseholder may simply make his application for consent to the landlord because that is what he has always done and he often knows better who that is. The landlord then sends it on [to] the RTM company which doesn't know what to do with it!
- Alternatively, the application may be made to the RTM company but it does not appreciate that it needs to seek the consent of the landlord before it can issue a consent itself. To be fair, there are also some less sophisticated landlords who, on receipt of an application are equally ignorant of the fact that only the RTM can issue the consent.
- 11.35 Urang Property Management Limited, a managing agent, said that after the acquisition of the RTM, there is an additional £1,000 – £2,000 in costs to the process of obtaining lease approvals in the case of high value flats or works. Peter Milford, a leaseholder, reported that in his experience the RTM company would respond within two weeks and charges would be minimal, such as a £10 administration fee whereas the landlord would charge “significantly more”.

Discussion and recommendations

- 11.36 It is to some extent inevitable that the process of granting lease consents becomes more complex after the RTM is acquired since there is no longer just one party responsible for granting approvals under the lease.
- 11.37 As set out above, we suggested that one way to reduce the costs involved might be to require the RTM company and landlord to engage a joint adviser. However, as some consultees have pointed out, this would necessitate the introduction of a process for agreeing and appointing the adviser, and there may well be conflicts of interest between the RTM company and landlord. We have therefore concluded that option three is unlikely to produce the desired benefits and may not be workable given the differing interests of the parties.
- 11.38 We have also considered whether the leaseholder should be able to request consents from the RTM company and landlord in parallel rather than relying on the RTM company to notify the landlord (option four in the Consultation Paper). The advantage of this approach is that the RTM company and landlord would be reviewing the application at the same time rather than one after the other. However, we are concerned that this approach could create significant confusion and result in costs being unnecessarily incurred by leaseholders.

11.39 Leaseholders would need to be aware of the need to apply to two different parties. They might then receive two different decisions in response to their application. The advantage of the current process is that leaseholders only need apply to the RTM company who provides them with a decision. It would be a waste of time and costs for the landlord to consider the application if the RTM company was minded to refuse consent anyway. Presently, the landlord need only be notified of the application if the RTM company wishes to grant the approval. We do not therefore make a recommendation along these lines.

11.40 However, we do consider that the process could be changed to address the problems we have identified. Although we did not consult specifically on some of our recommendations, we think they are justified because of consultees' strong views that the process needs to be improved. Our recommendations aim to mitigate, if not entirely remove, the problems with the current system.

Restricting the landlord's involvement to certain types of approval

11.41 A number of consultees highlighted that the problems we had identified could be addressed by making lease approvals the sole responsibility of the RTM company or landlord. In the Consultation Paper, we considered this option but thought it would unfairly prejudice the interests of whichever party was excluded from the approvals process. We remain of the view that it would not be fair to exclude either the RTM company or landlord entirely from the process. In cases such as alienations or structural alterations both parties have a legitimate interest in whether the approval should be granted.

11.42 Other consultees thought that we should restrict the landlord's involvement to approvals which have a direct and significant impact on the landlord's interests. In the Consultation Paper, we were concerned about the practicality of trying to distinguish between different types of approvals given the range of matters in respect of which consent might be required. However, we think on reflection that there are certain types of approvals which can be identified as warranting different treatment.

11.43 We have concluded that the landlord should only have the right to object to approvals which relate to alienations, the making of structural alterations or improvements or alterations of use. We think the landlord should retain some ability to object to the granting of these approvals since they may significantly affect the landlord's interests, in terms of, for example, the value of the building and therefore the reversion. The 2002 Act already differentiates between these and other types of approval when prescribing the notice period which must be given to landlords.²¹

11.44 We are not persuaded that landlords should have any right to object to other types of approval being granted by the RTM company which do not directly affect the landlord's reversionary interest (for example, an application for consent to paint the front door). We consider that it should be solely for the RTM company to decide whether such approvals should be granted. RTM companies would no longer be required to notify the landlord before granting these other types of approval. This will

²¹ CLRA 2002, s 98(4)(a).

mean it is far more straightforward for leaseholders to obtain approvals in these cases and should mean they can be dealt with more quickly than at present.

11.45 The RTM company will still have an obligation to monitor compliance with leaseholder covenants and report failures to comply to the landlord.²² The RTM company should also notify the landlord of consents it has granted, so that the landlord is aware that there has been no breach.

Speeding up the approvals process

11.46 In the case of approvals which do still need to be notified to the landlord, we think RTM companies should have a statutory duty to process the leaseholder's application within a reasonable time, and in any event no longer than 30 days. This will ensure that RTM companies are required to act expeditiously from the moment they receive the application and aim to provide a response as soon as they reasonably can, not simply providing one on the thirtieth day following submission of the application. Where it is a consent with which only the RTM company is involved, the RTM company must give its response to the leaseholder within this time limit. If the landlord is also involved and the RTM company is minded to grant the consent, the RTM company must give notice to the landlord within this time limit. We discuss below the process that the landlord must follow.

11.47 What is a reasonable period of time will depend on the facts of any given case and in some cases 21 or 14 days might be reasonable; 30 is an absolute maximum. Applications concerning alienation of the property are likely to be capable of being dealt with in a shorter time, especially if they are straightforward. On the other hand, for more complex consents we envisage that it would be reasonable for RTM companies to take the maximum 30 days to make a decision. The fact that a leaseholder has requested a quicker turnaround does not mean that the RTM company has acted unreasonably by taking 30 days, if it was objectively reasonable to take this amount of time.

11.48 We acknowledge that in some cases this will result in RTM companies having to respond to applications for consent more quickly than a landlord would have had to before the RTM was acquired. However, we think that this is justified because once the RTM is acquired there will be two parties involved in granting the consents and so there is a greater need to ensure the leaseholder's application is dealt with efficiently by the RTM company in the first instance.

Where the landlord wishes to object to consent being granted

11.49 Where an RTM company gives notice to a landlord of an application that it proposes to consent to, the landlord is entitled to object to such consent being granted. In such circumstances, we think the landlord (not the leaseholder) should have to apply to the Tribunal for a determination as to whether consent should be granted. The landlord would need to do so within a reasonable time, and in any event no longer than 30 days from the date on which they are notified of the application by the RTM company. It would be for the landlord to demonstrate why the approval should not be granted.

²² CLRA 2002, s 101.

11.50 We think that it is fair and appropriate to shift the onus onto landlords to apply to the Tribunal if they wish to object to the grant of an approval by the RTM company. The RTM company is the primary decision maker whose decision is being objected to by the landlord, though the decision made ultimately impacts of the leaseholder seeking the approval. Landlords are likely to have more resources than leaseholders who may be deterred from applying to the Tribunal given the hassle and costs involved. We think that by placing the onus on landlords to apply to the Tribunal they will have less incentive to routinely object to approvals being granted by the RTM company.

Enforcement of obligations

11.51 In Chapter 12 below, we recommend that the Tribunal should acquire exclusive jurisdiction to hear proceedings under section 107 of the 2002 Act (that is, proceedings to determine whether a requirement of the 2002 Act has been met).²³ We envisage this would include proceedings to determine whether a landlord or RTM company complied with its duties in relation to lease consents within the prescribed period.

11.52 We also note that any order made by the Tribunal to comply with a requirement of the 2002 Act would be enforceable with the permission of the county court, in the same way as if it were an order of the county court.²⁴ We think that this would encompass any order to comply with the new obligations pertaining to lease consents.

Recommendation 79.

11.53 We recommend that landlords should only have the right to receive notice of, and to object to, approvals relating to assignment, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use.

11.54 We further recommend that:

- (1) where an RTM company receives an application for such an approval, it should be under a duty to either notify the landlord (if it is minded to approve the application) or refuse the application within a reasonable time and in any within 30 days after receipt of the application; and
- (2) if the landlord wishes to object to an approval being granted by the RTM company, it should have to apply to the Tribunal for a determination as to whether consent should be granted. Such an application must be made within a reasonable time and in any event within 30 days after receiving notification of the approval from the RTM company.

²³ See paras 12.32 to 12.38.

²⁴ CLRA 2002, s 176C. See also Tribunal, Courts and Enforcement Act 2007, s 27(1).

Administration charges for lease approvals

11.55 As set out above, there is evidence of some landlords imposing excessive administration charges in relation to applications for approvals by leaseholders before the RTM is acquired.²⁵ When the RTM is acquired, that problem is potentially exacerbated because leaseholders may be asked to pay two administration charges – one to the RTM company for deciding whether to grant the approval under the lease, and one to the landlord for deciding whether to object to the grant of an approval by the RTM company.

11.56 In the Consultation Paper, we considered various changes to the law that might help to address this problem. However, following consultation we have concluded that the problem is likely to be addressed by the existing law. Nevertheless, we consider that this would benefit from clarification as two interpretations are possible in the 2002 Act as to whether two sets of administration charges can be imposed on leaseholders.

11.57 The 2002 Act provides that “all functions in relation to the grant of approvals” are transferred to the RTM company,²⁶ (although, as we have discussed above, provision is made for the landlord to receive notice of any approval requests, and to object to the granting of consent). We consider that “all functions” extends to the function of imposing administration charges for considering whether to grant an approval. It is then provided that provisions in the lease in respect of the relationship of the landlord and leaseholder about “such functions” do not have effect.²⁷ Accordingly, this can be interpreted as a provision of a lease which requires a leaseholder to pay administration charges to the landlord would become ineffective post-RTM. Finally, it is provided that a “function of a tenant” which relates to approvals and which is exercisable “in relation to” the landlord is instead exercisable in relation to the RTM company.²⁸ We have concluded that the better interpretation of these provisions is that after RTM acquisition, leaseholders would only be required to pay an administration charge for an approval to the RTM company and not the landlord.

11.58 However, as we highlighted in the Consultation Paper²⁹, other provisions in the 2002 Act as well as case law suggest that a landlord can still recover an administration charge in respect of approval applications following RTM acquisition.³⁰ We understand that there is a difference of opinion in the market as to which interpretation is correct, and that landlords do sometimes charge fees in these circumstances.

11.59 We think that the first interpretation, that the leaseholder should only be liable to pay one administration charge to the RTM company, is the right outcome as a matter of

²⁵ See from para 11.10.

²⁶ CLRA 2002, s 98(2). Functions are any matter set out in a lease.

²⁷ CLRA 2002, s 98(3).

²⁸ CLRA 2002, s 98(6).

²⁹ CP, para 9.29.

³⁰ CLRA 2002, s 158, sch 7, para 16 and sch 11, para 2. Also, in accordance with section 19(1)(a) of the Landlord and Tenant Act 1927 where a covenant in a lease is conditional upon the landlord giving his consent, such consent not to be unreasonably withheld, it is reasonable to require the leaseholder to pay the professional fees associated with obtaining consent: see *Holding & Management (Solitaire) Limited v Norton* [2012] UKUT 1 (LC), [2012] Landlord and Tenant Reports 15.

policy. When the RTM is acquired, the RTM company is given responsibility for deciding whether approvals should be granted under the lease. This may be a key motivation for acquiring the RTM in the first place. Leaseholders may want to have greater control over whether approvals are granted and the administration charges that they must pay for them.

11.60 We are concerned that if landlords can impose administration charges in relation to lease approvals then this will make the RTM less attractive to leaseholders. If a leaseholder seeking consent under a lease is at risk of paying administration charges to both the RTM company and landlord, that leaseholder is actively disadvantaged by the RTM having been acquired.

11.61 As is set out above, we consider that landlords should have the right to object to certain grants of approval which have a direct impact on their reversionary interest. But we think that right should be exercised at their own expense.³¹ This will prevent unscrupulous landlords from continuing to impose excessive fees for such approvals once the RTM is acquired. This is consistent with our earlier recommendation that it should be for landlords to bear the cost of applying to the Tribunal if they wish to object to the grant of an approval by the RTM company.³²

11.62 While we think the better interpretation of the current legislation is that the landlord cannot charge administration fees in these circumstances, the opposite interpretation is possible. This is particularly in light of case law which has held that a landlord can impose costs of consent on leaseholders even where no right to do so is conferred by the lease.³³ We think the position should be beyond doubt and that the legislation needs to be clarified in this regard.

Recommendation 80.

11.63 We recommend that Government considers clarifying the legislation to ensure that landlords cannot charge administration fees for lease consents after the RTM has been acquired.

RETROSPECTIVE COVENANTS AND ABSOLUTE COVENANTS

Current law and problems

11.64 As set out above, leases will almost certainly contain restrictions on what leaseholders can do with their premises. Some of these restrictions will amount to an outright prohibition (known as an “absolute” covenant), where leaseholders are entirely prohibited from doing something. More commonly, as discussed above, the lease will contain “qualified” covenants which provide that something cannot be done without

³¹ See from para 11.43.

³² See paras 11.53 to 11.54.

³³ See footnote 30.

the landlord's consent. The lease will stipulate when and how consent is required – usually requiring the landlord's prior written consent.

11.65 The 2002 Act provides that on acquisition of the RTM, the RTM company becomes responsible for granting approvals under a long lease of the premises.³⁴ The 2002 Act does not make express provision as to whether RTM companies are entitled to:

- (1) grant an approval in circumstances where the leaseholder has already done something for which they should have obtained prior consent (“a retrospective approval”);
- (2) grant an approval for a leaseholder to breach an absolute covenant.

11.66 On the face of it, RTM companies are not entitled to grant either type of approval since neither are being granted under the lease and indeed are contrary to the terms of the lease. The RTM company only acquires functions under the lease. However, it has been said, including by Tanfield Chambers, that a broader interpretation is possible, namely that the RTM company does acquire responsibility for such approvals.³⁵ In the Consultation Paper, we said that this was something that might benefit from further clarification.³⁶

Our proposals

11.67 In the Consultation Paper, we proposed to clarify that the RTM company is not entitled to grant retrospective consents or consents to breach absolute covenants.³⁷ We thought it was worth making clear that leaseholders must apply to the landlord for such consents. This is because such consents go beyond what is provided for under the lease, and the RTM is predicated on transferring rights and obligations under the lease.

Consultees' views

11.68 The vast majority of consultees agreed with our provisional proposal and very few consultees disagreed. Consultees, including those representing landlord and leaseholder interests, generally agreed that it would be useful to clarify that the RTM company is not entitled to grant retrospective consents, or consents in respect of absolute covenants. Consultees of this view considered that this would help prevent future problems. Notting Hill Genesis said:

We have experience of situations where consent has been issued where it should not have been given or could not be given and have found that it creates perverse future problems for the leaseholder and landlord.

³⁴ CLRA 2002, s 98(1).

³⁵ Tanfield Chambers, *Service Charges and Management* (4th ed 2018) para 29-023.

³⁶ CP, para 9.46

³⁷ CP, para 9.47.

The Wellcome Trust, a charity landlord, told us that the present lack of clarity causes “confusion, delay and unnecessary costs”. One individual leaseholder told us that it ought “to be very clear to everyone in respect of what a RTM company can do”.

11.69 However, a couple of consultees considered that statutory clarification was unnecessary. For example, the Property Bar Association commented:

We do not consider that the law requires clarification in this regard. However, this is an area that ought to be included in compulsory training for prospective and current RTM directors, and equally, is an area in which many managing agents would also benefit from further training on.

11.70 A few legal professionals suggested that whilst the RTM company should be prohibited from granting consent in respect of absolute covenants they should be able to grant retrospective consent in respect of qualified covenants in cases where it would have been unreasonable to withhold consent if the leaseholder had applied before the event.

Discussion and recommendations

11.71 We remain of the view that the RTM company should not be able effectively to change the terms of the lease by granting consent to act in contravention of an absolute covenant. The terms of the lease reflect the mutual understanding of the landlord and the leaseholder in respect of each party’s rights and obligations when they enter into the lease. It would be inappropriate for RTM companies to be able to grant consent for leaseholders to do something which the lease completely prohibits under an absolute covenant.

11.72 Some consultees thought that RTM companies ought to be able to grant retrospective consents in circumstances where it would have been open to them to grant the approval if it had been sought in advance. However, allowing RTM companies to grant such approvals would potentially have significant consequences for landlords. As we explained in the Consultation Paper, there is no obligation on the landlord to grant retrospective consent and if a leaseholder acts in breach of the lease it is open to the landlord to seek a remedy such as an injunction, damages or forfeiture.³⁸ If the RTM company could grant consent in respect of such a breach, it would effectively amount to a waiver of the landlord’s rights to enforce a breach of covenant. We do not consider that such an interference with the landlord’s rights under the lease is sufficiently justified. The landlord will retain the right to grant retrospective consents should they choose to do so, and they might also agree that the RTM company should be able to grant such consents on their behalf.

11.73 However, the recently decided Supreme Court case of *Duval v 11-13 Randolph Crescent Ltd*³⁹ emphasised that even landlords are restricted in their ability to consent to an action which would otherwise amount to a breach of an absolute covenant. The Supreme Court held that, where the leases contain a mutual enforceability covenant (an obligation on the landlord to enforce leaseholder covenants), these would be

³⁸ CP, para 9.44.

³⁹ *Duval v 11-13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] 2 WLR 1167.

rendered ineffective if a landlord could grant consent for a leaseholder to take the action in any case.

11.74 The *Duval* case highlights significant risks to RTM companies dealing with issues of approval applications. If an RTM company purports to grant such a consent, not only would it be going beyond its powers but it may also be putting the landlord in breach of covenant as regards the other leases.

11.75 There is a lack of awareness amongst landlords, leaseholders and RTM companies as to qualified and absolute covenants. We agree with the Property Bar Association that this is an important area in which understanding needs to be promoted and ought therefore to be included in directors' training. We do not consider that it is strictly necessary to put this in legislation as it is already the position that RTM companies can only grant consents under the leases, although Government may wish to consider making this explicit.

Recommendation 81.

11.76 We recommend that RTM companies should not be entitled to grant an approval other than in accordance with the terms of a lease of the premises, and this should be made clear in training for RTM company directors.

OBLIGATION TO FURNISH LEASEHOLDERS WITH A NAME AND ADDRESS

Current law and problems

11.77 Landlords have a duty under section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act") to provide their name and address (and if that address is not in England and Wales, an address for service in England and Wales) in any written demand for sums payable under a lease including rent, a service charge or administration charge. If a landlord fails to comply with this duty, the leaseholder will have no obligation to pay any service or administration charge which is demanded.⁴⁰

11.78 The 2002 Act modifies section 47 of the 1987 Act, so that following acquisition of the RTM, RTM companies must likewise provide their name and address when issuing a written demand for sums payable under the lease.⁴¹ There is however some ambiguity as to whether section 47 (as modified) also requires RTM companies to include the name and address of the landlord when giving a written demand of this kind. Equally, it is not clear whether landlords are in turn required to include the name and address of the RTM company in any written demands they give.⁴² This might be problematic if the RTM company does not know any of the landlords' addresses because the landlord has not kept them informed.

⁴⁰ Landlord and Tenant Act 1987, s 47.

⁴¹ Landlord and Tenant Act 1987, s 47, as modified by CLRA 2002, sch 7, para 12(2).

⁴² CP, paras 9.66 to 9.67.

Our proposals

11.79 In the Consultation Paper, we proposed that the RTM company should not be required to include the name and address of each landlord of the premises in any demand for sums payable under a lease.⁴³ We said that RTM companies should not be prevented from recovering service charges under the lease because they are unable to provide information which may not be within their control.

Consultees' views

11.80 The vast majority of consultees agreed with our provisional proposal. A number of consultees, including landlords, managing agents and leaseholders, said it was unnecessary and potentially confusing to require the landlord's details to be included in any service charge demands when those charges are no longer payable to the landlord. For example, Investment Technology Ltd t/a Canonbury Management said that "it makes sense since the landlord has no continuing involvement in such matters".

11.81 Peter Milford explained that the current approach has created confusion for leaseholders. He said leaseholders had used the landlord's contact details for enquiries that should have been directed to the RTM company. We were told that the landlord had attempted to charge the leaseholders for responding to the enquiry.

11.82 There were however a significant minority of consultees who disagreed with our provisional proposal. Some of these consultees, including individual leaseholders, thought it was helpful for leaseholders to be given this information. For example, the Property Bar Association said:

It is important that leaseholders know who their landlord is, particularly where no ground rent is payable (such that the landlord is not [serving] its own demands). It is the landlord that generally retains the right to forfeit a lease; leaseholders should be able to contact that party and the RTM company is best placed to ensure that details are supplied, as required by sections 47 and 48 of the [Landlord and Tenant Act 1987].

11.83 Other consultees representing leaseholder interests noted that including the landlord's address for service would promote greater transparency. The Residential Landlords Association said:

We think that as a matter of course [the] landlord's information should be provided on service charge demands to provide transparency for all parties involved. We respect that on some occasions leaseholders may not have the landlord's address. However, it should be incumbent on the RTM to have accurate information of all parties.

11.84 Long Harbour and HomeGround, a landlord and an asset manager, similarly thought that the landlord's name should be included. They also suggested that the role of the RTM company and the landlord could be clarified by amending the prescribed notes that must accompany the service charge demand.

⁴³ CP, para 9.69.

11.85 Urang Property Management Limited said that our concern that the landlord may not provide accurate information despite the RTM company being under an obligation to provide these details could be addressed by placing an obligation on the landlord to inform the RTM company in relation to any change of address.

Discussion and recommendations

11.86 We remain of the view that RTM companies should not be required to include the landlord's name and address in any demand for sums payable under the lease. We think that it is potentially confusing for landlords' details to be provided in a demand issued by the RTM company in respect of service charges or other sums which are payable to them. For the same reason, we also consider that landlords should not be required to include the RTM company's name and address in any written demand that they give to leaseholders.

11.87 It has been suggested that any potential confusion could be addressed by clarifying the respective roles of the RTM company and landlord in the prescribed summary of rights and obligations which must accompany any service charge demand given by the RTM company.⁴⁴ However, this would add additional complexity to the provision of this prescribed information and it would not address the problem of RTM companies having to provide the name and address of any landlords of the premises in circumstances where the RTM company does not have that information.

11.88 We also note that there is no obligation for a management company under a tripartite lease to include the landlord's name and address in any demand for sums payable under the lease.⁴⁵ If the inclusion of the landlord's address for service is unnecessary in this context, we are not convinced that it should be necessary when an RTM company is collecting service charges.

11.89 Landlords will still have a duty under section 47 of the 1987 Act to provide their name and address when issuing a demand for ground rent under the lease. Landlords would also still be required under section 48 of the 1987 Act to provide leaseholders with notification of their address for service in England and Wales. Failure to provide such notification would mean leaseholders would have no obligation to pay ground rent otherwise due to the landlord under the lease.

11.90 We recognise that there may be limited incentive for landlords to comply with these duties after the RTM is acquired in circumstances where the landlord receives limited or no ground rent. However, we consider that this highlights a broader problem with the enforceability of section 47 and 48 of the 1987 Act. We would suggest that Government considers separately whether landlords need to be given stronger incentives to comply with these existing duties so that leaseholders have access to key information about the landlords of their premises.

⁴⁴ Landlord and Tenant Act 1985, s 21B, as modified by the CLRA 2002, sch 7, para 4.

⁴⁵ *Pendra Loweth Management Ltd v North* [2015] UKUT 91 (LC), [2015] Landlord and Tenant Reports 30.

Recommendation 82.

11.91 We recommend that RTM companies should not be required to include the landlord's name and address in any demand for sums payable under the lease.

TRANSFER OF EMPLOYEES TO RTM COMPANIES

Current law

11.92 When a business changes owner, its employees may be protected under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE").⁴⁶ In the Consultation Paper, we explained that persons who are employed by the landlord (or other relevant person) to provide management services may fall within the scope of TUPE when the RTM is acquired. If TUPE applies, any rights and obligations under their employment contract will transfer to the RTM company.⁴⁷ This would include any rights in their employment contract to live in onsite accommodation.

Consultees' views

11.93 In the Consultation Paper, we explained that we did not think that provision should be made to address what should happen to employees when the RTM is acquired. We said that the rights of such persons would fall to be assessed under the TUPE Regulations. We suggested that RTM companies seek legal advice if they are unsure about whether TUPE applies in their circumstances. We asked consultees to share their experiences of TUPE where they acquired the RTM, and whether they had come across any issues in relation to employees with rights to occupy the premises.

11.94 A significant minority of consultees reported experiences of TUPE. These consultees reported that various types of employees had transferred to the RTM company under TUPE. These included managers in the retirement sector, "scheme managers",⁴⁸ porters and concierges, and housekeepers.

11.95 Consultees with experience of TUPE held mixed views on its impact on the RTM process. On the one hand, two managing agents told us that the process had been "straightforward" and had not caused difficulties. By contrast, Anthony Molloy, a leaseholder, thought that TUPE should be excluded from the RTM process. Parkhurst Court RTM Company Limited told us that some of the early difficulties that they had experienced with TUPE have been addressed by the fact that guidance from the Leasehold Advisory Service now mentions TUPE. They noted that their solicitor did not bring the issue of TUPE to their attention when they were acquiring the RTM, and recommended that this might be a topic where training or advice would be helpful for RTM company directors.

⁴⁶ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No 246).

⁴⁷ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No 246), reg 4(2)(a).

⁴⁸ Scheme managers are responsible for managing sheltered or retirement housing schemes.

- 11.96 A few consultees said that they had experience in relation to transferred employees with rights to occupy part of the premises under their employment contract.
- 11.97 Three consultees told us that in their experience, the employee remained in on-site accommodation occupied as part of their employment with the landlord and, in two cases, transferred under TUPE to the RTM company. Additionally, a leaseholder said that when the RTM was acquired the landlord continued to allow the caretaker to occupy a flat and employed them on another site.
- 11.98 The Right to Manage Federation told us that, in their experience, there were two outcomes:
- Either the caretaker, house manager or warden is transferred across and in these case[s] the licence to occupy also transfers as it is a term of their employment. Alternatively ... the onsite manager is encouraged to take a transfer to another site and the employment and the licence to occupy is therefore terminated.
- 11.99 Urang Property Management Limited said that these flats are “typically rented at market rate”, and that upon acquisition of the RTM, the RTM company takes on liability for the rent and “continues to pay it from the service charge”. They told us that they had not experienced any situations where the landlord had refused to carry on this arrangement. However, an individual, Barbara Farmer, reported that the landlord attempted to double the rent of the flat to a “market rate”, but the RTM company objected to this and the landlord agreed to keep the rent at the current rate.

Discussion

- 11.100 The responses we received indicate that TUPE can be a source of confusion for leaseholders seeking to acquire the RTM. For example, one consultee told us that acquiring the RTM would “trump” TUPE and that the RTM company could dismiss the employee if it did not want to retain them. This is not correct. If TUPE applies, the RTM company takes over the employee’s contract of employment (unless the employee objects to being transferred).⁴⁹ The responses from consultees also indicate that there remains some confusion as to the consequences of TUPE. Any obligations to provide onsite accommodation under a transferred contract of employment will apply to the RTM company.
- 11.101 We think that TUPE should be a topic included in training for RTM company directors to ensure that they are aware that they may become responsible for contracts of employment entered into by the landlord in connection with their management functions.⁵⁰ This training ought to make clear that all rights and obligations under any transferred employment contracts will be preserved including any rights to stay in onsite accommodation under those contracts.
- 11.102 RTM companies should take legal advice if they are unsure whether the TUPE Regulations apply in their individual circumstances.

⁴⁹ Transfer of Undertakings (Protection of Employment) Regulations SI 2006 (SI 2006 No 246), reg 4(7) and (8).

⁵⁰ See our recommendations on director training in Ch 7, from para 7.3.

Chapter 12: Dispute resolution and costs

INTRODUCTION

- 12.1 The process of claiming and acquiring the RTM will inevitably lead the RTM company and the landlord (and potentially third parties such as managing agents) to incur some costs. Where there is a dispute between the parties over the claim these costs will increase, particularly if a court or tribunal is involved. The RTM company is liable not only for its own costs, but also for the landlord's non-litigation costs, and potentially their litigation costs if a dispute arises.
- 12.2 Particularly after the RTM has been acquired, RTM companies may become involved in disputes with parties other than the landlord, such as with leaseholders or third parties.
- 12.3 The appropriate forum for disputes will depend on their subject matter, value or complexity, or the remedy being sought. Disputes may be heard in the Tribunal,¹ the county court or the High Court.
- 12.4 In this chapter, we start by explaining problems with the current law. We discuss the way in which disputes involving RTM companies are currently allocated to different forums and explain the role played by mediation, arbitration and other forms of alternative dispute resolution. We examine the current rules on non-litigation and litigation costs and the extent to which the current rules may act as a disincentive to claiming the RTM.
- 12.5 We then consider consultees' views on our proposals before making recommendations for reform.

DISPUTES ARISING FROM THE ACQUISITION OF THE RTM

Current law

- 12.6 The Tribunal has exclusive jurisdiction to hear disputes arising from the acquisition of the RTM. Such disputes include where:
- (1) an RTM company seeks a determination that it is entitled to claim the RTM in circumstances where the landlord (or other relevant person) has given a counter-notice disputing the RTM company's entitlement to do so;²
 - (2) there is dispute as to the amount of accrued uncommitted service charges payable to the RTM company;³

¹ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

² CLRA 2002, s 84(3).

³ CLRA 2002, s 94(3).

- (3) an RTM company applies for a determination that premises should not be excluded from the RTM on the grounds that the RTM ceased to be exercisable less than four years ago previously;⁴
- (4) a dispute has arisen in relation to the amount of any costs payable by an RTM company to the landlord (or other relevant person) in connection with the RTM claim;⁵
- (5) a leaseholder or other relevant person seeks a determination that the RTM company should be entitled to grant an approval under a lease in circumstances where the landlord has objected to the grant of the approval;⁶ or
- (6) an RTM company cannot trace the landlord (or other relevant person) to whom it must give a claim notice, and needs an order that it is to acquire the RTM.⁷

12.7 The only proceedings under the RTM provisions of the 2002 Act which are not heard exclusively by the Tribunal are proceedings to enforce a requirement of the 2002 Act. These proceedings are heard by the county court and are dealt with separately below.

Our proposals

12.8 In the Consultation Paper, we proposed that the Tribunal should continue to have exclusive jurisdiction over disputes arising from the RTM provisions of the 2002 Act. We pointed out that this would mean the Tribunal assuming jurisdiction for various new types of proceedings which would be introduced as a consequence of our proposals.⁸

12.9 We asked consultees:

- (1) whether they thought our proposal would save time and lower costs;⁹ and
- (2) to identify any disputes over which they considered the county court should have jurisdiction.¹⁰

Consultees' views

Should the Tribunal have exclusive jurisdiction over disputes arising from the acquisition of the RTM?

12.10 The vast majority of those who responded agreed with our proposal that the Tribunal should have exclusive jurisdiction over disputes arising from the acquisition of the RTM.

⁴ CLRA 2002, sch 6, para 5.

⁵ CLRA 2002, s 88(4).

⁶ CLRA 2002, s 99(1).

⁷ CLRA 2002, s 85(2).

⁸ CP, paras 10.23 and 10.24.

⁹ CP, para 10.26.

¹⁰ CP, para 10.27.

12.11 Notting Hill Genesis, a housing association, thought that our proposals would reduce costs and complexity:

It makes more sense for one venue to consider all applications and not for parties to litigate across more than one [forum] as it does increase costs and complicates matters considerably.

12.12 The Association of Residential Managing Agents (“ARMA”) commented that the Tribunal’s expertise meant that it was well placed to hear such disputes:

the Tribunal includes leasehold management experts and will have a far better understanding of the disputed matters than the county court.

12.13 The Property Bar Association agreed that the Tribunal ought to have jurisdiction to hear such disputes but thought that there ought to be flexibility in this respect:

We agree the Tribunal should have jurisdiction over all such disputes. It is unclear why it would be necessary to exclude the jurisdiction of the courts, however; flexibility would be preferable, bearing in mind complex disputes could still involve matters solely within the jurisdiction of the courts.

Would this save time and costs?

12.14 A sizeable majority of consultees considered that the Tribunal having exclusive jurisdiction over disputes arising from the acquisition of the RTM would save time and lower costs. However, some consultees disagreed.

12.15 ARMA noted that the process would be quicker and Professor James Driscoll, a former tribunal judge, agreed, pointing out that the Tribunal’s procedures are “more streamlined and quicker than the courts”.

12.16 Two leaseholders who thought there would be time and cost savings noted the Tribunal’s specialism and familiarity with RTM disputes. Similarly, the Property Litigation Association Law Reform Committee considered the Tribunal to be “better resourced and its processes more efficient and suited to RTM disputes”.

12.17 Notting Hill Genesis said that even if there was not a significant cost saving, the proposal would be justified insofar as it reduced complexity.

12.18 On the other hand, a few individuals thought that any cost savings were unlikely given that there would still be expense involved in applying to the Tribunal. The Property Bar Association said that whilst having proceedings in the Tribunal might save time and reduce costs in most instances, it did not follow that the Tribunal needed to have exclusive jurisdiction over proceedings arising from the acquisition of the RTM.

If not, over what disputes should the county court have jurisdiction?

12.19 We received 43 responses to this question, though many consultees who responded simply commented that they agreed with our proposal that the Tribunal should have exclusive jurisdiction.

12.20 Consultees suggested that the county court should retain jurisdiction over the following disputes:

- (1) high value disputes (for example, over £100,000);
- (2) permission rights and some money disputes;
- (3) debt issues and forfeiture of leases;
- (4) the collection of service charges; and
- (5) where an injunction is required.

12.21 Two consultees, The Right to Manage Federation and the Property Bar Association, both considered that it would be preferable for the parties to have the flexibility to go to the county court or Tribunal rather than to confer exclusive jurisdiction on the Tribunal.

Discussion and recommendation

12.22 We remain of the view that the Tribunal should have exclusive jurisdiction over proceedings which arise from the acquisition of the RTM. We think that the Tribunal's experience and expertise in this area means that it is best placed to hear such disputes. These types of proceedings are already dealt with exclusively by the Tribunal and we recommend that the Tribunal ought likewise to have jurisdiction over any new proceedings which are introduced as a consequence of our recommendations.¹¹ We do not consider that there should be a choice of jurisdiction between the Tribunal and county court as we think this would result in unnecessary complexity and therefore costs.

Recommendation 83.

12.23 We recommend that the Tribunal should continue to have exclusive jurisdiction over any proceedings arising from the acquisition of the RTM.

PROCEEDINGS TO ENFORCE REQUIREMENTS OF THE RTM REGIME

Current law and problems

12.24 Any interested person may bring proceedings applying for an order requiring a person to make good any failure to comply with a requirement imposed by or under any of the RTM provisions of the 2002 Act.¹² Those proceedings are currently heard exclusively by the county court.

12.25 Before an application can be made to the county court, the defaulting party must be given a notice requiring them to make good the default and 14 days must have elapsed since that notice has been given.

12.26 It is potentially confusing that almost all disputes arising from the acquisition of the RTM should be heard by the Tribunal but that proceedings to enforce a provision of

¹¹ For example, proceedings brought by an RTM company to give up the RTM: see from para 13.143.

¹² CLRA 2002, s 107.

the RTM regime should be heard by the county court. The Tribunal is the expert body with greater familiarity with the RTM regime (and leasehold disputes generally) and so may be better placed to determine whether a requirement of the RTM regime has been met. The Tribunal's limitation lies in the fact that it lacks the power to effect enforcement action (such as granting injunctions, or enforcing money payments through contempt powers or instructing bailiffs).

Our proposal

12.27 In the Consultation Paper, we proposed that the Tribunal should replace the county court as the body with exclusive jurisdiction over proceedings to enforce the requirements under the RTM provisions of the 2002 Act.¹³

Consultees' views

12.28 The vast majority of those responding agreed with our proposal that enforcement of the requirements of the 2002 Act should be the exclusive preserve of the Tribunal although some consultees disagreed. Again, consultees who agreed (including a leaseholder and the Residential Landlords Association) noted that the Tribunal's expertise meant it was best placed to enforce the requirements of the RTM provisions.

12.29 The First-tier Tribunal (Property Chamber) agreed that it would be appropriate for it to hear these disputes since it is already responsible for hearing any other disputes arising from the acquisition of the RTM. It added:

We agree that conferring the exercise of enforcement powers on the Tribunal would not pose significant problems. This is already proposed in enfranchisement cases and also sits well with the judicial deployment project currently being developed in the Tribunal.

12.30 However, some consultees were concerned that the Tribunal lacked the necessary powers to enforce such decisions. For example, Professor James Driscoll and The Right to Manage Federation noted that the Tribunal's powers of enforcement are "limited". The Leasehold Advisory Service ("LEASE") suggested that the Tribunal should be given the power to attach a penal notice to any order enforcing a party's obligations.

12.31 The Property Bar Association and the Right to Manage Federation repeated their earlier comments that the parties should be able to choose whether to bring proceedings in the county court or Tribunal, rather than the Tribunal having exclusive jurisdiction to make such determinations.¹⁴

Discussion and recommendation

12.32 We consider that the Tribunal should be given jurisdiction to determine whether a requirement of the RTM provisions of the 2002 Act has been met. The Tribunal is a specialist body familiar with the RTM legislation (and leasehold disputes generally). It is well placed to determine whether the RTM provisions of the 2002 Act have been

¹³ CP, para 10.31.

¹⁴ See para 12.21 above.

met. We consider that it is potentially confusing and complex to give a different body exclusive jurisdiction in relation to such disputes.

12.33 Some consultees raised concerns as to whether the Tribunal has sufficient enforcement powers compared with the county court. We referred in the Consultation Paper to the possibility of conferring new enforcement powers on the Tribunal as a consequence of our proposal.¹⁵

12.34 We have since noted that existing legislation already facilitates the enforcement of Tribunal decisions by the county court. First, if the Tribunal were to order that a sum must be paid in accordance with a requirement of the 2002 Act (for example, an order that the landlord should pay accrued uncommitted service charges to the RTM company), that order would be enforceable as if it had been made by the county court.¹⁶ Second, any other order by the Tribunal to comply with a requirement of the 2002 Act would be enforceable with the permission of the county court in the same way as if it were an order of the county court.¹⁷ The Civil Procedure Rules make provision as to the process for enforcing Tribunal decisions in the civil courts in these circumstances.¹⁸

12.35 In light of these existing provisions, we do not consider that it is necessary or proportionate to give new enforcement powers to the Tribunal as a consequence of it acquiring exclusive jurisdiction to hear proceedings under section 107 of the 2002 Act. It is already possible for Tribunal decisions to be enforced in like manner to orders of the county court.

12.36 We note that the High Court retains its inherent jurisdiction, for example to make a declaration that premises are (or are not) within the scope of the 2002 Act.¹⁹

12.37 Finally, we note that a pilot program has been run by the Tribunal, in which it trialled dealing with cases which previously would have required separate hearings in the county court and the Tribunal.²⁰ Further, proposals are being considered by the Ministry of Housing Communities and Local Government, for a new specialist Housing Court combining the property work of the Tribunal and court.²¹ If a specialist Housing Court is created, Government should consider bringing RTM disputes within that body's jurisdiction.

¹⁵ CP, para 10.30.

¹⁶ Tribunal, Courts and Enforcement Act 2007, s 27(1).

¹⁷ CLRA 2002, s 176C.

¹⁸ Civil Procedure Rules, r 70.5; Practice Direction 70, para 4.

¹⁹ *Hayes Point RTM Co Ltd v Avon Freeholds Ltd* (11 July 2017) D90CF004 High Court, Cardiff District Registry (unreported).

²⁰ Judge Siobhan McGrath, "Report on Property Chamber Deployment Project for Civil Justice Council Meeting 26 October 2018" <https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf>.

²¹ See speech of Sir Geoffrey Vos (Chancellor of the High Court), "Professionalism in Property Conference 2018", para 24; Ministry of Housing Communities and Local Government, *Considering the case for a Housing Court: A Call for Evidence* (November 2018) p 6; and *Updating the Land Registration Act 2002* (2018) Law Com No 380, para 21.72.

Recommendation 84.

12.38 We recommend that the Tribunal be given exclusive jurisdiction to determine whether a requirement of the RTM provisions of the 2002 Act has been met.

OTHER DISPUTES INVOLVING RTM COMPANIES

Current law

12.39 The acquisition of the RTM results in the RTM company being able to enforce certain rights against leaseholders as if it were the landlord. For example, the RTM company acquires the right to enforce leaseholders' obligations to pay service charges and other covenants under the lease.²² Disputes in relation to a leaseholder's liability to pay service charges may be heard in the Tribunal or county court.²³

12.40 Following acquisition of the RTM, leaseholders can in turn enforce certain rights against the RTM company as if the latter were the landlord. For example, proceedings may be brought by a leaseholder against the RTM company, in the Tribunal or county court, to determine the extent of the leaseholder's liability to pay an administration charge under the lease.²⁴

12.41 RTM companies may also become involved in disputes with other third parties in the same way as any other company. For example, proceedings brought by an employee against an RTM company for unfair dismissal, or proceedings brought by an RTM company against a managing agent for breach of contract.

12.42 The forum for disputes between the RTM company and the landlord, leaseholder or other third parties is in all cases determined by the subject matter of the dispute and the remedy being sought.

Our proposals

12.43 We proposed that the Tribunal should not have exclusive jurisdiction over disputes between the RTM company and other third parties where those disputes do not arise specifically as a consequence of the acquisition of the RTM.²⁵

12.44 We also proposed that the Tribunal should not have jurisdiction over disputes between the RTM company and a leaseholder.²⁶

²² CLRA 2002, ss 96 and 97.

²³ Landlord and Tenant Act 1985, s 27A.

²⁴ CLRA 2002, sch 11, as modified by s 102 of, and para 16 of sch 7 to that Act.

²⁵ CP, para 10.34.

²⁶ CP, para 10.35.

12.45 We considered that the forum for such disputes should continue to be governed by the subject matter of the dispute and the remedy being sought.²⁷

Consultees' views

Disputes between the RTM company and third parties

12.46 The vast majority of those responding agreed with our proposal that the Tribunal should not be given exclusive jurisdiction over disputes between the RTM company and third parties (other than landlords and leaseholders). This proposal was supported by consultees representing both leaseholder and landlord interests.

12.47 Consultees agreed with our view that there was little benefit to conferring jurisdiction over such disputes to the Tribunal simply because an RTM company was involved. The Berkeley Group Holdings plc, a developer, said:

We agree that the forum for disputes should continue to be governed by the remedy and subject matter, rather than the fact it involves a RTM co.

12.48 Investment Technology Ltd t/a Canonbury Management, a managing agent, considered that common disputes would be contractual in nature, and therefore outside of the Tribunal's jurisdiction. Anthony Harris, a consultee, noted that "the range of possible disputes is too wide".

12.49 The few consultees who disagreed thought that the Tribunal should have responsibility for determining all disputes but without providing specific justification for that view.

Disputes between the RTM company and leaseholders

12.50 A sizeable majority of those responding also agreed with our proposal that the Tribunal should not be given exclusive jurisdiction over disputes between the RTM company and leaseholders although a significant minority disagreed.

12.51 The First-tier Tribunal (Property Chamber) commented that:

We agree that the Tribunal should not be given exclusive jurisdiction to deal with disputes between the RTM company and a third party or between the RTM company and a leaseholder. It would not be appropriate for the current arrangements in the selection of an appropriate forum for dispute resolution to be changed as part of the proposals to reform the RTM process.

12.52 Professor Anthony J Naldrett, a leaseholder, said that:

If an individual leaseholder wishes to challenge a decision of the RTM board, they should, for example, be able to make use of the small claims court.

12.53 There were some consultees however who thought that the knowledge and experience of the Tribunal meant that they ought to be solely responsible for determining such disputes. For example, the Society of Licensed Conveyancers

²⁷ CP, para 10.33.

referred to the specialist expertise of the Tribunal. LEASE noted that other jurisdictions utilise a single online Tribunal for such disputes.

Discussion

12.54 We do not consider that it would be desirable to give the Tribunal exclusive jurisdiction over disputes between an RTM company and leaseholders merely because there is an RTM company rather than landlord involved. It would mean that disputes between landlords and leaseholders heard in the county court before acquisition of the RTM would, following acquisition of the RTM, be heard in the Tribunal even though the subject matter of the dispute was the same. This would result in potential confusion and unnecessary complexity for the parties.

12.55 We think that the appropriate forum for disputes which arise other than as a consequence of the acquisition of the RTM should continue to be determined by the remedy and subject matter of the dispute. This reflects the status quo and so we have not made any recommendation for reform.

MEDIATION AND ARBITRATION OF RTM DISPUTES

Current law and problems

12.56 The parties to a dispute involving an RTM company may voluntarily pursue mediation or arbitration as an alternative to bringing formal proceedings. This may lead to a cheaper, quicker and/or more amicable solution. The Civil Mediation Council maintains an online directory service of civil mediation providers which can be searched by area.²⁸ The First-tier Tribunal (Property Chamber) have told us that they offer a judicial mediation service. Both the Chartered Institute of Arbitrators and the Royal Institute of Chartered Surveyors provide arbitrators who specialise in property and landlord and leaseholder disputes.

12.57 The county court and Tribunal also have duties to encourage the use of alternative dispute resolution (“ADR”). Both have a duty to seek to, where appropriate, bring to the attention of the parties the availability of any appropriate methods of ADR and, if the parties wish, to facilitate their use.²⁹

12.58 There are however constraints on the extent to which the parties can be compelled to engage in mediation and other forms of ADR prior to, or instead of, bringing formal proceedings.

12.59 A requirement to engage in ADR must be compatible with the parties’ rights to a fair and public hearing. Article 6(1) of the European Convention on Human Rights (“ECHR”) provides that in the determination of civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law. Whilst Article 6(1) is not an absolute right and so

²⁸ <https://civilmediation.org/mediator-search/>.

²⁹ Civil Procedure Rules 1998, r 1.4(e); Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169), r 4(1).

may be subject to legitimate limitations,³⁰ any such restrictions must not impair the essence of the right, must pursue a legitimate aim, and must be proportionate.³¹

12.60 In addition, in exercising its power to make Tribunal Procedure Rules or Practice Directions, the Tribunal must have regard to the following principles:³²

- (1) mediation of matters in dispute between the parties is to take place only by agreement between the parties; and
- (2) failure to mediate, or to resolve disputes via mediation, must not affect the outcome of proceedings.

12.61 In the Consultation Paper, we said that we had been told by leaseholders that some RTM claims were initiated as a “last resort” where they wanted to obtain information about the building or felt that their views were not being considered by the landlord. We were also told by some landlords and managing agents that RTM claims may flounder once leaseholders realise the nature and scale of the obligations which acquisition of the RTM entails.

12.62 In addition, we pointed to the time and costs which are involved in bringing formal proceedings to resolve disputes arising between the parties once an RTM claim has been made.

Our proposals

12.63 We did not make a proposal for reform. However, we asked for consultees’ views on whether there was any stage of the RTM process (pre- or post-acquisition) or any particular issue in relation to which mediation or arbitration might play a helpful role.

Consultees’ views

12.64 A number of consultees were broadly in favour of ADR as a way of resolving disputes arising before or after the acquisition of the RTM. The National Leasehold Campaign pointed out that finding ways to resolve disputes without the need for the Tribunal and expensive legal professionals would save time and costs for the parties.

12.65 Other consultees however were more sceptical as to the benefits of ADR in this context. Some consultees pointed out that if the parties attempted ADR but it failed then this only served to add time and costs to the process of resolving the dispute. One residents’ association said:

We have found informal mediation attempts to be [a] complete waste [of] time and a huge waste of money...

12.66 Similarly, the Right to Manage Federation commented:

³⁰ *Golder v United Kingdom* [1975] 1 EHRR 524 at 38.

³¹ *Ashingdane v United Kingdom* [1985] 7 EHRR 528 at 57.

³² Tribunals, Courts and Enforcement Act 2007, s 24.

...in our experience mediation and arbitration are often expensive and if not successful, the parties end up before [the] courts after delays.

12.67 There was a range of views on which disputes ADR might be best suited to resolving. Some consultees thought that it might be particularly useful for pre-acquisition disputes relating to the extent of the management functions being acquired by the RTM company, or the division of responsibility in relation to shared appurtenant property. Other consultees thought ADR might work best for post-acquisition disputes over the amount of accrued uncommitted service charges payable to the RTM company, or the extent of the RTM company's functions in relation to granting consents under the lease and the fees payable.

Arbitration

12.68 Few consultees were specifically in favour of arbitration as a means of resolving RTM disputes. Jennifer Studholme, a solicitor, BPL Solicitors Ltd and Birchall Blackburn Law submitted near-identical responses noting that arbitration was "binding and appears to be a quicker solution". On the other hand, Damian Greenish, a solicitor, pointed out that it was difficult to see what advantage arbitration would have over the Tribunal as a means of resolving disputes.

Mediation

12.69 There was wider support amongst consultees for the use of mediation to resolve RTM disputes. The First-tier Tribunal (Property Chamber) pointed out that mediation is particularly useful in cases where there is a continuing relationship between the parties and that it can be helpful in narrowing or resolving disputes. ARMA commented that mediation could be of considerable benefit early in the RTM acquisition process.

Discussion

12.70 Arbitration may in some cases offer a way for parties to resolve disputes more quickly and at less cost whilst still resulting in a binding determination. We do not however recommend that measures should be introduced to require or incentivise the parties to arbitrate disputes. If arbitration were to be made compulsory or significantly encouraged then it would be necessary to ensure that the arbitration itself was compatible with the right to a fair hearing under Article 6 of the ECHR. This would mean procedural safeguards would need to be introduced which might diminish the time and costs savings.

12.71 In relation to mediation, we have concluded that it would not be desirable to compel the parties to attempt mediation. If the parties both objected to the mediation then it would only serve to make the process of resolving the disputes more expensive and time consuming. We have however been told that mediation may be useful in narrowing or resolving certain RTM disputes. We think that it may therefore be worthwhile for measures to be introduced encouraging the further use of mediation in RTM disputes. However, we consider that this is something that ought to be looked at in the context of landlord and leaseholder disputes more generally. RTM disputes are not unique in the sense that other landlord and leaseholder disputes may also benefit from the greater use of mediation given the continuing nature of the relationship

between the parties. We have therefore decided against making specific recommendations in this area.

NON-LITIGATION COSTS

Current law and problems

12.72 The RTM company is liable for the “reasonable costs” which are incurred by a landlord in consequence of an RTM claim notice.³³ In addition, the RTM company is liable for the reasonable costs of third parties to the lease, and court-appointed managers.³⁴ Where the RTM claim notice is withdrawn or otherwise ceases to have effect, the RTM company and each member³⁵ of the RTM company remain jointly and severally liable to pay those costs up to the time that the claim notice is withdrawn.³⁶

12.73 This is intended to ensure that the landlord can recover the reasonable costs they may incur in investigating the RTM claim including the costs of instructing lawyers and surveyors. The landlord might also be able to recover the reasonable costs incurred in preparing and serving a counter-notice, as well as the costs of a managing agent having to provide information to facilitate the transfer of management functions to the RTM company.³⁷

12.74 In the Consultation Paper, we said that the RTM company’s liability for the non-litigation costs of the landlord (or other third party) has attracted substantial criticism from stakeholders for the following reasons.³⁸

- (1) Landlords are incentivised to conduct a forensic analysis of the claim with a view to identifying minor and inconsequential defects on the basis that they will be able to recover the costs of doing so from the RTM company.
- (2) RTM companies are usually undercapitalised and have no assets. Before the RTM is acquired, they are not entitled to collect service charge monies. Paying all reasonable costs incurred by the landlord in consequence of the claim therefore represents a significant financial commitment which will often need to be met by individual leaseholders.
- (3) The amount of reasonable costs may be particularly significant in the case of large or complex developments, and the RTM company has no ability to limit them.

³³ Leasehold and Commonhold Reform Act 2002, s 88(1).

³⁴ Appointed under the Landlord and Tenant Act 1987, s 24.

³⁵ The costs liability of a leaseholder does not apply where the leaseholder has, at the time the claim notice has been withdrawn, assigned their lease and the new leaseholder has become a member of the company: CLRA 2002, ss 89(4) and (5).

³⁶ CLRA 2002, s 89.

³⁷ *Columbia House Properties (No 3) Ltd v Imperial Hall RTM Co Ltd* [2014] UKUT 30 (LC).

³⁸ CP, para 10.73.

- (4) It may be difficult for the RTM company to anticipate the amount of those reasonable costs, meaning it is difficult to predict with any accuracy how much an RTM claim might cost.
- (5) If the RTM company does not consider that the claimed costs are “reasonable” it must take the question to the Tribunal,³⁹ which is time consuming and increases the costs payable.

12.75 However, we pointed out that others have strongly argued that the RTM company should cover the landlord’s non-litigation costs, or make at least a substantial contribution on the following grounds.⁴⁰

- (1) The RTM is a “no-fault” right which leaseholders can exercise without the need to prove a complaint against the landlord. Landlords have no say over whether the RTM is initiated. If the RTM is claimed the landlord will usually require some professional advice to assist them in determining the validity of the claim, and to assist them in meeting their obligations under the RTM claim process and during the handover following acquisition.
- (2) Landlords may have to go to some length to provide the correct information to qualifying tenants and contractors as a consequence of an RTM claim being initiated, incurring costs while doing so.
- (3) If the landlord incurs costs because the RTM company has acted on inadequate advice or has made mistakes it is unfair to expect them to have to bear those costs.

Our proposals

12.76 In the Consultation Paper, we said that we considered the arguments for and against the RTM company being liable for the landlord’s reasonable non-litigation costs to be finely balanced.⁴¹ We did not make any provisional proposal as to whether an RTM company should pay any part of the landlord’s non-litigation costs and instead asked for the views of consultees on this question.

Consultees’ views

12.77 A majority of consultees thought that the RTM company should not contribute to the landlord’s non-litigation costs. Various individual leaseholders pointed out that the current costs rules create incentives for landlords to resist RTM claims on the basis that their reasonable costs of doing so will be met by the RTM company. Peter Milford, a leaseholder, pointed out that removing this incentive to resist claims will speed up the process and reduce pressure on the Tribunals.

12.78 One leaseholder commented:

³⁹ CLRA 2002, s 88(4).

⁴⁰ CP, para 10.74.

⁴¹ CP, para 10.75.

The RTM company should not be required to make any contribution to the landlord's non-litigation costs because it encourages the landlord to conduct a forensic analysis of the claim to identify minor defects, knowing that the costs will be recoverable.

12.79 The Residential Landlords Association said:

We do not believe RTM companies should be required to make any contribution towards [the] landlord's non-litigation costs. We believe if this proposal was put forward then it could be a significant barrier to the formation of RTM companies especially for RTM companies occupying a larger area where costs could prove significant. We also have reservations that if the RTM company do not feel costs are reasonable, then it could produce another layer of bureaucracy in seeking a resolution from the Tribunal service which in itself will add to time delays and costs.

12.80 Consultees pointed out that the requirement to pay the landlord's reasonable costs acts as a significant deterrent to claiming the RTM because it means that in doing so the RTM company must effectively expose itself to an unknown financial liability which may be very significant. Michael Byrrne, a leaseholder, told us:

... this is a key deterrent to stop people going for the RTM as you basically have to write a blank cheque before starting to cover the landlord's costs.

12.81 Leaseholders also commented that the RTM is likely to be undercapitalised and cannot collect service charges until the RTM is acquired whereas landlords are likely to have far more significant financial resources at their disposal.

12.82 A couple of consultees said that while the RTM is strictly speaking a "no-fault" right it was, in their view, most likely to be claimed where there is dissatisfaction with the current management of the building by the landlord or its managing agents.

12.83 However, a significant minority of those responding thought that RTM companies should have to contribute to landlords' non-litigation costs. These consultees mainly represented freeholders' interests, managing agents and legal industry stakeholders. A number of these consultees referred to the RTM being a "no-fault" right initiated by leaseholders often against the wishes of the landlord. It was argued that in those circumstances it would be unfair to effectively require the landlord to surrender its rights over the property through no fault of its own and incur costs in doing so.

12.84 For example, Residential Management Group Limited, managing agents, said that:

The transfer of management functions is effectively a compulsory acquisition of property rights which if not carried out properly could expose the landlord to residual liability. It would be unjust to force the landlord to relinquish those rights and requiring it to pay the costs of that too.

12.85 Several consultees pointed out that there may be significant work and costs incurred by landlords in relation to RTM claims, and that these may increase because of our

proposed information requirements.⁴² Consensus Business Group, a landlord, noted that:

A significant amount of work is required from the landlord in dealing with an RTM claim which requires it to review documentation and liaise with various parties, such as the property manager and leaseholders. The landlord will also need to understand the various legislative and contractual rights and obligations, prior to and following a successful RTM claim.

12.86 A registered provider of social housing pointed out that if it was required to meet these costs then it would need to divert these funds from its other functions.

Discussion and recommendation

12.87 In the Consultation Paper, we said that the arguments for and against the RTM company contributing towards the landlord's non-litigation costs were finely balanced.⁴³ We have ultimately concluded that there should be no requirement for the RTM company to contribute towards the landlord's non-litigation costs. We have reached that view for the following reasons.

12.88 First, we consider the requirement to pay the landlord's (or other relevant person's) reasonable non-litigation costs carries a significant risk of deterring leaseholders from pursuing the RTM and participating in an RTM claim. Leaseholders initiating an RTM claim face unknown and potentially significant costs liability for which they are jointly and severally liable. The deterrent effect of the current costs rules is an aspect that was highlighted in responses we received to this consultation. We consider that removing leaseholders' liability for these costs will significantly improve accessibility to and the practical effectiveness of the RTM.

12.89 Second, we consider that landlords are generally better placed to bear these costs. Landlords will generally be in a stronger financial position than newly formed RTM companies which will be reliant on voluntary contributions from leaseholders until the RTM is acquired. Landlords currently have very little incentive to drive down their non-litigation costs because the RTM company will be liable for those costs insofar as they are reasonable. As some consultees pointed out, this means landlords may appoint particularly expensive advisors, or take a very forensic approach to the RTM claim. A requirement that landlords should bear their own costs will mean that they have an incentive to reduce their costs and have the secondary benefit of encouraging competition between providers of professional services.

12.90 We have considered the possibility of introducing a fixed or capped costs regime (which we discuss below),⁴⁴ that could in some way limit the costs recoverable by a landlord instead. However, there will inevitably be practical difficulties in trying to fix or cap costs in a way that is both clear and predictable whilst also being flexible enough to accommodate the multiple different factors that could affect the non-litigation costs

⁴² See Ch 9.

⁴³ CP, para 10.75.

⁴⁴ See from para 12.96 onwards.

which are in fact incurred. This is especially so given the wide variety of premises over which the RTM could be claimed under our recommendations.⁴⁵

12.91 Our Terms of Reference require us to consider the case for improving access to the RTM and to make recommendations which render the RTM procedure simpler, particularly for leaseholders. We consider that removing the requirement for RTM companies (and their leaseholder members) to contribute towards landlords' non-litigation costs presents the simplest and most effective way of improving access to the RTM, and would also reduce the areas of dispute that may arise on acquisition of the RTM.

12.92 We do, however, recommend that an exception ought to be made where an RTM claim has been withdrawn or otherwise ceased early and the RTM company has acted unreasonably in bringing the RTM claim. In such cases the landlord should be able to apply to the Tribunal to recover any reasonable non-litigation costs that have been incurred. We discuss this recommendation further below.⁴⁶ In Chapter 9, we also explain that the RTM company would be liable to pay the landlords' reasonable costs of responding to any request for information made before the claim notice was issued.⁴⁷

Non-litigation costs arising from enfranchisement claims

12.93 In the Enfranchisement Report, we recommend that the leaseholders should not generally be required to pay the landlord's non-litigation costs of an enfranchisement claim. However, we recommend that they *should* make a fixed contribution to those costs in cases where the landlord is not receiving a "market value" premium for the property being acquired.⁴⁸

12.94 In our view, a policy divergence between RTM and enfranchisement on the question of non-litigation costs is justified for the following reasons:

- (1) The RTM is a much less significant interference with the landlord's proprietary interests than enfranchisement. The RTM constitutes a control of use of property, rather than a deprivation of property.⁴⁹ The landlord retains their freehold interest in the property and, whilst they no longer have the same control over how the building is managed, they are also relieved of the burden of exercising the management functions. Therefore, the human rights analysis

⁴⁵ For example, in Ch 3 we recommend that the RTM should extend to leasehold houses and in Ch 4 we recommend that an RTM company should be able to claim the RTM over multiple premises in a single RTM claim.

⁴⁶ See from para 12.127.

⁴⁷ See from para 9.148.

⁴⁸ Enfranchisement Report, para 12.56.

⁴⁹ This distinction is relevant to the compatibility of legislative measures with Article 1 of the First Protocol to the European Convention of Human Rights. See for example *Iatridis v Greece* (2000) 30 EHRR 97 at para 55; *Paulet v UK* (2015) 61 EHRR 39 at para 63.

that requires a contribution to the landlord's costs in an enfranchisement if the landlord does not receive a market value premium does not apply to the RTM.⁵⁰

- (2) Enfranchisement is beyond the means of many leaseholders. If leaseholders had the financial option, they would in all likelihood enfranchise in preference to claiming the RTM. We think that the RTM should be set up not only to be a cheaper process, but designed in such a way that the costs involved are within the leaseholders' control. For example, leaseholders decide what is a reasonable amount to spend on a solicitor to run their RTM claim, but they will have no control over how much money the landlord spends on their advisors, and should not therefore be required to contribute to those costs.
- (3) Many of the reasons for our recommendation that leaseholders be liable for non-litigation costs in the context of enfranchisement are set against the background of the payment of the enfranchisement premium. This enables non-litigation costs to be set off against the enfranchisement premium. No such premium is payable in RTM, and all non-litigation costs will be out-of-pocket expenses for leaseholders (through the vehicle of the RTM company).
- (4) A related issue is the proportionality of costs to the asset involved. In enfranchisement, the leaseholders acquire a valuable asset. The non-litigation costs involved in this transaction will (in all but the most extraordinary cases) be a small fraction of the overall value of the asset acquired. In an RTM claim, the leaseholders acquire no asset at all; indeed, the company is taking on not just management rights but obligations, which offer no real balance to the landlord's non-litigation costs. In circumstances where RTM claimants will often not have the same financial means as those making enfranchisement claims, we consider that landlords, rather than the leaseholders, will be better placed to bear the costs incurred by the landlord.

Recommendation 85.

12.95 We recommend that RTM companies should not generally be required to contribute towards landlords' (or other relevant persons') non-litigation costs.

Rejected option: a fixed or capped contribution to non-litigation costs

Our proposals

12.96 We have concluded that RTM companies should not have to make any contribution to landlords' non-litigation costs. We therefore only briefly consider below consultees' views on the alternative options we put forward in the Consultation Paper for determining how any contribution by RTM companies to landlords' non-litigation costs should be calculated.

⁵⁰ Enfranchisement Report, paras 12.37 to 12.40, citing advice from Catherine Callaghan QC on the compatibility of enfranchisement recommendations with Article 1 of the First Protocol to the European Convention of Human Rights.

12.97 In the Consultation Paper, we sought consultees' views on whether any such contribution should be based on:

- (1) a fixed amount;
- (2) a capped amount;
- (3) a fixed costs regime varying according to certain factors, subject to an overall cap; or
- (4) the landlord's response to the claim notice, or whether the landlord succeeds in relation to any points raised in his or her counter-notice.

12.98 We then asked for 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 costs regime were 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.

Consultees' views

How should the contribution be calculated?

12.99 Consultees' views were split on how any contribution to non-litigation costs should be calculated: fewer than half of consultees preferred fixed costs subject to a cap, a significant minority preferred fixed costs, some consultees preferred capped costs and others preferred the costs to be based on the landlord's response.

12.100 Investment Technology Ltd t/a Canonbury Management said that a fixed costs regime would be "simpler" and several leaseholders preferred this option because it would give RTM companies certainty of their cost liability. One leaseholder said:

If fixed costs are used the RTM company will know exactly how much it needs to plan to set it up.

12.101 Commenting on a capped costs regime, Peter Milford told us that the requirement to pay unknown costs was a "key deterrent" to claiming the RTM. They told us that in their experience the landlord had accrued £30,000 in costs prior to a Tribunal hearing. Similarly, another leaseholder told us that their failed attempt to acquire the RTM had incurred liability for £3,000 of the landlord's costs.

12.102 The Right to Manage Federation preferred a fixed costs regime subject to a cap and told us that our suggested guidelines in the Consultation Paper broadly corresponded with an "unofficial scale" of reasonable fees in the Tribunal. One leaseholder suggested that this approach would encourage landlords to only litigate on well-founded points of dispute. The Berkeley Group Holdings plc noted that this option

“would allow a degree of variation, reflecting the costs that the landlord is likely to incur in respect of different types of RTM claims”.

12.103 Church & Co Chartered Accountants preferred our suggested option that costs be dependent on the landlord’s response as they thought that the costs recoverable should distinguish between dealing with a straightforward claim and a more complex claim over a modern development.

12.104 Some consultees responded to this question without expressing a preference on how any contribution should be calculated. Notting Hill Genesis indicated agreement with any of the suggested calculations in (1) to (3) provided that the sums “were adequate to cover costs”. LEASE made the same point but instead suggested that the level of contributions should not be “adverse to the interests of leaseholders”.

12.105 Other consultees, such as Boodle Hatfield LLP, solicitors, and Long Harbour and HomeGround, a landlord and an asset manager, thought that the current system should be retained. Rothesay Life PLC, an investor, thought that it would be unfair to require the landlord to cover its own costs of dealing with a claim. Similarly, Y&Y Management Ltd, managing agents, said that the landlord should be out of pocket “under no circumstances”.

12.106 On the other hand, several leaseholders and the National Leasehold Campaign suggested that there should be no contribution to the landlord’s non-litigation costs.

Should a fixed-costs regime apply to claim notices?

12.107 We received 59 responses to this question although some consultees simply commented to express their preference for the RTM company to not contribute to the landlord’s non-litigation costs or for the landlord’s reasonable costs to remain recoverable as under the current law.

12.108 A number of consultees – including LEASE, the Property Litigation Association Law Reform Committee, several leaseholders, Residential Management Group Limited and the the Berkeley Group Holdings plc – said that a fixed costs regime should apply to claims notices.

12.109 Samantha Cockburn, a managing agent, suggested that there should be a single fixed cost with no additional elements. However, other consultees mentioned the following as additional features which should attract further contributions:

- (1) the costs of passing over information and documents;
- (2) transferring accrued uncommitted service charges; and
- (3) where there are multiple parties to the lease and/or additional facilities, such as a gym, hotel or offices, which might make the claim more complex.

12.110 The Society of Licensed Conveyancers, the Property Litigation Association Law Reform Committee, LEASE and a few leaseholders thought that the costs recoverable for any additional features should also be fixed. In contrast, the Berkeley Group Holdings plc suggested that the landlord should be able to recover their reasonable

costs in respect of additional features. The Right to Manage Federation said that the recovery of costs which exceed a cap should be determined by the Tribunal.

Discussion

12.111 We have explained above why we consider that RTM companies should not be required to contribute towards landlords' non-litigation costs.⁵¹ We have not therefore made any recommendations as to the way in which any such contribution ought to be calculated.

12.112 Consultees' responses do however highlight the difficulties that would likely be involved in introducing a fixed or capped costs scheme which achieves an appropriate balance between fairness and simplicity. In the Consultation Paper, we mooted a fixed costs regime based on the size of the premises in relation to which the RTM is being claimed. As consultees have pointed out, this may well not properly reflect the extent of costs incurred by the landlord. Small premises may give rise to complex matters and cause the landlord to incur significant costs, whereas large premises may be straightforward to deal with and not necessarily result in higher costs being incurred. Any regime which tried to better reflect the actual non-litigation costs incurred risks being overly complex because it would be necessary take into account a greater number of factors.

Multiple or intermediate landlords and third parties

Current law and problems

12.113 As we explain above,⁵² the RTM company is currently liable for the reasonable costs incurred in consequence of a claim notice of:

- (1) a landlord under a lease of the whole or "any part" of the premises;
- (2) a party to such a lease otherwise than as landlord or tenant; or
- (3) a manager appointed under Part 2 of the Landlord and Tenant Act 1987.⁵³

This will include intermediate landlords or multiple landlords where the premises are held in split freehold ownership, as well as third party management companies who are parties to the lease.

12.114 Where there are multiple landlords and/or third parties, the RTM company is potentially exposed to significant costs liability which could act as a deterrent to claiming the RTM.

⁵¹ See from para 12.87.

⁵² See from para 12.72.

⁵³ CLRA 2002, s 88(1).

Our proposal

12.115 In the Consultation Paper, we proposed that where there are intermediate landlords or split freehold titles, the landlords should not be able to recover additional costs.⁵⁴ We said that it would be unfair for the RTM company to have to pay increased costs because of the complexity of landlords' titles. We noted that qualifying tenants are unlikely to have had any role or say in the creation of an intermediate interest or to have derived any benefit from it.⁵⁵ Instead, we thought that any new regime would need to detail which party would be entitled to the costs and how the landlords might then share the costs between them.

12.116 However, we suggested that where there is a third-party manager the RTM company should be required to pay an additional fee if the manager has incurred expense due to the RTM company's claim.⁵⁶

12.117 We asked consultees whether they agreed with both of our proposals.

Consultees' views

12.118 Over half of consultees agreed with our proposals but a significant minority disagreed. All of the consultees who agreed with our proposals and made comments, mainly leaseholders, considered that any additional costs recoverable by third-party managers should be controlled or limited in some way.

12.119 Several consultees, mainly representing freeholder and legal industry interests, objected to our proposal that there should be no additional costs recoverable where there are intermediate landlords or split freehold titles. For example, Boodle Hatfield LLP said:

The blanket exclusion of intermediate landlords' costs is unreasonable...Even in the simplest of claims, intermediate landlords will incur costs, particularly in relation to providing information which can be time consuming.

Similarly, the Law Society commented:

The Society disagrees with this provisional proposal of the Law Commission. Split reversions are often troublesome, and the parties should seek legal representation. The same principle applies to intermediate landlords, particularly in London where many difficult issues arise.

12.120 Residential Management Group Limited also told us that it would be wrong to assume that the landlord's title would be irrelevant for management purposes.

12.121 Consultees were largely supportive of our proposal that the RTM company should pay an additional fee to a third-party manager where costs have been incurred in consequence of the claim. However, a couple of leaseholders were concerned that

⁵⁴ CP, para 10.103(1).

⁵⁵ CP, para 10.95.

⁵⁶ CP, para 10.103(2).

landlords who also own third-party management companies would manipulate this provision to recover duplicated costs.

12.122 Investment Technology Ltd t/a Canonbury Management opposed both of our proposals on the basis that it made the scheme more complex and they were concerned that this would reduce the efficiency of a fixed costs regime.

Discussion and recommendation

12.123 As we explained above, we do not consider that RTM companies should generally make any contribution to landlords' non-litigation costs. It follows that this should also be the case where there are multiple landlords either by virtue of intermediate leases or split freehold titles. It is unnecessary for us to make a separate recommendation to give effect to this.

12.124 We have reconsidered our approach towards third-party managers and are of the view that there is little justification to distinguish between third-party managers and landlords. A third-party management company could be owned by the leaseholders, for example as the result of a collective freehold acquisition, or as consultees have pointed out, could be created and owned by the landlord as a separate entity to manage the property.

12.125 Where the landlord retains control of the third-party management company, we are concerned that this provision could be manipulated to circumvent the general rule we recommend that RTM companies should not be liable for landlords' non-litigation costs. Equally, where the management company is controlled by the leaseholders, we think it would be rare that the company would incur significant costs in consequence of the RTM claim. Members of the RTM company are likely to reflect those same leaseholders who are members of the third-party management company.

12.126 As a result, we do not recommend that the RTM company should be required to pay an additional fee if the third-party manager has incurred expense due to the RTM company's claim.

Costs when RTM claim ceases early

Current law and problems

12.127 Where an RTM claim is withdrawn, deemed to be withdrawn, or otherwise ceases to have effect, the RTM company and its members are jointly and severally liable for the reasonable costs incurred by a landlord, third party to the lease or court-appointed manager down to that time.⁵⁷

Our proposal

12.128 In the Consultation Paper, we proposed 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.⁵⁸

⁵⁷ CLRA 2002, ss 89(2) and (3).

⁵⁸ CP, para 10.107.

We explained that this would align with our proposals in the enfranchisement Consultation Paper.⁵⁹

12.129 Additionally, we proposed that the percentage of the fixed non-litigation costs that would be payable should vary depending on the stage that the claim has reached.⁶⁰ For example, a distinction could be made between where the claim notice has been served (regardless of whether the notice was valid) and where a counter-notice has been served accepting the RTM company's right to acquire management of the premises.

12.130 We asked whether consultees agreed with our proposals, and if they agreed that the percentage payable should vary depending on the stage that the claim had reached, to specify the percentages that should apply at particular stages of the claim.

Consultees' views

Should a percentage of the landlord's non-litigation costs be payable when a claim is withdrawn?

12.131 A majority of consultees agreed with our proposal, but a significant minority disagreed. Consultees who agreed with this proposal were mainly leaseholders and managing agents. Notting Hill Genesis also agreed and commented:

Having made an unsuccessful application for which the landlord has incurred costs it is only right that the RTM company should bear the landlord's costs.

12.132 ARMA and a leaseholder suggested that a contribution should only be made where the landlord has actually incurred costs.

12.133 The Law Society considered that there should be a contribution to the landlord's costs in these circumstances but had difficulty with our suggestion that this should comprise a percentage of the costs incurred. They raised several questions, such as whether all or only some of the costs should be recoverable, how a percentage would be quantified and what principle laid behind reducing the recovery of the landlord's costs from 100% where they are not at fault.

12.134 Some leaseholders thought that the RTM company's liability to contribute a percentage towards the landlord's costs should depend upon whether there was fault attributable to the RTM company. For example, a leaseholder said:

...this depends on whether the leaseholders making the claim are culpable and could easily have avoided ending up in this position. It's unclear whether this would apply in situations where a claim fails on a technicality, or only those where bringing the claim was almost vexatious on the part of the leaseholders (in which case it would be fair enough to pay some degree of costs).

⁵⁹ CP, para 10.104.

⁶⁰ CP, para 10.108.

12.135 Several consultees representing landlords' interests suggested that all of the landlord's costs should be recoverable. Cadogan Group Limited, a landlord, commented:

No, 100% of the landlord's abortive costs should be paid. RTM is a no fault claim and could be exploited by litigious lessees.

On the other hand, some leaseholders and LEASE were of the opinion that the parties should bear their own costs and there should therefore be no contribution.

Should the percentage payable vary depending on the stage the claim reaches?

12.136 A sizeable majority of consultees agreed that the percentage payable should vary depending on the stage that the claim reached although some consultees disagreed. Consultees who agreed with this proposal, including managing agents and leaseholders, noted that it was logical and reasonable.

12.137 Other consultees, mainly representing freeholders' interests, considered that all the landlord's reasonably incurred costs should be recoverable. Y&Y Management Ltd said:

Each case is different. They should pay all reasonable costs incurred up to that point.

12.138 Residential Management Group Limited told us that it was "very uncommon" for a claim notice to be withdrawn before a counter-notice is served and said that they were uncertain that such a distinction between the stages of the claim would be necessary.

12.139 Few consultees provided details of the percentages that they thought should apply at the various stages of the claim. The Right to Manage Federation suggested that 50% of the costs should be payable if the claim is withdrawn prior to the transfer of management responsibility, and 100% where the claim has succeeded and the landlord has incurred costs transferring responsibility for management.

12.140 A leaseholder similarly suggested that 50% of the costs should be recoverable where a claim notice has been issued but subsequently withdrawn, 75% of the costs should be recoverable at later stages of the process and 100% should be recoverable where the Tribunal denies the claim.

12.141 A few consultees, including the Berkeley Group Holdings plc and legal industry stakeholders, suggested that the fees recoverable should take account of whether there had been an exchange of information between the parties.

Discussion and recommendations

12.142 We make a separate recommendation in respect of the recoverability of costs incurred as a result of the information notice in Chapter 9.⁶¹

12.143 We have decided not to recommend the introduction of a fixed costs regime and instead think that, generally, RTM companies should not be required to contribute

⁶¹ See from para 9.148.

towards the landlord's non-litigation costs. We consider that there should be a general exception to this rule when the RTM claim is withdrawn, deemed to be withdrawn, struck off or otherwise ceases to have effect, and the RTM company has acted unreasonably in serving or proceeding with the claim. In such cases, the landlord should be able to apply to the Tribunal for any reasonable costs it has incurred in consequence of the RTM claim down to the time that the claim ceased.

12.144 This is intended to address the risk of landlords potentially having to bear the cost of responding to unreasonable or vexatious claims issued by leaseholders which are subsequently withdrawn. However, we expect that the Tribunal would apply this test narrowly, in the same way that the Tribunal's current power to award costs against a party who has behaved unreasonably in bringing, defending or conducting proceedings is applied.

Recommendation 86.

12.145 We recommend the landlord should be able to apply to the Tribunal to recover any reasonable non-litigation costs he or she has incurred where:

- (1) an RTM claim is withdrawn, deemed to be withdrawn, struck off, or otherwise ceases to have effect; and
- (2) the RTM company has acted unreasonably in serving or proceeding with the claim.

LITIGATION COSTS

Costs of Tribunal proceedings in respect of an RTM claim

Current law and problems

12.146 The Tribunal can usually only make an order in respect of costs if:⁶²

- (1) it is doing so in relation to "wasted costs", and the costs incurred in applying for such costs;
- (2) a person has acted unreasonably in bringing, defending or conducting proceedings; or
- (3) the case is a land registration case.

12.147 However, the 2002 Act provides, somewhat unusually, that the RTM company must pay the landlord's reasonable costs if the landlord issues a counter-notice challenging the RTM company's entitlement to the RTM and the RTM company unsuccessfully

⁶² The Tribunal, Courts and Enforcement Act 2007, s 29; The Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013/1169, r 13.

applies to the Tribunal for a determination that it is so entitled.⁶³ This is “one-way” costs shifting because, by contrast, the RTM company is not entitled to recover its costs from the landlord if it is successful in such proceedings. The RTM company can only recover its costs from the landlord if the Tribunal makes an order using its general powers as set out above.

12.148 As was set out in the Consultation Paper, it is unusual for costs to be shifted in one direction in favour of the generally more powerful and better resourced party. It may encourage landlords to resist RTM claims and appeal adverse Tribunal decisions on the basis that that they are shielded from having to pay the other side’s costs.⁶⁴ Leaseholders may decide against bringing an RTM claim, or decide to give up their claim, because of the risk of having to pay the landlord’s litigation costs if the landlord contests their claim.

Our proposals

12.149 In the Consultation Paper, we provisionally proposed that the litigation process in respect of an RTM claim should not confer a right to costs on either party. We said that, instead, each party should bear their own costs, unless there has been unreasonable behaviour or wasted costs, or where one of the following exceptions applies:

- (1) where a landlord is missing and the RTM company has obtained an order from the Tribunal that allows a claim to proceed;⁶⁵ and
- (2) where a landlord has failed to serve a counter-notice but has subsequently been permitted to participate in any application made by the RTM company for a determination that it was entitled to acquire the RTM.⁶⁶

12.150 In such cases, we suggested that the Tribunal should be able to order the landlord to pay the RTM company’s costs. We also asked consultees whether they thought that each party having to bear their own costs of litigation would lead to fewer Tribunal cases.

Consultees’ views

12.151 The vast majority of consultees agreed with our provisional proposal.

12.152 Some consultees highlighted that our provisional proposal was consistent with the usual approach to the costs in Tribunal proceedings. The First-tier Tribunal (Property Chamber) said that:

⁶³ CLRA 2002, s 88(3). Alternatively, if the RTM company withdraws its claim, leading to a dismissal: *R (O Twelve Baytree Ltd) v Leasehold Valuation Tribunal* [2014] EWHC 1229 (Admin), [2015] 1 WLR 276; *Post Box Ground Rents Ltd v Post Box RTM Co Ltd* [2015] UKUT 230 (LC).

⁶⁴ A successful appeal to the Upper Tribunal (Lands Chamber) results in the landlord recovering its costs of both the First-tier and Upper Tribunal: *Albion Residential Ltd v Albion Riverside Residents RTM Co Ltd* [2014] UKUT 6 (LC).

⁶⁵ See from para 8.51.

⁶⁶ See from para 8.186.

None of the residential property jurisdictions in the Tribunal have general cost-shifting rules. The power of the Tribunal to make orders for costs is exceptional and applies only where there has been unreasonable behaviour or wasted costs. The practice of each party bearing its own costs works well.

12.153 A number of individuals said that the risk of having to pay the landlord's litigation costs acted as a disincentive to claiming the RTM. Other consultees, mainly leaseholders and residents' associations, said our proposal would help to level the playing field and that landlords would have less incentive to resist RTM claims. For example, one leaseholder said:

The current law is incredibly unfair and needs changing... If each party had to bear their own costs this would reduce legal delays as both parties would be keen to progress to a conclusion.

12.154 The Residential Landlords Association thought that our provisional proposal would reduce the number of "vexatious" disputes and so alleviate the burden on the Tribunal:

We believe that in ensuring that both parties are liable for the own litigation costs, then the probability of vexatious disputes will be reduced. This in turn, should speed up the overall process and result in less cases going to the Tribunal service.

12.155 However, some consultees thought that there should be costs shifting in favour of the successful party. Long Harbour and HomeGround thought that this approach would "focus parties' minds on resolving disputes effectively".

12.156 A residents' association thought that the RTM company ought to be able to recover its costs if it won but that otherwise it should be left to the Tribunal to decide.

12.157 Cadogan Group Limited said that as the RTM is a "no-fault" right the landlord ought to be able to recover its costs from the RTM company. LB Tower Hamlets and Y&Y Management thought that there should continue to be one-way costs shifting in favour of the landlord. LB Tower Hamlets said:

...if a landlord needs to defend a case after this it seems unreasonable that costs would have to be met by landlords and potentially passed onto other residents. Overall we think the party wishing to exercise the RTM should meet the freeholder/landlord costs.

12.158 A small number of consultees commented in relation to our proposed exceptions to the general rule that the parties should bear their own costs. ARMA agreed with our proposal but queried who will determine unreasonable behaviour and whether this would result in further costs and delays in the Tribunal. The Property Bar Association said that there ought to be a "wholly no costs regime" and that there was no need to provide for the proposed exceptions which were already adequately dealt with under the existing Tribunal Rules.⁶⁷

⁶⁷ The Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013, SI 2013 No 1169, r 13.

Impact of our proposal on the number of Tribunal cases

12.159 The vast majority of consultees thought that each party having to bear their own litigation costs would reduce the number of Tribunal cases, but some consultees disagreed.

12.160 Leaseholders and residents' associations who thought that this proposal would reduce the number of Tribunal cases pointed out that it would reduce incentives to litigate cases. LEASE said:

The prospect of not being able to recover professional fees including those of senior counsel and expert witnesses such as surveyors save in exceptional circumstances should act as a deterrent to RTM companies and landlords bringing cases before the Tribunal.

12.161 Similarly, Notting Hill Genesis noted that "each party would have an incentive to limit their losses by avoiding litigation". One leaseholder agreed but said that the effect was limited insofar as landlords are in a stronger financial position.

12.162 Two individuals suggested that the proposal might lead to litigation being conducted in a more efficient way by the parties.

12.163 In contrast, some consultees representing managing agents and leaseholders were of the view that landlords would continue to litigate and that having to bear their own costs would be unlikely to deter them from doing so. Residential Management Group Limited commented that:

In our experience, the key driver for litigation is certainty of transfer of liability and not costs. Landlords may be marginally more sensitive to litigating but given the scale of their potential risk we do not consider this will have an appreciable impact.

The Right to Manage Federation said:

We doubt this. Obstructive landlords will still fight RTM to the wire.

Discussion and recommendation

12.164 We remain of the view that the parties should generally bear their own litigation costs arising from an RTM claim regardless of the outcome. This would give RTM companies greater certainty as to their potential costs exposure when embarking on an RTM claim. It would lessen the incentive for landlords to resist RTM claims and to appeal any adverse Tribunal decisions.

12.165 We do not agree with the suggestion by some consultees that costs should follow the event. The imbalance of resources that often exists between the RTM company and landlord would usually mean that the prospect of costs-shifting against the losing party would have a greater impact on the RTM company than landlords. It is also inconsistent with the approach which is generally taken to litigation costs in proceedings before the Tribunal.

12.166 As set out above, we did propose certain exceptions to the rule that the parties should bear their own costs. First, as set out above, we said that the Tribunal should

have the power to award costs where there has been unreasonable behaviour or wasted costs. This reflects the general powers of the Tribunal to award costs under the Tribunal procedure rules. We are not proposing any change to those existing powers.

12.167 Second, we proposed that the landlord should have to pay the RTM company's costs where a landlord is missing and the RTM company has obtained an order from the Tribunal that allows a claim to proceed.⁶⁸ This was based on a similar proposal in the Enfranchisement Consultation Paper.⁶⁹ However, on reflection we consider that it would not be appropriate to introduce such provision in the context of the RTM. Unlike in an enfranchisement claim there is no premium payable by the RTM company for acquiring the RTM from which its litigation costs could be deducted by order of the Tribunal. If the landlord is missing, it is unclear how the RTM company would otherwise recover its litigation costs because no landlord has been identified or located from which those costs can be recovered. We have therefore concluded that the RTM company should bear its own costs of bringing these proceedings.

12.168 Third, we proposed that the landlord should be liable to pay the RTM company's litigation costs. This should happen where the landlord has failed to serve a counter-notice but has subsequently been permitted to participate in any application made by the RTM company for a determination that it was entitled to acquire the RTM.⁷⁰ We have concluded on reflection that no such exception should be made. As set out in Chapter 8, there is no requirement for the RTM company to apply to the Tribunal if the landlord does not respond to the claim notice within the deadline specified in that notice.⁷¹ In those circumstances, the RTM company will acquire the RTM on the date specified in the notice. The RTM company need only apply to the Tribunal if it wants certainty as to its entitlement to claim the RTM. This differs from an enfranchisement claim where leaseholders are required to incur the costs of applying to the Tribunal and so there is a stronger justification for requiring the landlord to bear the RTM company's costs if it wishes to contest those proceedings.

Recommendation 87.

12.169 We recommend that the parties should bear their own costs of any Tribunal proceedings relating to the acquisition and exercise of the RTM subject to the Tribunal's existing costs powers (for example, where there has been unreasonable conduct or wasted costs).

⁶⁸ CP, para 10.115.

⁶⁹ Enfranchisement CP, para 13.109.

⁷⁰ CP, para 10.115.

⁷¹ See paras 8.184 to 8.185.

Restraint orders to prevent vexatious claims

12.170 In the Enfranchisement Report, we acknowledge that landlords have an interest in avoiding the possibility of being faced with a series of unsuccessful or vexatious enfranchisement claims made by the same leaseholder or leaseholders. For this reason, we recommend the landlord should have the power to apply to the Tribunal for an Enfranchisement Restraint Order, “to prohibit a leaseholder from bringing a further claim in respect of the same premises without the permission of the Tribunal”.⁷²

12.171 We recognise that there may be a similar need to protect the landlord from a series of vexatious or unsuccessful RTM claims. However, since an RTM claim is brought by an RTM company rather than individual leaseholders, we think that the restraint order would have to apply to the premises rather than to individuals. This is because it would be difficult in practice to ascertain who is behind the RTM company bringing the claim, and have the restraint order apply to them.

12.172 We therefore recommend that a landlord should have the power to ask the Tribunal to prohibit an RTM company from bringing further RTM claims in respect of the same premises without the landlord’s permission. We note that, because it applies to the premises rather than individuals, this is a broader order than the equivalent order in the enfranchisement context, and therefore more restrictive for leaseholders.

12.173 We also recommend that the Tribunal should have discretion to determine the scope of the prohibition, and that it should have the power to grant permission to a leaseholder on application, with or without imposing conditions.⁷³

Recommendation 88.

12.174 We recommend that a landlord should be able to apply to the Tribunal for an order prohibiting an RTM company from bringing a further RTM claim without the permission of the Tribunal. Such an order may be made where a prescribed number of RTM claims, that are totally without merit, have been brought in relation to the same premises.

Recommendation 89.

12.175 We recommend that a Tribunal may grant permission to bring an RTM claim in relation to premises that are subject to a prohibition either with or without conditions.

⁷² Enfranchisement Report, para 12.154.

⁷³ See analogous recommendation in Enfranchisement Report, from para 12.163.

RECOVERY OF COSTS UNDER THE LEASE

Current law and problems

12.176 Landlords are currently able to recover any costs arising from the acquisition or exercising of the RTM by including a provision in the lease allowing such costs to be recovered through a service charge or administration charge. Leaseholders have some protection in relation to litigation costs insofar as they are able to apply to the Tribunal or court hearing the proceedings for an order that the landlord's costs cannot be included in any relevant service charge or administration charge.⁷⁴ In the Consultation Paper we pointed out that this places the burden on leaseholders who may be unrepresented and unaware of the need to make an application to the relevant Tribunal.⁷⁵

Our proposals

12.177 We provisionally proposed that there should 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.⁷⁶

Consultees' views

12.178 The vast majority of consultees agreed with our provisional proposal.

12.179 Professor James Driscoll commented that our proposal would represent "a very important reform". A number of individuals and organisations representing leaseholders were supportive on the basis that landlords should not be able to pass on their litigation costs to leaseholders.

12.180 ARMA thought that our proposal was only necessary if leaseholders were unaware of these provisions. The Property Bar Association thought that our suggestion was unfair and unlikely to make any difference in practice:

Such an expropriatory provision should not be imposed automatically. Leaseholders invariably apply for such orders and the Tribunal is well accustomed to dealing with them and granting them in the appropriate cases.

In any event, we are unconvinced that such a presumption would make a practical difference in most instances, on the assumption that the test for making an order (or, conversely, not making one) were similar to that which it is now.

12.181 The First-tier Tribunal (Property Chamber) thought there was some merit in our proposal but was concerned that it might lead to disputes as to whether the presumption should apply.

12.182 Investment Technology Ltd t/a Canonbury Management commented that Section 20C of the 1985 Act needed to be removed entirely once the RTM is acquired

⁷⁴ Landlord and Tenant Act 1985, s 20C; CLRA 2002, sch 11, para 5A.

⁷⁵ CP, para 10.65.

⁷⁶ CP, para 10.117.

because an RTM company should not be prevented from recovering its litigation costs through service charges under the lease.

Discussion and recommendation

- 12.183 We concluded above that RTM companies should not generally be liable for landlords' litigation and non-litigation costs arising from the acquisition of the RTM. We do not think that landlords should be able to circumvent those recommendations by imposing liability on leaseholders to pay such costs under the lease through a service charge or administration charge. We are concerned that the disparity in bargaining power between the parties will result in leaseholders agreeing to such terms and having to bear these costs.
- 12.184 In the Consultation Paper, we proposed to address this issue by preventing landlords from recovering their litigation costs through a service charge or administration charge unless the Tribunal determines otherwise. We have concluded on reflection that our proposal did not go far enough. First, our proposal only extended to litigation costs arising from the acquisition of the RTM. It did not extend to provisions in leases which enable the landlord to recover any non-litigation costs they incur in consequence of an RTM claim. We have recommended above that RTM companies should no longer be liable for such costs on the basis that they may deter leaseholders from acquiring the RTM. There is a risk that if that recommendation is adopted landlords may instead seek to recover such costs through the imposition of service charges and administration charges under the lease. We have therefore concluded that provision is also needed to prevent landlords from being able to pass these costs on to leaseholders.
- 12.185 Secondly, we have concluded that there should be no right for landlords to apply to the Tribunal for an order that litigation or non-litigation costs arising from the RTM are to be recoverable through the service charge or administration charge. We think that provisions in leases should be unenforceable insofar as they purport to enable the landlord to recover such costs from leaseholders. We cannot envisage any circumstances in which it would be appropriate for such costs to be passed on to leaseholders under the lease and so we do not think it is necessary or appropriate to confer discretion on the Tribunal to determine otherwise.
- 12.186 Our recommendation, if implemented, would only prevent landlords from passing on costs arising from the acquisition of the RTM to leaseholders under the lease. It would not prevent RTM companies from recovering any costs which they would otherwise be entitled to recover through service charges or administration charges once the RTM is acquired. It is important that RTM companies can recover any costs to which they are entitled under the lease because they are unlikely to have any other source of funds.
- 12.187 Finally, we would suggest that Government considers implementing this change more broadly so that it applies to other litigation costs which are incurred by landlords and passed on to leaseholders through service charges or administration charges. We note that the MHCLG Select Committee has recommended that more general

legislation be introduced to prevent landlords from being able to recover such costs under the lease.⁷⁷

Recommendation 90.

12.188 We recommend that a term of a lease should be unenforceable to the extent that it purports to enable a landlord or third party to recover any litigation or non-litigation costs arising from the RTM.

⁷⁷ Housing, Communities and Local Government Committee, Report on Leasehold Reform (2017-19) HC 1468, para 179.

Chapter 13: Termination of the RTM

INTRODUCTION

13.1 There may be circumstances in which it is no longer possible or desirable for an RTM company to continue managing the premises. We use the terms “ceasing”, “ending”, or “terminating” to refer to situations where the RTM ceases to be exercisable in relation to the premises.

13.2 In this chapter, we make recommendations on:

- (1) the circumstances in which the RTM should terminate, including whether the RTM company should be able to apply to terminate the RTM if it no longer wishes to manage the premises;
- (2) the consequences of termination, including who should become responsible for managing the premises when the RTM terminates; and
- (3) the length of time leaseholders should have to wait before bringing a further RTM claim after the RTM has terminated.

CONSULTEES’ EXPERIENCES OF THE RTM TERMINATING

13.3 In the Consultation Paper, we asked whether consultees had experience of the RTM terminating, what caused it to terminate, and what happened afterwards. The vast majority of consultees indicated that they did not have relevant experience. This may indicate that once leaseholders acquire the RTM, it tends to work well in practice.

13.4 Consultees who did have experience of the RTM terminating described a range of reasons why it had happened. These included the difficulty of finding replacement directors for the RTM company, the RTM company having no funds, the board of directors lacking the support of the leaseholders, or the RTM company being struck off from the register of companies. We consider the grounds for termination of the RTM in the following section.

EXISTING GROUNDS FOR TERMINATION

13.5 Under the current law, the RTM continues unless and until one of the following events occurs:

- (1) the RTM company and all landlords of the premises agree to terminate the RTM;¹

¹ CLRA 2002, s 105(2).

- (2) the RTM company is wound up;²
- (3) a manager or receiver is appointed over the RTM company;³
- (4) a company voluntary arrangement is proposed between an RTM company and its creditors;⁴
- (5) the RTM company is struck off the register of companies;⁵
- (6) the Tribunal⁶ appoints a manager over the premises under Part 2 of the Landlord and Tenant Act 1987 (“the 1987 Act”);⁷ or
- (7) the RTM company ceases to be an RTM company in respect of the premises.⁸

13.6 If any of these events occurs, the RTM is automatically terminated in respect of the premises. In the Consultation Paper, we provisionally proposed that these existing grounds should be retained, subject to certain changes which we consider further below, before making recommendations for reform.

Termination by agreement

Current law

13.7 Under the current law, the RTM company may agree with each person who is a landlord of the premises that the RTM should terminate.⁹ The decision to enter into such an agreement would be taken by the board of directors,¹⁰ although the members of the RTM company could by special resolution require the company’s directors to do so.¹¹

Our proposal

13.8 In the Consultation Paper, we said that we were reluctant to interfere with the RTM company and landlord’s ability to terminate the RTM where both are agreed that the RTM company should no longer manage the premises.¹² However, we were

² CLRA 2002, s 105(3)(a).

³ CLRA 2002, s 105(3)(b).

⁴ CLRA 2002, s 105(3)(c).

⁵ CLRA 2002, s 105(3)(d).

⁶ The First-tier Tribunal (Property Chamber) in England or the Leasehold Valuation Tribunal in Wales.

⁷ CLRA 2002, s 105(4).

⁸ CLRA 2002, s 105(5).

⁹ CLRA 2002, s 105(2).

¹⁰ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, art 5(m) and 8; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1, arts 5(m) and 8.

¹¹ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, art 9; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1, art 9. A special resolution would need to be supported by at least 75% of the total number of votes within the RTM company (Companies Act 2006, s 283).

¹² CP, para 11.87.

concerned that leaseholders might be prejudiced if the RTM company and the landlord agreed that management functions should be exercised by a third party against whom leaseholders could not enforce performance of the management functions.¹³

13.9 We provisionally proposed that, if an agreement between the RTM company and landlord does not have the support of all qualifying tenants, then the Tribunal should be required to approve the agreement. We indicated that the Tribunal should do so if it is satisfied that leaseholders will be able to enforce performance of the management functions under the lease against the person taking over the management functions.¹⁴

13.10 We provisionally proposed that if the Tribunal did not approve the agreement then the RTM would not terminate and management functions would remain with the RTM company.¹⁵

Consultees' views

13.11 The majority of consultees agreed with our provisional proposal. However, a few questioned why the support of "all qualifying tenants" should be required for an RTM company to agree to terminate the RTM. For example, Notting Hill Genesis, a housing association, thought that if the RTM company has the support of a significant majority of qualifying tenants then that should suffice. The Residential Landlords Association were concerned that requiring "all qualifying tenants" to support the agreement could cause the Tribunal to be overburdened with cases where there are only a modest number of objections from leaseholders.

13.12 A few consultees noted that our proposal would require a higher proportion of leaseholders to agree to terminate the RTM than is required to acquire the RTM in the first place. For example, the Property Bar Association said that:

The statutory scheme does not require all qualifying tenants to support the acquisition of RTM, so it is unclear why a single qualifying tenant should be able to force the need for an application for the management to revert back to the party named in the lease that that tenant originally signed up to (or acquired by assignment). Furthermore, where the RTM company does not wish to continue managing, on what proper basis could the Tribunal force it to do so at the insistence of a single/a minority of tenants?

Discussion

13.13 While our proposal was well supported by consultees, we have concluded on reflection that it is neither necessary nor desirable for it to be adopted as a recommendation.

13.14 As set out above, our proposal was intended to address a problem which we were concerned might arise if an agreement to terminate the RTM purported to transfer management functions to a third party against whom management functions were not

¹³ CP, para 11.88.

¹⁴ CP, para 11.89.

¹⁵ CP, para 11.91.

enforceable by leaseholders. However, having considered this further we do not think that such an agreement is ever likely to have that effect in practice.

13.15 Under the 2002 Act, an agreement between the RTM company and any landlords of the premises to terminate the RTM will have the sole effect of terminating the RTM. When the RTM is terminated, the management functions which were performed by the RTM company will once again be exercisable by the persons responsible for those functions under any leases of the premises.¹⁶

13.16 Such an agreement to terminate the RTM could not change the party who is responsible for management under the leases. Management functions can only be conferred on a different person by varying the leases. An agreement which purported to give effect to a different outcome without varying the lease would not alter the leaseholder's rights under the lease. The leaseholder could continue to enforce performance of the management functions against the person exercising them under the lease, irrespective of what the agreement between the RTM company and landlord might say.

13.17 We have therefore concluded that it is unnecessary to recommend that the Tribunal must approve any agreement between the RTM company and the landlord which does not have the support of all leaseholders. We therefore do not make provision in this context for another route to vary the leases: this may be done with the leaseholders' consent or under certain existing powers of the Tribunal.¹⁷

13.18 There is no requirement for unanimous support to be obtained from leaseholders for any other decision of the RTM company, including the decision to serve a claim notice and commence the process of acquiring the RTM in the first place. Requiring the parties to apply to the Tribunal to approve the agreement in circumstances where it does not have unanimous support from leaseholders will create additional delays and costs for both parties, making the process of termination by agreement unnecessarily complicated and burdensome. This may be particularly problematic if the RTM company is seeking to terminate due to having a lack of funds.

13.19 We do not therefore make a recommendation in this area.

Termination where the RTM company is struck off

Current law

13.20 If an RTM company is struck off the register of companies, it is dissolved and the RTM ceases to be exercisable by the RTM company.¹⁸ The registrar may strike off a company if they have reasonable cause to believe that a company is not carrying on

¹⁶ See from para 13.152.

¹⁷ Landlord and Tenant Act 1987, Pt 4.

¹⁸ Companies Act 2006, ss 1000(6), 1001(4) and 1003(5); CLRA 2002, s 105(3)(d).

business or is not in operation.¹⁹ The registrar may also strike off a company which is being wound up,²⁰ or if the company applies to be struck off.²¹

13.21 However, a company which has been struck off the register can subsequently be restored to the register by the registrar or court.²² An application to the registrar or court for restoration to the register must generally be made within six years of the date of the dissolution of the company.²³

13.22 The general effect of restoration is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.²⁴ In addition, the registrar or court are given the power to make such directions and provision as seems just for placing the company and all other persons in the same position (or as nearly as may be), as if the company had not been dissolved or struck off the register.²⁵

13.23 In the Consultation Paper, we referred to the First-Tier Tribunal's decision in *AB&R RTM Company Limited v Rovergrange Limited* ("AB&R"),²⁶ in which an RTM company was struck off the register but then subsequently restored. The Tribunal held that, since the effect of restoration was that the RTM company was deemed to have never been dissolved or struck off the register, it followed that the RTM company had the right to resume management of the premises.²⁷

13.24 However, in the Consultation Paper, we expressed doubt as to whether that decision was correct. We pointed to the relevant provision of the 2002 Act, which states that the RTM "ceases" when the RTM company is struck off.²⁸

Our proposals

13.25 We made the following provisional proposals which aimed to provide what would happen if an RTM company was struck off and then subsequently restored to the register.²⁹

- (1) if an RTM company is struck off and restored to the register the Tribunal should have the power to reinstate the RTM to the RTM company;

¹⁹ Companies Act 2006, s 1000.

²⁰ Companies Act 2006, s 1001.

²¹ Companies Act 2006, s 1003.

²² Companies Act 2006, s 1024 and 1029.

²³ Companies Act 2006, s 1024(4) and 1030.

²⁴ Companies Act 2006, s 1028(1) and 1032(1).

²⁵ Companies Act 2006, s 1028(3) and 1032(3).

²⁶ *AB&R RTM Company Limited v Rovergrange Limited* (12 April 2017) LON/00AM/LRM/2017/0005 First-tier Tribunal Property Chamber (Residential Property) (unreported).

²⁷ *AB&R RTM Company Limited v Rovergrange Limited* (12 April 2017) LON/00AM/LRM/2017/0005 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [21].

²⁸ CP, para 11.95.

²⁹ CP, paras 11.98 to 11.100.

- (2) the RTM company should have to apply to be restored to the register within 30 days of the company having been struck off if it wishes to have the RTM reinstated;
- (3) in the interim period between the RTM company being struck off and having the RTM reinstated, management functions should revert to the person responsible for exercising them under the lease. Alternatively, we said that leaseholders should be able to apply to the Tribunal for the appointment of a manager.

Consultees' views

13.26 The vast majority of consultees agreed that if an RTM company is struck off and then restored to the register, then the Tribunal should be able to reinstate the RTM.

13.27 Consultees who disagreed with our proposal thought that there should be a higher or lower threshold for reinstatement of the RTM. Leasehold Advisory Service ("LEASE") suggested that the RTM ought to be automatically reinstated once the RTM company is restored to the register. However, the Property Bar Association thought that the RTM company should have to acquire the RTM again if it is struck off and then restored to the register:

The fact that the RTM company had allowed itself to be struck off (even if due to a simple administrative error) is a significant cause for concern, particularly given the number of warnings that will have been ignored prior to strike out taking effect. It is not unreasonable for such a company to have to reacquire RTM in accord with the Act after an appropriate period of time...

13.28 The majority of consultees also agreed that an application to restore the RTM company to the register should be made within 30 days of the strike off taking effect.

13.29 Consultees who disagreed with our proposal were divided on whether a longer or shorter period was required. For example, the Property Litigation Association Law Reform Committee said that a longer period may be required to give the RTM company enough time to realise what had happened and seek professional advice. On the other hand, the Property Bar Association supported a shorter period of 21 days, given that the RTM company will have had numerous warnings prior to being struck off.

13.30 The vast majority of consultees agreed that, if an RTM company is struck off, management functions should revert to the person responsible for exercising them under the lease, unless the leaseholders apply to the Tribunal for a manager to be appointed, or the RTM company is restored and has the RTM reinstated.

13.31 Some consultees also raised concerns about the cost and inconvenience for landlords of resuming management in the period between the RTM company being struck off and restored. For example, the Berkeley Group Holdings plc, a developer, argued that it was "unreasonable" for the landlord to be responsible during this interim period as there was a risk that the landlord would not be aware that the RTM had terminated.

13.32 To address these concerns, it was suggested by some consultees that the landlord should be compensated for "reasonable costs" during this period, or that a manager should instead be appointed by the Tribunal.

Discussion

- 13.33 Our proposals were supported by consultees and we consider that the policy aim is correct. However, upon further analysis we consider that the existing provisions of company law already satisfactorily address what should happen when an RTM company is struck off and restored to the register.
- 13.34 As set out above, when an RTM company is struck off the register, the RTM automatically terminates under the 2002 Act. However, the Companies Act 2006 (“CA 2006”) provides that if a company is restored to the register then it is deemed to have continued in existence as if it had never been dissolved or struck off.³⁰ Further, the court may give directions and make such provision “as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register”.³¹ Therefore, if there is doubt as to the status of the RTM, the court may determine that the RTM is reinstated. The court is likely to take the effect on the landlord of such a decision into account, and may not provide for the reinstatement of the RTM if this would unduly prejudice the landlord and/or other third parties.
- 13.35 The effect of the CA 2006 provisions is demonstrated in *Beauchamp Pizza Ltd v Coventry City Council*.³² In that case, a company’s club licence had lapsed under the Licensing Act 2003 as a consequence of the company being struck off the register.
- 13.36 The High Court held that the effect of the company being restored to the register was that the licence was deemed to never to have lapsed.³³ As discussed above, the Tribunal in *AB&R*³⁴ found the same in the case of the RTM.
- 13.37 The existing provisions of the CA 2006 are more favourable to an RTM company than our proposals in the Consultation Paper, in particular by giving the RTM company more time to apply to be restored to the register.³⁵ We consider therefore that these provisions should continue to apply to RTM companies as they do to all other companies.
- 13.38 Therefore, we do not make any recommendations in this area.

What happens when an RTM company is struck off the register?

- 13.39 Under the current law, if an RTM company is struck off (causing the RTM to terminate), management functions will revert to the person responsible for performing those functions under any leases of the premises. This would continue to be the case

³⁰ Companies Act 2006, ss 1028 (1) and 1032 (1).

³¹ Companies Act 2006, ss 1028 (3) and 1032 (3).

³² *Beauchamp Pizza Ltd v Coventry City Council* [2010] EWHC 926, [2010] 5 WLUK 9.

³³ *Beauchamp Pizza Ltd v Coventry City Council* [2010] EWHC 926, [2010] 5 WLUK 9 at [27].

³⁴ *AB&R RTM Company Limited v Rovergrange Limited* (12 April 2017) LON/00AM/LRM/2017/0005 First-tier Tribunal Property Chamber (Residential Property) (unreported) at [21], and see above at para 13.23.

³⁵ Under the Companies Act 2006, the RTM company would not have to have applied within 30 days to be restored to the register and, after being restored, it would be deemed to have never been struck off with all the associated consequences, rather than having to apply to the Tribunal to have the RTM reinstated.

unless and until the RTM company is restored to the register. In addition, we recommend below³⁶ that the person taking back responsibility for managing the premises should be given a short period to apply to the Tribunal to appoint a manager instead.

13.40 If the RTM company is restored to the register and the RTM is effectively reinstated, this might affect arrangements made during the interim period (for example, if the landlord who became responsible for management by default entered into management contracts with third parties). We do not think that these contracts would be automatically unwound as they are “secondary” (not “primary”) consequences of the RTM company being struck off the register.³⁷

13.41 However, the court could make such arrangements as part of its discretion to take action or make provision for “placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register”.³⁸ The court may bring such contracts to an end. If the court is not involved, the position with the management contracts will be as for management contracts when the RTM is first acquired.³⁹

13.42 Alternatively, it may be that the RTM company does not want the RTM back, and that the company is being restored to the register after the application of another party with an interest in the matter.⁴⁰ A party other than the RTM company may wish to have the company restored for reasons such as bringing an action against it, or seeking payment of debts. In this case, the RTM company would have to hand the RTM back to the landlord in accordance with our recommendations above. Obviously, it would make sense for an RTM company in this position to communicate with the landlord during the restoration process so that the RTM is not revived in any meaningful sense, and the landlord retains management functions. This would avoid a ping-pong situation.

Termination following an application under Part 2 of the 1987 Act

13.43 A leaseholder, or any landlord of the premises, may apply to the Tribunal for the appointment of a manager or for the RTM to terminate under Part 2 of the 1987 Act.⁴¹ The Tribunal must be satisfied that one of the following grounds are satisfied before making an order under Part 2:

³⁶ See from para 13.178.

³⁷ *Bridgehouse (Bradford No 2) v BAE Systems plc* [2019] EWHC 17668.

³⁸ Companies Act 2006, ss 1028(3) and 1032(3).

³⁹ See from para 9.157.

⁴⁰ Companies Act 2006, s 1029.

⁴¹ As modified by CLRA 2002, sch 7, para 8.

- (1) that the RTM company is in breach of an obligation owed to a tenant under their tenancy relating to management of the premises, and it is just and convenient in all the circumstances of the case;⁴²
- (2) that the RTM company has levied or proposed unreasonable service charges or variable administration charges, and it is just and convenient in all the circumstances of the case;⁴³
- (3) that the RTM company has failed to comply with any provision of a code of management practice approved by the Secretary of State, and it is just and convenient in all the circumstances of the case;⁴⁴ or
- (4) that other circumstances exist which make it just and convenient for an order appointing a manager to be made,⁴⁵ including that the RTM company no longer wishes to exercise the RTM.⁴⁶

13.44 In Chapter 5, we recommend that these grounds be extended to include the circumstance where no directors of the RTM company have undertaken relevant director training.⁴⁷ If the Tribunal is satisfied that one of these grounds are met, it may appoint a manager to carry out such management functions as it considers fit,⁴⁸ or order that the RTM should otherwise terminate causing management functions to revert back to the person responsible for them under any leases of the premises.⁴⁹

Premises to which Part 2 of the 1987 Act applies

Current law and problems

13.45 Part 2 of the 1987 Act only applies to premises consisting of a building or part of a building which contains two or more flats.⁵⁰ In Chapter 3 we recommend that the RTM regime should be extended to leasehold houses and other premises containing one residential unit. It would not currently be possible to apply under Part 2 of the 1987 Act for the appointment of a manager or to have the RTM terminated in respect of those premises.

13.46 We provisionally proposed that the scope of Part 2 of the 1987 Act should be extended to apply to any premises over which the RTM has been acquired. This would ensure that leaseholders and landlords have the safeguard of being able to

⁴² Landlord and Tenant Act 1987, s 24(2)(a) as modified by the CLRA 2002, sch 7, para 8(5).

⁴³ Landlord and Tenant Act 1987, ss 24(2)(ab) and (aba).

⁴⁴ Landlord and Tenant Act 1987, s 24(2)(ac). In relation to England, the code of practice approved by the Secretary of State is: Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code* (ISBN 978 1 84219 168 2).

⁴⁵ Landlord and Tenant Act 1987, s 24(2)(b).

⁴⁶ CLRA 2002, sch 7, para 8(6).

⁴⁷ See from para 7.3, and in particular from para 7.23.

⁴⁸ Landlord and Tenant Act 1987, s 24(1).

⁴⁹ CLRA 2002, sch 7, para 8(7).

⁵⁰ Landlord and Tenant Act 1987, s 21(2).

apply for the appointment of a manager or to have the RTM terminated when an RTM company is mismanaging the premises.

Consultees' views

- 13.47 A sizeable majority of consultees agreed with our provisional proposal. A few consultees emphasised that leaseholders should have an equal right to apply to the Tribunal regardless of the premises over which the RTM has been acquired.
- 13.48 Some consultees were concerned that our proposal might somehow make it easier for landlords to apply to the Tribunal to terminate the RTM. The Right to Manage Federation were opposed to the RTM being available in respect of leasehold houses, and so disagreed with Part 2 of the 1987 Act being extended to cover such premises.

Discussion and recommendations

- 13.49 We remain of the view that the right to apply for the appointment of a manager or for the RTM to terminate should apply to all premises over which the RTM can be acquired. This ensures that all leaseholders and landlords have an appropriate safeguard in circumstances where an RTM company is mismanaging the property. We do not think that there is any rationale for restricting the application of Part 2 of the 1987 Act to only some types of premises that are managed by RTM companies.
- 13.50 Some consultees were concerned that our proposal would give landlords a straightforward mechanism to terminate the RTM. However, we do not think our proposal has that effect. As set out above, the Tribunal will only appoint a manager or order that the RTM be terminated if certain grounds are met. It will only do so if it is satisfied that it is just and convenient in all the circumstances. In Chapter 7, we recommend that a failure by any of the RTM company directors to undertake director training should be a ground which the Tribunal can take into account when considering an application for the appointment of a manager.⁵¹
- 13.51 We also suggest that Government look separately at whether the scope of Part 2 of the 1987 Act ought to be expanded more generally. There are a number of types of premises which are currently exempt from Part 2 of the 1987 Act, but which the 2002 Act brings within scope of those provisions once the RTM is acquired.⁵² For example, premises held by a non-profit private registered provider of social housing are exempt from Part 2 of the 1987 Act unless and until the RTM is acquired in which case they are included.⁵³
- 13.52 This means that Part 2 of the 1987 Act currently applies differently depending on whether the RTM has been acquired. We do not think that there is a good reason for leaseholders to be afforded protection under Part 2 of the 1987 Act only when the RTM is acquired. We suggest that Government considers extending Part 2 of the 1987 Act to include those other premises.

⁵¹ See from para 7.3 on director training generally, and in particular from para 7.22.

⁵² CLRA 2002, sch 7, para 8(4).

⁵³ Landlord and Tenant Act 1987, s 21(3) and s 58(1)(g). CLRA 2002, sch 7, para 8(4).

Recommendation 91.

13.53 We recommend that the scope of Part 2 of the 1987 Act be extended to apply to any premises in relation to which the RTM has been acquired.

Application to terminate the RTM under Part 2 of the 1987 Act

Current law and problems

13.54 Leaseholders and landlords have the right to apply to the Tribunal for an order under Part 2 of the 1987 Act if they are dissatisfied with the way the RTM company is managing the property. If the application is successful, the Tribunal may either appoint a manager or order that the RTM “is to cease to be exercisable by the RTM company”.⁵⁴ If the Tribunal makes such an order, then the management functions would revert to the person responsible for exercising them under the lease.

Our proposals

13.55 We provisionally proposed that landlords should have the right to apply to the Tribunal for an order:

- (1) that management functions are to revert back to the person responsible for exercising those functions under the lease (or if that party no longer exists, the landlord); or
- (2) if the person who would otherwise exercise the management functions under the lease is not best placed to manage the premises, that a manager be appointed to manage the premises.

13.75 In either case, we proposed that the landlord would still need to prove one of the grounds in Part 2 of the 1987 Act are met.

Consultees views

13.76 A sizeable majority of consultees agreed with our provisional proposal. For example, the Property Litigation Association Law Reform Committee stated that it offered an important safeguard for landlords whose interests may be under-represented in the RTM company.

13.77 Several individual consultees were concerned that additional safeguards were needed to ensure that landlords did not abuse their right to apply to the Tribunal for the RTM to terminate. For example, Stefania Maulucci, a leaseholder, suggested that if the Tribunal finds that the landlord’s application was “spurious” then the landlord should pay the RTM company’s costs. Another individual suggested that the landlord should have to show that they had exercised the management functions satisfactorily before the RTM is acquired. One residents’ association commented that:

⁵⁴ Landlord and Tenant Act 1987, s 24, as modified by the CLRA 2002, sch 7, para 8(7).

The RTM company has to be given protection from landlords, for at least 2-3 years to help them get on with some work (and not be dealing with landlords' applications to oust them at every possible opportunity).

13.78 LEASE questioned why landlords should be able to apply to have a manager appointed in circumstances where leaseholders are content for the RTM company to continue managing the premises.

Discussion and recommendations

13.79 Many of the concerns raised by consultees were on the basis that our proposal would somehow make it significantly easier for landlords to thwart the RTM and take back management functions in relation to the premises. However, our proposals were for the most part merely intended to clarify what is already the position under the current law.

13.80 As under the current law, it would be necessary for landlords to demonstrate that one of the grounds in Part 2 of the 1987 Act were met. As set out above, it must in all cases be shown that it is just and convenient for an order to be made by the Tribunal. We are not proposing to lower the threshold which must be met before the Tribunal will make an order under Part 2 of the 1987 Act.

13.81 The Tribunal currently has discretion to either appoint a manager or order that the RTM is to terminate. If the Tribunal chooses to make an order terminating the RTM, the effect would be that management functions would revert to the person responsible under the lease. We think that the Tribunal should continue to have the discretion to make either order based on what it considers appropriate in the circumstances.

13.82 The only substantive change that we recommended to the current law was to address situations where the Tribunal orders that the RTM is to terminate but the party who would otherwise assume responsibility for the management functions under the lease no longer exists. In those circumstances, we think the Tribunal ought to be able to order that management functions are to be exercised by the landlord instead. This is consistent with recommendations we make below on who should generally manage the premises when the RTM terminates.⁵⁵

13.83 However, we now consider that the Tribunal could already make such an order under Part 4 of the Landlord and Tenant Act 1987. Under Part 4, a party to a lease can apply to the Tribunal for an order to vary the lease without the consent of the other party in certain circumstances. The relevant circumstances include where the lease does not make satisfactory provision with respect to the repair or maintenance of the relevant premises.⁵⁶ If the Tribunal makes an order for the RTM to come to an end, and the party with management functions under the lease no longer exists to take back those functions, the lease no longer makes satisfactory provision for maintenance and other management functions.

13.84 Finally, it has been questioned whether the Tribunal should be able to make an order to appoint a manager or terminate the RTM solely on the application of a landlord of

⁵⁵ See from para 13.152.

⁵⁶ Landlord and Tenant Act 1987, s 35(2)(a).

the premises. We consider that it is appropriate that landlords should continue to have the right to make an application given their interest in the premises. However, if leaseholders are content with the RTM company continuing to manage the premises, this might weigh against the Tribunal appointing a manager or ordering that the RTM should otherwise terminate.

Termination where company ceases to be an RTM company

Current law and problems

13.85 Section 105(5) of the 2002 Act provides that the RTM terminates if the RTM company ceases to be an RTM company in relation to the premises. The 2002 Act separately addresses the situations in which an RTM company might cease to be a company at all, for example because it has been wound up or struck off the register and dissolved.⁵⁷ Therefore, section 105(5) appears to be aimed at situations where the RTM company remains a company but has ceased to meet the requirements necessary for being an RTM company. There are only very limited in situations in which this is likely to happen in practice.

13.86 The following requirements must be met for a company to be an RTM company.⁵⁸ First, as we explain in Chapter 6, the company must be a private company limited by guarantee.⁵⁹ It is usually possible for a private company to re-register as a public company,⁶⁰ or for a private company to re-register as an unlimited company.⁶¹ However, this would not be possible in the case of RTM companies because it would necessitate changes to the company's name and articles which would be inconsistent with those prescribed by secondary legislation ("the model articles").⁶² The 2002 Act provides that changes to an RTM company's articles which are inconsistent with the model articles have no effect.⁶³

13.87 Second, to be an RTM company in relation to premises, the company's articles must state that it has the object of acquiring and exercising the right to manage the premises.⁶⁴ This is reflected in the model articles, which provide that an object of the RTM company is to acquire and exercise the right to manage the premises.⁶⁵ It would

⁵⁷ CLRA 2002, s 105(3)(a) and (d).

⁵⁸ CLRA 2002, s 73(1).

⁵⁹ CLRA 2002, s 73(2)(a). In Ch 6, we recommend that RTM companies should continue to be required to take the form of a company limited by guarantee.

⁶⁰ Companies Act 2006, s 90.

⁶¹ Companies Act 2006, s 102.

⁶² CLRA 2002, s 74; RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767); RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680); Companies Act 2006, s 90(3) (re-registration of private company as public) and s 102(3) (re-registration of private company as unlimited).

⁶³ CLRA 2002, s 74(5).

⁶⁴ CLRA 2002, s 73(2)(b).

⁶⁵ RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767), sch 1, art 4; RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680), sch 1, art 4.

not be possible to amend the articles so that its objects no longer included acquiring and exercising the RTM. To do so would be inconsistent with the model articles.

13.88 However, as we set out in the Consultation Paper, it would be possible to amend the premises specified in the articles without falling into inconsistency with the model articles.⁶⁶ There is no requirement for the premises specified in the articles to match the premises in relation to which the RTM has been acquired. However, a change to the premises specified in the RTM company's articles might arguably have the effect of terminating the RTM because it would no longer be an RTM company in relation to the premises over which the RTM is being exercised.

13.89 Third, a company is not an RTM company in relation to premises if another company is already an RTM company in relation to those premises.⁶⁷ We recommend in Chapter 6 that more than one RTM company should be permitted to exist in relation to each premises, so that RTM companies created by other parties cannot block the formation of legitimate RTM companies by leaseholders.⁶⁸

13.90 Fourth, the 2002 Act provides that a company cannot be an RTM company if it is a commonhold association.⁶⁹ In practice, it would not be possible for an RTM company to become a commonhold association as to do so would necessitate changes to its articles which would be inconsistent with the commonhold model articles of association.⁷⁰

13.91 Finally, a company ceases to be an RTM company if it is an RTM company in relation to the premises (or any premises containing or contained within them) and the freehold of the premises transfers to the RTM company (whether by collective enfranchisement or otherwise).⁷¹

Our proposals

13.92 We provisionally proposed that the Tribunal should have the power to reinstate the RTM if it has terminated because the RTM company has ceased to be an RTM company due to a clerical or administrative error which has not caused loss or prejudice to any party.

13.93 We also provisionally proposed that regulations should set out a non-exhaustive list of the circumstances in which an RTM company ceases to be an RTM company in relation to the premises. We proposed that this should include the following circumstances:

⁶⁶ CP, para 11.36.

⁶⁷ CLRA 2002, s 73(4).

⁶⁸ See above, from para 6.21.

⁶⁹ CLRA 2002, s 73(3).

⁷⁰ The name and articles of a commonhold association are prescribed by the CLRA 2002, sch 11; Commonhold Regulations 2004 (SI 2004 No 1829), r 12 and 14 and sch 2.

⁷¹ CLRA 2002, s 73(5).

- (1) where the freehold of any premises over which the RTM is exercised is transferred to the RTM company;
- (2) where the articles of the RTM company are changed so that they no longer provide that the purpose of the company is to manage the premises in question;
or
- (3) where the RTM company becomes a commonhold association.

Consultees' views

13.94 The vast majority of consultees agreed that the Tribunal should have the power to reinstate the RTM following a clerical or administrative error. For example, Stephen Desmond (Desmond Training Ltd) noted that RTM company directors are often volunteers, with limited company law experience. The Residential Landlords Association agreed with our proposal, but thought that the power to waive errors should be subject to a two-month time frame.

13.95 However, a few consultees expressed confusion about when this power would be exercised, and sought clarification on the meaning of “clerical or administrative error” and “loss or prejudice”. For example, Damian Greenish, a solicitor, asked:

Is it proposed that the Tribunal should have the power to correct the “error” or to say that the RTM company can continue to exercise the RTM notwithstanding the error? What sort of “loss or prejudice” do you have in mind? Would it not be better to review and clarify the circumstances under which an RTM company ceases to be an RTM company?

13.96 Almost all consultees also agreed with our proposal that regulations should set out a non-exhaustive list of circumstances where an RTM company ceases to be an RTM company in respect of the premises. For example, the Property Litigation Association Law Reform Committee said that our proposal “add[ed] clarity without any drawbacks”. Birmingham Law Society added that the regulations should make it clear that the list is non-exhaustive.

13.97 However, a few consultees thought that our proposal was unnecessary. For example, the Residential Landlords Association noted that the 2002 Act already provides for the grounds on which an RTM company ceases to be an RTM company. However, they agreed that the Secretary of State should be empowered to add to the list to address future developments.

13.98 Peel Common Residents Association Limited thought that it would be difficult to create such a list and queried whether it would include mandatory requirements which might cause the RTM to cease even if the RTM company was managing the premises adequately.

13.99 Almost all consultees agreed that the RTM company should cease to be an RTM company in the three circumstances outlined above. Consultees also proposed various additional grounds in which an RTM company should cease to be an RTM company. For example:

- (1) where the RTM company is in default of a statutory duty, breaches lease terms, or undertakes criminal activity;
- (2) where the RTM company has no directors (such as upon the death of a single director), or fails to hold a general meeting;
- (3) where the RTM company is “clearly failing in its duties”, such as accounting, transparency and communications;
- (4) a more general power for the Tribunal to order that the RTM company should cease to be an RTM company.

13.100 Finally, Damian Greenish queried whether the circumstances in the first ground (RTM company acquiring the freehold) or third ground (RTM company being converted into a commonhold association) would ever arise in light of recommendations we had made elsewhere in the Consultation Paper.⁷²

Discussion and recommendations

13.101 We have decided against adopting our proposal that the Tribunal should have the power to reinstate the RTM if it has been terminated following a clerical or administrative error which did not cause loss or prejudice to any other party.

13.102 This proposal was primarily intended to address the situation where an RTM company amends the premises specified in its articles of association without realising that this could have the effect of terminating the RTM in relation to those premises. However, we are sympathetic to the concerns raised by some consultees as to the uncertain scope and effect of the power we had proposed.

13.103 We consider that in relation to changes to the premises specified in the articles, it should be clarified that once the RTM is acquired such changes generally have no effect. This will prevent an RTM company from accidentally terminating the RTM by changing its articles in this way. In addition, it is important that merely changing the premises specified in the articles should not have the effect of terminating the RTM because otherwise the RTM company could terminate the RTM without making an application to the Tribunal. We recommend below that an RTM company ought to have reach an agreement with the landlord or apply to the Tribunal if it no longer wishes to manage the premises.

13.104 However, the RTM company will need to be able to amend the premises specified in the articles where:

- (1) the change is required in order to correct an error in the address or update the address (for example, if the name of the building is changed); or

⁷² See from para 6.11. As discussed in Ch 6, the current law allows leaseholders to use an RTM company as a nominee purchaser in a collective enfranchisement claim. Although we considered a change to this in the Consultation Paper, we do not now make any recommendation for reform in this regard.

- (2) premises are being added to or removed from a multi-building RTM and the change is required so as to include or exclude the relevant premises.⁷³

Recommendation 92.

13.105 We recommend that once the RTM is acquired, an amendment to the premises specified in the articles of association of an RTM company should have no effect other than where:

- (1) the change is required to update or correct an error in the address; or
- (2) premises are being added to or removed from a multi-building RTM and the change is required so as to include or exclude the relevant premises.

13.106 We have concluded that it is unnecessary to introduce a power to make secondary legislation specifying a non-exhaustive list of the circumstances in which an RTM company will cease to be an RTM company in relation to the premises. The 2002 Act already specifies what is, and what is not, an RTM company. It therefore already makes provision as to the circumstances in which an RTM company will cease to be an RTM company. We do not think there are any additional circumstances in which an RTM company should cease to be an RTM company beyond those which are already addressed by the 2002 Act.

NEW GROUNDS FOR TERMINATION

Termination where the RTM company no longer meets the participation requirement

Current law and problems

13.107 As we explained in Chapter 3, when the claim notice is served the number of qualifying tenants who are members of the RTM company must be equal to at least half of all the total number of flats in the premises (the “participation requirement”).⁷⁴ However, this is not an ongoing requirement. The RTM is not terminated if the RTM company’s membership later falls below the participation requirement.

13.108 During the consultation process, some stakeholders argued that the RTM should cease where it is no longer supported by the majority of leaseholders.⁷⁵ However, in the Consultation Paper we pointed out the negative side effects of a continuous membership requirement. We said it would create uncertainty and additional costs, and give landlords an ongoing opportunity to challenge the RTM. We also pointed out that it may not be uncommon for membership to fall below the participation

⁷³ See from para 5.50.

⁷⁴ From para 3.155.

⁷⁵ CP, para 11.69.

requirement for a short period, for example where flats are sold and the new owner has not decided whether to join the RTM company.⁷⁶

Our proposals

13.109 In the Consultation Paper, we concluded that majority membership should not be introduced as an ongoing requirement. However, we provisionally proposed that if the landlord or leaseholders apply to the Tribunal to appoint a manager or have the RTM terminate under Part 2 of the 1987 Act then the Tribunal should take into account whether the participation requirement is still being met, and if it is not then the reasons why.⁷⁷

Consultees' views

13.110 The vast majority of consultees agreed with our provisional proposal. For example, Franciszka Mackiewicz-Lawrence, a leaseholder, noted that a decline in participation by leaseholders in the RTM company was relevant to whether a manager should be appointed because it may indicate a loss of confidence in the management team within the RTM.

13.111 The Property Bar Association queried whether legislative provision was needed to ensure that the Tribunal took this matter into account when deciding whether to appoint a manager. A few consultees suggested that our proposal was preferable to the RTM automatically ceasing if participation fell below the 50% threshold. For example, Peel Common Residents Association Limited thought that the participation requirements were “very important”, but must be sufficiently flexible to cover different types of property.

13.112 A number of those who disagreed did so because, in their view, a failure to meet the participation criteria was not directly relevant to whether a manager should be appointed. The Property Litigation Association Law Reform Committee noted that:

Whether the RTM Co would still satisfy the initial criteria is only a surrogate for various other considerations which are directly relevant. Those considerations might include: whether the RTM Co is being run effectively; whether it represents the interests of the leaseholders as a whole; whether it embodies a sustainable approach to management. In an application to appoint a manager or revert to the landlord, those are examples of the considerations which should be taken into account, and the issue of whether the RTM Co would still satisfy the initial criteria does not add anything concrete to them.

13.113 Similarly, a few consultees commented that membership figures should be relevant to whether a manager is appointed but should not be determinative. For example, the Right to Manage Federation said:

...The Tribunal should be focusing on the management structure in place and whether it is functioning effectively or if there are signs of neglect etc. An RTM with a good managing agent can function well regardless of the number of RTM members.

⁷⁶ CP, para 11.70.

⁷⁷ CP, para 11.73.

But that said we believe low membership of the RTM is a sign that leaseholders are disinterested and it is a factor for a Tribunal to consider.

13.114 Finally, an individual who responded to the leaseholder survey said that the RTM should terminate if it was not operating on a democratic basis.

Discussion and recommendations

13.115 We agree that if membership of an RTM company drops below the participation requirement then this will undermine the democratic legitimacy of the RTM company and could lead to a decline in management standards. However, we remain of the view that this should not automatically terminate the RTM. As we set out above, participation by leaseholders in the RTM company may naturally fluctuate. Alternatively, a small number of leaseholders may be managing the property well, while other leaseholders are content with the management but not sufficiently motivated to join the RTM company. We think it would be unfair and unnecessarily disruptive if the RTM terminated whenever the participation requirement was not met.

13.116 A failure to meet the participation requirements would not automatically result in the Tribunal making an order to appoint a manager. The Tribunal would also need to consider whether it was just and convenient in the circumstances to make an order to that effect. It would consider the reasons why the participation requirement was not currently being met and whether the RTM company was performing its management functions satisfactorily.

13.117 The Tribunal can already take into account a failure to meet the participation requirements when determining whether “other circumstances” exist that make it just and convenient to appoint a manager or terminate the RTM.⁷⁸ However, we think that it is helpful to make provision to ensure that this is one of the circumstances that will prompt the Tribunal to assess whether it is just and convenient in the circumstances for a manager to be appointed or for the RTM to terminate.

Recommendation 93.

13.118 We recommend that, when considering whether to appoint a manager or order that the RTM be terminated under Part 2 of the 1987 Act, the Tribunal should take into account whether the RTM company’s membership has fallen below the original participation requirement.

Termination at request of the RTM company

Current law and problems

13.119 In the Consultation Paper, we explained that there is no mechanism that allows an RTM company to give up the RTM voluntarily. The RTM company cannot force the landlord to agree to take back the management functions, or apply to the Tribunal for the appointment of a manager or to terminate the RTM.

⁷⁸ Landlord and Tenant Act 1987, s 24(2)(b).

13.120 If the RTM company cannot agree with the landlord to terminate the RTM, the options available to the RTM company are:

- (1) if company is solvent, resolving to enter into a members' voluntary liquidation;
- (2) if the company is insolvent, waiting for a creditor to take action against the RTM company;
- (3) taking some action to ensure that the company is struck off the register of companies; or
- (4) leaseholders incurring the costs of an application to the Tribunal for a manager to be appointed on fault-based grounds.

13.121 In the Consultation Paper, we indicated that none of these options promoted the effective transfer of management.⁷⁹ There is a risk that management standards will decline in the period between the RTM company wanting to give up management, and the RTM company actually being able to do so.

Our proposals

13.122 We provisionally proposed that an RTM company, whether solvent or insolvent, should be able to apply to the Tribunal for an order that the RTM should be terminated and that either:

- (1) management functions be transferred back to the person responsible for those functions under the lease (or if that person no longer exists, the landlord),⁸⁰ or
- (2) that a manager be appointed. In this scenario, we provisionally proposed that the RTM company would not be required to make out the fault-based grounds. However, we anticipated that the Tribunal would only exercise its power to appoint a manager if the landlord or third party no longer exists, has carried out management functions poorly, or has clearly expressed a resolve not to manage the building once the RTM ceases.⁸¹

13.123 We also provisionally proposed that the landlord should not be entitled to object to having management functions revert to them, nor to have a manager appointed, other than in exceptional cases.⁸²

Consultees views

13.124 The vast majority of consultees agreed that an RTM company should be able to apply to the Tribunal in the manner set out above. Consultees who agreed with our proposal emphasised that RTM companies should be able to relinquish their

⁷⁹ CP, para 11.64.

⁸⁰ CP, para 11.112.

⁸¹ CP, para 11.116.

⁸² CP, para 11.118.

obligations “fairly”, and that introducing a method to give up the RTM was consistent with the aim of safe and effective management.

13.125 Several consultees expressed qualified agreement with our proposal. For example:

- (1) a few consultees emphasised that the landlord (and other interested parties) should receive sufficient notice of the application, and have the opportunity to participate in proceedings;
- (2) a few consultees argued that the RTM company should consult leaseholders before making such an application. For example, Shula Rich (Brighton Hove and District Leaseholders Association and FPRA) thought that an application should only be made if all the members agree.
- (3) Damian Greenish stated that the Tribunal should have wide powers to make orders, such as providing redress to landlords who are asked to “pick up the pieces and inherit the RTM company’s default”.

13.126 By contrast, the Property Litigation Association Law Reform Committee thought that the RTM company should be able to give up the RTM without involving the Tribunal in uncontroversial cases, for example by executing a deed to that effect, which is communicated to the default managing entity.

13.127 A sizeable majority of consultees thought that the landlord should only be able to object to an RTM company’s application to give up the RTM in exceptional cases.

13.128 It was suggested by some consultees that this should include circumstances where the RTM company has mismanaged the property in some way, such as by failing to perform its obligations under the lease or general law, incurring significant debt or allowing the property to deteriorate significantly. Others thought that that landlords should be able to object where there had been repeated RTM companies, or where the landlord could not carry out the management functions efficiently.

13.129 Consultees were divided on whether the “exceptional circumstances” should be prescribed by legislation. The National Leasehold Campaign thought that these situations should be “clearly defined”. However, a few consultees suggested that it is not necessary to prescribe the exceptional cases, and that it should be left to the Tribunal to decide in each case.

13.130 Some consultees who disagreed with our proposal told us that the landlord should never be able to object to the RTM company’s proposal to relinquish the RTM. The Property Litigation Association Law Reform Committee pointed to our provisional proposal that landlords should have the power to seek the appointment of a manager after the RTM ceases.⁸³

13.131 We asked consultees whether there would be a time or financial saving if RTM companies could apply to give up the RTM, and how often they thought that RTM

⁸³ See from para 13.178 below.

companies would utilise this option. Just over half of consultees thought that there would be a time or financial saving. The Property Bar Association commented:

Whilst it is probably unlikely to be used all that often, we do consider there could be significant financial savings in some instances, for instance where a failing RTM is managing ineffectively with a consequent impact upon market values of units, or where a lack of resources is leading to more expensive repairs.

13.132 By contrast, some consultees thought that our proposal would not result in any savings.

13.133 Consultees were divided on how often RTM companies would utilise the option to give up the RTM. Several consultees suggested that it would be used infrequently. However, it was said that even if the right was used rarely it would be beneficial to have in place. The Right to Manage Federation commented that this would only be used where the RTM could not be terminated by agreement.

13.134 The Association of Residential Managing Agents (“ARMA”) thought that take up of this option would be “medium to high”, and provide a useful solution in cases where leaseholders “see the RTM as a quick means to an end, without adequate forethought or consideration to the longer-term management prospects”.

Discussion and recommendations

13.135 We think that there is a clear need for a mechanism that allows the RTM company to give up the RTM if it no longer wishes to continue managing the property. We do not think it is in any party’s interests for an RTM company to continue to be responsible for a managing the property if it no longer wishes to do so. It is already possible under the current law for landlords and leaseholders to apply to the Tribunal for a manager to be appointed or for the RTM to otherwise terminate in circumstances where the RTM company no longer wishes to manage the property.⁸⁴ We think that the RTM company should likewise be able to make this application, rather than relying on the landlord or leaseholders to do so.

13.136 We have considered whether the Tribunal needs to be involved in every case where the RTM company wants to give up the RTM. We note that it is already open to the RTM company and landlord to agree to terminate the RTM without involving the Tribunal.⁸⁵ We think that the RTM company is only likely to apply to the Tribunal to give up the RTM in more difficult situations where the landlord does not agree, or because the landlord is missing or cannot be identified. We think that the Tribunal ought to be involved in the absence of agreement between the parties so that it can determine the terms on which the RTM is to be terminated.

13.137 We consider that if the RTM company applies to the Tribunal to give up the RTM then the Tribunal should have discretion as to whether it makes an order terminating the RTM and on what terms. This is consistent with the position where the landlord or

⁸⁴ Landlord and Tenant Act 1987, s 24, as modified by the CLRA 2002, sch 7, para 8(6).

⁸⁵ CLRA 2002, s 105(2).

leaseholder make an application⁸⁶ for an order appointing a manager or terminating the RTM on the grounds that the RTM company no longer wishes to exercise the RTM. If the application is made out, the Tribunal has broad discretion as to whether to make an order.⁸⁷ We would however envisage that in the vast majority of cases the Tribunal would order that the RTM should be terminated following such an application and that it would only be in exceptional circumstances that an application would be refused.

13.138 In the Consultation Paper we suggested that the management functions would revert to the landlord other than in exceptional cases. However, on reflection we think that the Tribunal should have discretion as to who should become responsible for the management functions on termination of the RTM. The Tribunal might order that management functions should revert back to the person responsible under the lease (or if that person no longer exists, the landlord) or that a manager should be appointed. This is consistent with the discretion given to the Tribunal when an application is made by the landlords or leaseholders under Part 2 of the 1987 Act on the ground that the RTM company no longer wishes to exercise the RTM.⁸⁸ We have concluded that the Tribunal should not have a narrower discretion merely because the application is being made by the RTM company rather than the landlord or leaseholders.

13.139 We acknowledge the concerns raised by some consultees that landlords ought to be given sufficient notice if they are to be expected to take back responsibility for managing the premises. We consider that this is addressed by giving the Tribunal broad discretion to decide when and on what terms management functions are to be exercised by the person who is being assigned those functions. This is again consistent with the broad discretion given to the Tribunal when an application is made by the landlords or leaseholders under Part 2 of the 1987 Act, and the Tribunal is satisfied that the RTM company no longer wishes to exercise the RTM. In particular, the Tribunal may grant the order on such conditions as it thinks fit, and may make provision as to such related, incidental or ancillary matters as it thinks fit.⁸⁹

13.140 Finally, we consider that this new right to apply to the Tribunal should include a right for leaseholders to apply to terminate the RTM in relation to a particular building or buildings. This might occur where the leaseholders in a particular building want to leave the RTM and revert to landlord management rather than claim the RTM themselves.

13.141 It might also be appropriate for the RTM company to ask to remove one block where, for example, there are no qualifying tenants from the relevant building participating in the RTM company or assisting with management, and that building presents particular problems for management. In such a case, it does not seem right that the RTM company (effectively leaseholders in another block) should be forced to continue to manage it. Allowing the RTM company to apply to remove that building from the RTM

⁸⁶ Under the Landlord and Tenant Act 1987, s 24, as modified by the CLRA 2002, sch 7, para 8(6).

⁸⁷ Landlord and Tenant Act 1987, s 24(1).

⁸⁸ Landlord and Tenant Act 1987, s 24, as modified by the CLRA 2002, sch 7, para 8(7).

⁸⁹ Landlord and Tenant Act 1987, s 24(4) to (6).

is likely to be preferable to, and more efficient than, the RTM company terminating the whole RTM and starting a fresh claim excluding that building.

13.142 In such a case, we think that the Tribunal could take into account the number of qualifying tenants from the relevant buildings who are members of the RTM company and who are actively participating in it, and the views of the leaseholders in that building.

Recommendation 94.

13.143 We recommend that the RTM company should be able to apply to the Tribunal if it wishes to give up the RTM, including in relation to a particular building(s).

13.144 In determining such an application, the Tribunal should have discretion as to:

- (1) whether the RTM should terminate; and
- (2) if it should, whether management functions should transfer to either:
 - (a) the person responsible for those functions under the lease (or if that person no longer exists, the landlord); or
 - (b) a manager appointed by the Tribunal.

13.145 In the Consultation Paper, we provisionally proposed that the landlord should only be able to object to the RTM company's application to appoint a manager in exceptional circumstances. As set out above, we have concluded that the Tribunal should have discretion as to whether to make an order terminating the RTM. This is consistent with the discretion given to the Tribunal when an application is made by the landlord or leaseholders under Part 2 of the 1987 Act on the grounds that the RTM company wishes to give up the RTM. We envisage that the Tribunal would only refuse to terminate the RTM in exceptional circumstances. We recommend that landlords ought to be able to participate in those proceedings and make submissions as to whether the RTM ought to terminate and on what terms.

Recommendation 95.

13.146 We recommend that landlords should be able to participate in proceedings to determine an application brought by an RTM company wishing to give up the RTM.

Termination where the premises become a commonhold

13.147 As explained in the Commonhold Report, commonhold is a scheme which enables the freehold ownership of flats. There is a specific management structure which is prescribed by the commonhold legislation. In particular, each flat in the building must be owned on a freehold basis by a commonhold "unit owner" and these unit owners will be members of a "commonhold association" which owns and manages the

common parts. Unit owners will be able to vote in decisions about the management of the common parts through their membership of the commonhold association. Leaseholders who satisfy certain qualifying criteria⁹⁰ will be able to convert to commonhold and replace their existing leasehold structure with the commonhold management structure.

13.148 As we discuss in Chapter 6, it will be possible for an RTM company to continue in existence and continue managing premises which are subject to a collective freehold acquisition (“CFA”).⁹¹ Although it will depend on the circumstances, the two are not necessarily incompatible because a CFA is about ownership rather than management, and premises which have been subject to a CFA are still leasehold premises. The CFA legislation does not prescribe who must manage the premises or how the premises must be managed.

13.149 In contrast, where leaseholders convert to commonhold, enabling the RTM to continue would be inconsistent with, and undermine, the bespoke commonhold management structure which has been prescribed by the commonhold legislation.

13.150 Although we did not consider this in the RTM Consultation Paper, we think it is the inevitable consequence conversion to commonhold that the RTM must terminate. We therefore recommend that conversion to commonhold should bring the RTM to an end.

Recommendation 96.

13.151 We recommend that the RTM should terminate upon the conversion of the premises to commonhold.

RESPONSIBILITY FOR MANAGING THE PREMISES WHEN THE RTM TERMINATES

Who should become responsible for the management functions?

Current law and problems

13.152 Until the RTM is acquired, management functions in relation to the premises are exercised under and in accordance with any leases of those premises. Leases may provide for the landlord or a management company to exercise those functions.

13.153 As set out in Chapter 10, when the RTM is acquired management functions under any leases of the premises are instead exercised by the RTM company. They continue to be exercised by the RTM company until such time as the RTM terminates.⁹²

⁹⁰ See Commonhold Report, Ch 4.

⁹¹ See from para 6.16.

⁹² CLRA 2002, s 95. See Ch 10 and 11 generally.

13.154 When the RTM terminates, management functions once again fall to be exercised by the person responsible for performing those functions under the lease.⁹³ However, it is unclear what would happen if the person responsible for performing those functions under the lease is a third party which no longer exists. In this situation, the leaseholders would have to either apply to the Tribunal for the appointment of a manager under Part 2 of the 1987 Act, apply to vary their lease under Part 4 of the 1987 Act, or acquire the RTM again.⁹⁴

Our proposals

13.155 In the Consultation Paper, we said that there needed to be clarity as to who becomes responsible for managing the premises when the RTM terminates so that there is a smooth handover of management functions.⁹⁵

13.156 We provisionally proposed that on termination of the RTM, the management functions of the RTM company should revert to the party responsible for those functions under the lease. However, we proposed that the landlord should exercise the management functions if they would otherwise revert to a management company who no longer exists.⁹⁶

13.157 In addition, we proposed that management functions should not automatically transfer to the person responsible under the lease where the Tribunal has made an alternative determination or order, or the issue has otherwise been agreed between the RTM company and landlord.⁹⁷

Consultees' views

13.158 The vast majority of consultees agreed with our proposal that management functions should generally revert to the person responsible under the lease (or if that person no longer exists, the landlord). The Residential Landlords Association stated that it was desirable for management functions to resume quickly and seamlessly after the RTM is terminated.

13.159 A number of consultees said it would be important for the landlord to be notified in advance if management functions are to revert back to them. The Compton Group, a landlord, said it was vital that landlords be notified that they are “back on the hook” for insuring the premises, and suggested that landlords should be given adequate notice before taking back management functions.

⁹³ Unless termination arises as a consequence of a manager being appointed under Pt 2 of the 1987 Act, in which case the management functions will be exercised by that manager in accordance with the Tribunal's order. See from para 13.43 above.

⁹⁴ This would however be subject to the minimum period which must elapse before a successive RTM claim can be made which can only be disapplied by obtaining an order from the Tribunal. We discuss this below from para 13.217 onwards.

⁹⁵ CP, para 11.81.

⁹⁶ CP, para 11.83.

⁹⁷ CP, para 11.84.

13.160 A few consultees noted that similar handover issues arise when management functions revert to the landlord as arise when the RTM company acquires the RTM. For example, the Berkeley Group Holdings plc suggested that landlords who take over management functions after the RTM ceases should have:

- (1) the same “information rights” as an RTM company;⁹⁸
- (2) scope to apply to the Tribunal in relation to existing management contracts, service charge monies, and arrear; and
- (3) a statutory right to recover the cost of investigating and resuming the management functions via the service charge.

13.161 Some consultees were concerned that our proposal would require landlords to deal with the consequences of poor management by the RTM company. For example, LifeCare Residences Limited, a retirement housing provider, noted that it may be expensive for the landlord to rectify problems caused by the RTM company failing to maintain the premises, and that there might be increased risks for the landlord under health and safety legislation. Notting Hill Genesis suggested that landlords should not be held accountable for incomplete or incorrect works undertaken by the RTM company.

13.162 Those consultees who disagreed with this proposal argued that it was undesirable for management functions to revert to the landlord, particularly if the leaseholders originally acquired the RTM because the landlord was not managing the premises satisfactorily. One leaseholder suggested that the Tribunal should have the power to appoint a new manager to take over the management functions.

13.163 Almost all consultees agreed with our proposal that that management functions should not automatically revert to the landlord where the Tribunal has made an alternative determination or order, or where the issue has been otherwise agreed between the RTM company and every landlord.

13.164 Consultees provided very few substantive comments on this proposal. However, Damian Greenish suggested that any person who might be required to resume management functions under an agreement or following a Tribunal determination should be a party to the agreement, or have the right to apply to be heard in the relevant Tribunal proceedings.

13.165 Church & Co Chartered Accountants were opposed to the provisional proposal on the basis that it was not practicable. They queried how a “defunct” RTM company would be able to enter into an agreement with the landlord, and queried how this would work in relation to multiple landlords.

Discussion and recommendations

13.166 We remain of the view that management functions should generally revert to the person responsible for exercising those functions under any leases of the premises. When the RTM comes to an end, the leases remain in place as they were before.

⁹⁸ See our recommendations in Ch 9.

Before the RTM is acquired that person would be obliged to carry out the management functions and so it makes sense that they should resume management of the premises when the RTM terminates. Otherwise it would be unclear on what basis the management functions were now being performed.

13.167 We recommend that this should apply when the RTM terminates in the following circumstances:

- (1) the RTM company and each person who is a landlord of the premises agree to terminate the RTM;⁹⁹
- (2) the RTM company becomes insolvent, or voluntarily winds itself up;¹⁰⁰
- (3) a manager or receiver is appointed over the RTM company;¹⁰¹
- (4) the RTM company is struck off the register of companies;¹⁰² or
- (5) the RTM company ceases to be an RTM company in respect of the premises.¹⁰³

13.168 We acknowledge the concerns raised by leaseholders that this could result in management functions being restored to a landlord who had previously mismanaged the premises. However, as the RTM is a no-fault right, the landlord will not necessarily have been at fault when the leaseholders acquired the RTM. Furthermore, it would be open to the leaseholders to apply the Tribunal under Part 2 of the 1987 Act for the appointment of a manager on the basis that one of the fault-based grounds are met.

13.169 While ideally the landlord or other person responsible for the management functions under the lease would be given notice of the RTM terminating and any handover issues would be dealt with in orderly way, it may not always be possible in practice. For example, if the RTM company becomes insolvent there may be a limit to how much notice can be given to the person who will resume management of the premises. We have proposed below that landlords should be given a limited period to apply to the Tribunal for the appointment of a manager. This would happen in circumstances where the RTM has reverted back to them but it is just and convenient for a manager to be appointed to exercise the management functions for a limited period instead.

13.170 It is possible that in some situations, landlords may have to resume management of premises that have been mismanaged by RTM companies. This would make the landlord responsible for remedying any defects, such as undertaking neglected repairs. However, it would be open to landlords to recover their costs of doing so through service charge contributions, if the lease permits. It is also open to landlords to apply to appoint a manager or have the RTM terminate under Part 2 of the 1987 Act

⁹⁹ CLRA 2002, s 105(2).

¹⁰⁰ CLRA 2002, s 105(3)(a) and (c).

¹⁰¹ CLRA 2002, s 105(3)(b).

¹⁰² CLRA 2002, s 105(3)(d).

¹⁰³ CLRA 2002, s 105(5).

while the RTM is being exercised to address any mismanagement by the RTM company at an early stage.

13.171 Finally, we remain of the view that provision ought to be made to address the uncertainty which may currently arise when there is a third party responsible for performing the management functions under the lease who no longer exists. This might happen where a management company has responsibility for management of the property under the lease but is then wound up following the acquisition of the RTM. In these circumstances we think that management functions should instead revert to the landlord.

Recommendation 97.

13.172 We recommend that management functions should revert to whoever is responsible for exercising those functions under any leases of the premises when the RTM terminates in the following circumstances:

- (1) the RTM company and each person who is a landlord of the premises have agreed to terminate the RTM;
- (2) the RTM company has become insolvent, or voluntarily wound itself up;
- (3) a manager or receiver has been appointed over the RTM company;
- (4) the RTM company has been struck off the register of companies; or
- (5) the RTM company has ceased to be an RTM company in respect of the premises.

13.173 Management functions should instead transfer to the landlord if the party responsible for performing those functions under a lease of the premises no longer exists.

13.174 We consider that the position should be different where the RTM has terminated following an application to the Tribunal. This could happen where a landlord or leaseholder apply to the Tribunal under Part 2 of the 1987 Act to appoint a manager or otherwise terminate the RTM,¹⁰⁴ or where the RTM company applies to give up the RTM under our recommendation above.¹⁰⁵ We consider that when the RTM terminates in these circumstances the Tribunal should decide whether management functions should transfer to a Tribunal-appointed manager, or revert to the person responsible for performing them under the lease (or if that person no longer exists, the landlord).

¹⁰⁴ See from para 13.178.

¹⁰⁵ See from para 13.135.

13.175 In the Consultation Paper, we also proposed that the position might be different where there is an agreement between the RTM company and any landlords of the premises to terminate the RTM.¹⁰⁶ We said the agreement might assign the management functions to someone other than the person responsible for managing the property under any lease of the premises.

13.176 However, as we explain above, we have concluded that an agreement to terminate the RTM should have effect to determine who is responsible for taking over the management functions in limited circumstances. Specifically, we explain that it would need to vary the leases of the premises under which the relevant management functions are exercised. To vary the leases of the premises would likely necessitate leaseholders being a party to the agreement. We do not think the RTM company should somehow be able to act on behalf of leaseholders to permanently alter their rights and obligations under the leases of the premises.

Recommendation 98.

13.177 We recommend that if the RTM has terminated following an application to the Tribunal then the Tribunal should determine whether the management functions should transfer to either:

- (1) a manager appointed by the Tribunal, or
- (2) the person responsible for performing those functions under the lease (or if that person no longer exists, the landlord).

Landlord application to appoint a manager after taking back management functions

Current law and problems

13.178 Above, we recommend that when the RTM terminates, in most cases management functions should automatically revert to the person responsible for performing those functions under the lease (or if that person no longer exists, the landlord).¹⁰⁷ However, the person taking over management of the premises may be in a difficult position if they are given limited notice of the termination of the RTM and have limited resources to carry out the management functions immediately.

Our proposals

13.179 We provisionally proposed that the landlord (or other person responsible for the management functions under the lease) should be able to apply to the Tribunal to appoint a manager after the RTM has terminated.¹⁰⁸ We said that the person making

¹⁰⁶ CP, paras 11.81 to 11.84.

¹⁰⁷ See from para 13.152.

¹⁰⁸ CP, para 11.126.

the application would need to demonstrate that a manager would be better placed than them to manage the building.¹⁰⁹

13.180 We proposed that the application to appoint a manager in these circumstances should have to be made within 30 days of the RTM ending.

Consultees' views

13.181 The vast majority of consultees agreed that the landlord should be able to apply to appoint a manager in this scenario. It was commented that this was a sensible option in situations “where the landlord feels this is the best of way of ensuring management functions are delivered”.

13.182 A few consultees who agreed with our proposal pointed out that it was necessary to decide who would be responsible for exercising management functions during the interim period before the Tribunal has determined the application. ARMA and the Residential Landlords Association both thought that landlords should be obliged to carry out management functions during this period.

13.183 However, some consultees thought that leaseholders (and not the landlord) should be able to apply to the Tribunal to prevent management functions reverting back to the landlord (or other person) under the lease. An individual thought that it should be mandatory for a manager to be appointed by the Tribunal in all cases.

13.184 The vast majority of consultees agreed that the application to appoint a manager should be made within 30 days of the RTM ending. However, a few of these consultees made their agreement conditional upon the landlord being formally notified that the RTM had ended. Alternatively, the Law Society suggested that if the landlord was not aware of the RTM ending, they should be able to apply for an extension of time within the 30-day period.

13.185 A few consultees who disagreed with this proposal raised concerns about imposing a time limit on the landlord’s application. For example, the Property Litigation Association Law Reform Committee said that:

It may preclude the appointment of a manager in unusual but deserving cases – it might mean a substantial injustice to the landlord lasting over many years simply because of an oversight or poor decision within the first 30 day period.

13.186 A few consultees appeared to support a fixed time limit, but thought that 30 days was too short. Various consultees preferred periods of 45 days, 60 days, or 30 days with the option to apply to the Tribunal for an extension.

Discussion and recommendations

13.187 We remain of the view that landlords and management companies should have a limited period to apply for the appointment of a manager after the RTM has terminated. There may be situations where the person taking back the management functions is unable to exercise those functions satisfactorily. In those circumstances it

¹⁰⁹ CP, para 11.122.

may be in all parties' interests for a manager to be appointed to ensure the premises are managed effectively once the RTM has terminated.

13.188 Following such an application, it would be for the Tribunal to determine whether it was just and convenient to appoint a manager in the circumstances. We would not expect a manager to be appointed in cases where the landlord was capable of managing the premises themselves. As under Part 2 of the 1987 Act, we envisage that the Tribunal would be given broad discretion as to the terms on which such an order is made.¹¹⁰ For example, the Tribunal might appoint a manager for a limited period with a view to the landlord resuming management of the property once it had been given time to prepare.

13.189 In the period between the RTM terminating and a manager being appointed, management functions would be exercised by the person responsible under the lease (or if that person no longer exists, the landlord). We envisage that the Tribunal would have the power to address related, incidental and ancillary matters when appointing a manager, such as how any causes of action arising during the interim period are to be addressed.¹¹¹

13.190 We remain of the view that there ought to be a time-limit imposed on landlords wishing to make an application to appoint a manager after the RTM has terminated. We envisage that this mechanism should only be used to address issues which arise in the short-term as a consequence of landlords and management companies having to resume management of the premises at short notice on termination of the RTM.

13.191 We do not think that landlords should have an indefinite right to apply to the Tribunal to be relieved of management functions that they would otherwise be obliged to perform under the lease. We think that a time limit is necessary to reduce uncertainty about who is responsible for exercising the management functions, and to minimise disruption to residents that might be caused by management functions continually changing hands.

13.192 However, we do acknowledge the concerns raised by some consultees that there is a risk that landlords or management companies may be unaware of the RTM terminating, causing them to miss the deadline for applying to the Tribunal to have a manager appointed. This is more likely to occur in scenarios where the RTM automatically terminates by operation of law, such as where the RTM is struck off the register of companies, or becomes insolvent.

13.193 To address those concerns, we have decided to extend the period for applying to appoint a manager from 30 to 90 days, to mitigate the risk of landlords or management companies missing the deadline in circumstances where they are initially unaware that they have become responsible for managing the property. While there will always be a chance that landlords will not discover that the RTM has been

¹¹⁰ Landlord and Tenant Act 1987, s 24.

¹¹¹ We envisage that this would be similar to the powers given to the Tribunal under s 24(4) of Landlord and Tenant Act 1987.

terminated until after the 90-day period has expired, landlords can monitor the RTM company for events such as striking off or liquidation to reduce this possibility.

Recommendation 99.

13.194 We recommend that:

- (1) once the RTM has terminated the person who has taken over the management functions should have a limited period to apply for the appointment of a manager to exercise those functions; and
- (2) an application to appoint a manager in these circumstances should have to be made within 90 days of the RTM ending.

TREATMENT OF SERVICE CHARGES WHEN THE RTM TERMINATES

Service charges held by the RTM company

Current law and problems

13.195 As set out in Chapter 10, service charges are charges payable by a leaseholder to a landlord or management company in respect of the costs of managing the property. The landlord or other relevant person automatically holds such service charges on trust.¹¹²

13.196 When the RTM is acquired, the 2002 Act requires the landlord or other relevant person to transfer the accrued uncommitted service charges to the RTM company.¹¹³ These are any service charges which are held by the landlord or other relevant person after they have deducted their costs of managing the premises. The RTM company holds on trust any accrued uncommitted service charges which are transferred to them by the landlord or other relevant person, and any service charges which are paid to them by leaseholders or landlords after the RTM is acquired.¹¹⁴

13.197 When the RTM terminates, the 2002 Act imposes no equivalent obligation on RTM companies to transfer accrued uncommitted service charges to the person taking over the management of the premises.¹¹⁵ If the RTM terminates following the appointment of a manager by the Tribunal under Part 2 of the 1987 Act, then the Tribunal's order is likely to address what should happen to any accrued uncommitted service charges. When the RTM terminates in other situations it is unclear what is to happen to any accrued uncommitted service charges.

¹¹² Landlord and Tenant Act 1987, s 42.

¹¹³ CLRA 2002, s 94.

¹¹⁴ Landlord and Tenant Act 1987, s 42, as modified by CLRA 2002, sch 7, para 11.

¹¹⁵ CP, para 11.128.

Our proposals

13.198 We provisionally proposed that solvent RTM companies should be required to transfer any accrued uncommitted service charges to the person who is resuming management of the premises. We said that the funds should continue to be held on trust by that person.¹¹⁶

Consultees' views

13.199 Almost all consultees agreed with our provisional proposal.

13.200 A number of consultees agreed with our proposal subject to the introduction of certain safeguards. For example, a few consultees emphasised that the replacement party should also be under an obligation to hold the funds on trust, and that the uncommitted funds should only be used for their original purpose. McCarthy & Stone, a developer, added that the funds should be "transferred over but remain in the usual statutory trust bank account".

13.201 Damian Greenish agreed with our proposal, but queried why this would only apply where the RTM company was solvent.

13.202 In relation to the timing of the payment, McCarthy & Stone said that the RTM company should be under an obligation to transfer 50% of the estimated uncommitted service charges by the termination date, with the remainder payable within six months of the termination date. This reflects what we proposed should happen in relation to accrued uncommitted service charges when the RTM is acquired, although we have departed from those proposals when making our final recommendations.¹¹⁷

Discussion and recommendations

13.203 We remain of the view that clarification is needed to ensure that when the RTM terminates any service charges which are held by the RTM company are transferred to the person responsible for exercising the management functions under the lease. We agree that those service charges should continue to be held on trust alongside any service charges which are subsequently paid by leaseholders to the person taking over the management of the premises (as is required by statute).¹¹⁸

13.204 We think that our recommendation should apply in all cases where the RTM terminates other than by order of the Tribunal, although we would anticipate that the Tribunal might make an order similar to the process we envisage.

13.205 In cases where the RTM has terminated because the RTM company is insolvent, the service charge monies will be ringfenced as they remain subject to the statutory trust. Once the liabilities of the RTM company to creditors payable from the service charge fund have been discharged, the administrator or liquidator would then transfer the any

¹¹⁶ CP, para 11.130.

¹¹⁷ CP, para 8.114. See the discussion of our recommendations as to uncommitted service charges from para 10.155.

¹¹⁸ Landlord and Tenant Act 1987, s 42.

remaining service charge monies to the person taking over the management functions, who becomes the new trustee.¹¹⁹

13.206 We discuss further below exactly what should transfer to the landlord or other person taking over the management functions and when that transfer should have effect.

Service charges owed to the RTM company

Current law and problems

13.207 As set out in Chapter 10, when the RTM is acquired the RTM company is only entitled to receive what is "held by" the landlord on the acquisition date.¹²⁰ The RTM company is not entitled to receive service charges which are owed to the landlord. There is no requirement for the landlord to take steps to recover these arrears once the RTM is acquired, and the RTM company has no right to pursue them.

13.208 A parallel issue arises when the RTM terminates. There would be no ability for the landlord to recover arrears which were owed to RTM company before termination of the RTM nor is there likely to be much incentive for the RTM company to recover the arrears. This could mean leaseholders in service charge arrears unfairly benefiting from the termination of the RTM compared with those who have met their service charge obligations.

Our proposals

13.209 We provisionally proposed that there should be a statutory assignment from the RTM company to the new manager of the right to collect service charge debts. We suggested that this would apply to funds that were properly due to the RTM company before ceasing to exercise the RTM.

Consultees views

13.210 Consultees generally agreed with our provisional proposal. Millstream Management Services, a specialised managing agent, noted that because they supported uncommitted service charges being paid over, they also supported the statutory assignment of the right to pursue outstanding service charge payments.

13.211 Birmingham Law Society stated that our proposal was sensible, because the new manager would otherwise face the task of having to prove the debt from scratch. By contrast, the Property Bar Association noted that it may be difficult for the new manager to recover the debts as leaseholders would retain a right to defend the claims as against the RTM company.

Discussion and recommendations

13.212 We agree that it may be very difficult for the landlord to take over the right to pursue service charge arrears, particularly where the RTM company has not kept adequate records. We do not therefore consider that this is the best way forward. In Chapter 10, we recommended a different approach to address the issues on delays and unpaid

¹¹⁹ See *Lewin on Trusts* (20th ed 2020) from para 27-018.

¹²⁰ CLRA Act 2002, s 94(1). See from para 10.155.

service charges, both from the perspective of the RTM company and of individual leaseholders who have paid their service charges on time.¹²¹ We recommend the same approach here.

13.213 This means that the RTM company will immediately transfer to the landlord or other party any uncommitted service charges,¹²² retaining an estimated amount to cover any forthcoming expenditure to which the RTM company is already committed. Once this has been paid, there would then be a reconciliation exercise, as described in Chapter 10.

13.214 We recognise that this more complex accounting exercise may not always be possible at this point, depending on why the RTM has terminated and whether the RTM company still exists as a legal entity at that time. It may be that in practice something cruder happens, as will happen at the moment. However, we still think it is worth recommending this process as the fairest approach.

Recommendation 100.

13.215 We recommend that when the RTM terminates, that the RTM company should be required to transfer any uncommitted service charges to the party taking over the management functions, immediately upon termination.

CLAIMING THE RTM AFTER IT HAS TERMINATED

Current law and problems

13.216 Where the RTM has ceased to be exercisable by the RTM company, there can be no further RTM claim over the premises for a period of four years.¹²³ We refer to this as the “four-year restriction”. An RTM company can apply to the Tribunal to have the four-year restriction disapplied on the grounds that it is unreasonable for it to apply in the circumstances.¹²⁴

13.217 The four-year restriction prevents leaseholders from claiming the RTM soon after it has come to an end. It addresses the inconvenience and expense which might result for landlords in having to repeatedly take back management functions, or apply to the Tribunal to have a manager appointed.

13.218 However, in the Consultation Paper we said that four years may be too long a period to have to wait to bring a further RTM claim after a previous RTM has terminated.¹²⁵ The failure of the RTM when it was exercised by one RTM company does not necessarily mean that it will fail the next time, particularly where a different group of

¹²¹ See para 10.187 onwards.

¹²² We explain “uncommitted service charges” above, in para 10.190.

¹²³ CLRA 2002, sch 6, para 5(1)(b).

¹²⁴ CLRA 2002, sch 6, para 5(3).

¹²⁵ CP, para 11.80.

leaseholders propose to become directors and take responsibility for the day-to-day running of the company. We said that it may be place an unfair burden on leaseholders to have to apply for Tribunal for the four-year ban to be disapplied.

Our proposals

13.219 In the Consultation Paper, we supported the retention of a restriction on leaseholders' ability to make a new RTM claim immediately after an RTM has failed. However, we were not convinced that the length of the current restriction on successive RTM claims was justified and proposed that the four-year restriction should be reduced.¹²⁶ We asked consultees what period of time they considered appropriate for it to be reduced to and why.¹²⁷

13.220 We also asked consultees if they had experience of cases where the Tribunal had disapplied the four-year ban, and if so, whether there had been any negative impact on the parties.

Consultees' views

Should the four-year ban on successive RTM claims be reduced?

13.221 A sizeable majority of consultees agreed with our provisional proposal that the existing four-year restriction on successive RTM companies should be reduced.

13.222 The Residential Landlords Association agreed with our provisional proposal:

...We believe that a time should be upheld to prevent leaseholders from overspending on services or to obtain unsustainable credit that they cannot obligate in payment. However, under its current form, we feel that the four-year period is over zealous and incurs further costs and time delays on leaseholders who may be ready to reregister RTM companies back into existence.

13.223 Birmingham Law Society said:

The four-year period is arbitrary and to some extent is not a period that is known to the law. It tends to lead away from the ethos of the RTM process...

13.224 Some consultees agreed but commented that safeguards needed to be in place to ensure that any successor RTM company properly discharged its management functions.

13.225 Consultees who disagreed with our proposal commented that the length of the restrictive period was the minimum necessary to protect landlords from the time, cost and inconvenience taking back management functions. The Property Litigation Association Law Reform Committee thought that the current period struck an appropriate balance between the interests of landlords and leaseholders:

¹²⁶ CP, para 11.142.

¹²⁷ CP, para 11.143.

This period was originally reached as a compromise position to balance the interests of landlords and leaseholders, and to reflect an appropriate timeframe for leaseholder turnover. Those matters have not changed.

13.226 Some consultees pointed out that there was already scope for the four-year restriction to be disapplied if the Tribunal considers that it would be unreasonable for it to apply in the circumstances of the case.

[If the four-year ban should be reduced, what should it be reduced to?](#)

13.227 There were a range of views from consultees on what period, if any, should apply.

13.228 Some consultees suggested that there should be no restriction at all. Some individuals commented that the restrictive period should be very short, for example, one month. It was pointed out that in practice acquisition of the RTM is not a straightforward or quick process and so not one that leaseholders are likely to enter lightly.

13.229 There were other consultees who suggested that a 12-month period would be appropriate. An individual argued that that this would be consistent with the minimum period which leaseholders must wait if they have specified premises in an initial notice and that notice is withdrawn or deemed to have been withdrawn.

13.230 A number of consultees suggested that a two-year period would be appropriate. For example, the Property Bar Association said:

...4 years is too long. 12 months is not long enough to allow a new management regime to 'bed in' and establish itself, nor is it long enough to incentivise people to avoid changing management too often.

13.231 A number of consultees suggested that the current four-year period should be retained. An individual supported the current four-year period "...to avoid turf wars between different groups of stakeholders, and a cooling off period of four years would prevent this". Finally, Cadogan Group Limited suggested that the restrictive period should be made longer, commenting that lack of enthusiasm and the difficulties of achieving good management are the likely reasons for an RTM to fail.

[Consultee experiences of cases where the Tribunal has disapplied the four-year ban](#)

13.232 We asked whether consultees had any experience of cases where the Tribunal has disapplied the four-year ban, and if so, whether there had been any negative impact on any of the parties. No consultees reported having experienced a case where the Tribunal had disapplied the four-year ban. We did not receive any relevant substantive comments in response to this question.

Discussion and recommendations

[Should the four-year restriction on successive RTM companies be reduced?](#)

13.233 There were very few consultees who thought that there should be no restriction at all on the ability to have successive RTM claims in relation to a building. We consider that a restriction of some kind is necessary to protect landlords and leaseholders from the potential inconvenience and disruption that might result from the RTM being repeatedly terminated and then reacquired. However, we think a reduced period

would be strike a better balance between making the RTM more accessible while providing safeguards for landlords and leaseholders living in the property.

13.234 It was suggested by some consultees that in addition to, or instead of, reducing the length of the four-year restriction period, safeguards ought to be put in place to prevent systematic and recurring failures of the RTM. Although we hope that our work, including the director training, will mean that the RTM is generally successful and enduring, there may be different reasons for the RTM terminating. These could range from the RTM company becoming insolvent, to directors selling their properties and none of the remaining leaseholders wishing to take over. It is still therefore relevant to consider what should happen after the RTM has failed or been terminated.

13.235 Some consultees thought that the current minimum period was sufficient and pointed to the Tribunal's discretion to disapply it. The latter does provide some existing flexibility for leaseholders to claim the RTM before the four-year restriction expires. However, as we pointed out in the Consultation Paper, there is time and cost involved in making an application to the Tribunal, and we consider that a reduced period would generally strike a more appropriate balance.

What should the minimum period be reduced to?

13.236 There were a range of comments on what the four-year restriction should be reduced to, but the suggestions which received most support were for it to be reduced to either 12 months or two years. The reasons given for supporting either 12 months or two years were essentially based on the length of time which consultees considered struck the more appropriate balance between making it easier to claim the RTM, while mitigating the risk of disruption to landlords and leaseholders.

13.237 On balance, we consider that the minimum period should be reduced to two years. We think that a period of two years strikes the right balance in improving the accessibility of the RTM, while also mitigating the risk of disruption resulting from having successive RTM companies in relation to the same premises. Leaseholders would continue to have the option of applying to the Tribunal for the two-year restriction to be disapplied on the ground that it was not reasonable for it to apply in the circumstances.

13.238 We do not think that this two-year rule should apply where the RTM has been terminated in respect of a single building, and the proposal is for that building to be included in a new multi-building claim within the following two years. It may be better both for the management of that building, and for the management of the collection of buildings proposed to be part of the multi-building RTM claim, that the building is included.

What form should the restriction take?

13.239 As discussed above, the current law is formulated as a ban on successive RTM claims within a four-year period, which the Tribunal can disapply. Having regard to the recommendations we make in the Enfranchisement Report in the context of successive collective freehold acquisition claims, we now recommend that the restriction should be formulated as a defence to an RTM claim, rather than a ban. We think that it is preferable for a restriction on successive RTM claims to take the form of

a defence rather than a prohibition so that the Tribunal does not need to be involved if the landlord does not object to the new claim.

13.240 In the enfranchisement context, we recommend that this should be an absolute defence, so that the claim could not proceed if the landlord raised the defence.¹²⁸ We think a different approach is required in the RTM context. Under the current law, the Tribunal can disapply the four-year ban. Recommending an absolute defence would therefore be more restrictive than the current law. If the landlord raises the defence, we recommend that then the RTM company could apply to the Tribunal for a declaration as to whether or not the RTM claim should succeed.

Recommendation 101.

13.241 We recommend that there should be a defence to an RTM claim where the premises have been the subject of previous RTM which has terminated within the preceding two years. This should replace the existing four-year restriction on successive RTM claims.

13.242 If the landlord raised the defence, the RTM company could apply to the Tribunal for an order that the RTM claim should proceed.

¹²⁸ Enfranchisement Report, from para 5.206.

Chapter 14: Recommendations

Recommendation 1.

14.1 We recommend that the RTM should be exercisable in respect of leasehold houses as well as flats.

Paragraph 3.12

Recommendation 2.

14.2 We recommend that leaseholders of houses should follow the same process as leaseholders of flats in order to acquire the RTM.

Paragraph 3.19

Recommendation 3.

14.3 We recommend that the RTM should be exercisable in respect of any residential unit, drawing no distinction between a “flat” and a “house”.

Paragraph 3.37

Recommendation 4.

14.4 We recommend that the meaning of “building” should, in line with current case law, be a built or erected structure with a significant degree of permanence, which can be said to change the physical character of the land.

Paragraph 3.91

Recommendation 5.

14.5 We recommend that the RTM should be exercisable in relation to premises which consist of:

- (1) a self-contained building;
- (2) a self-contained part of a building; or
- (3) any building or part of a building which is reasonably capable of being managed independently.

Paragraph 3.92

Recommendation 6.

14.6 We recommend that the existing definition of “self-contained part of a building” should be retained but with a relaxation of the vertical division condition.

Paragraph 3.93

Recommendation 7.

14.7 We recommend that the non-residential limit be increased to 50%, such that the RTM cannot be claimed in relation to premises in which the internal floor area of any non-residential part (or where there is more than one such part, all of those parts taken together) exceeds 50% of the total internal floor area of the premises.

Paragraph 3.126

Recommendation 8.

14.8 We recommend that the RTM should be exercisable in respect of premises which comprise or contain at least one residential unit held by a qualifying tenant.

Paragraph 3.139

Recommendation 9.

14.9 We recommend the retention of the current rule that at least two-thirds of the residential units in the premises must be held by qualifying tenants in order to qualify for the RTM.

Paragraph 3.154

Recommendation 10.

14.10 We recommend the removal of the current rule requiring the participation of both qualifying tenants in premises with only two residential units.

Paragraph 3.183

Recommendation 11.

14.11 We recommend that shared ownership leases granted for more than 21 years should be long leases for the purpose of the RTM legislation, regardless of whether the particular leaseholder has staircased to 100%.

Paragraph 4.21

Recommendation 12.

14.12 We recommend that the current exclusion from the RTM of premises with a resident landlord and no more than four units should be abolished.

Paragraph 4.52

Recommendation 13.

14.13 We recommend that an RTM company should be able to acquire the RTM over a building containing different self-contained parts held by different freeholders.

Paragraph 4.71

Recommendation 14.

14.14 We recommend that:

- (1) where a lease does not permit residential use, the leaseholder should not be a qualifying tenant for the purposes of the RTM;
- (2) where a lease permits only residential use, the leaseholder should be a qualifying tenant for the purposes of the RTM; and
- (3) where a lease permits both residential and non-residential use, the leaseholder should be a qualifying tenant for the purposes of the RTM unless the premises are occupied solely for business purposes.

Paragraph 4.130

Recommendation 15.

14.15 We recommend that it should be possible for a single RTM company to acquire the RTM in respect of more than one building in a single RTM claim.

Paragraph 5.16

Recommendation 16.

14.16 We recommend that the qualifying and participation criteria should have to be met in relation to each building that is included in a multi-building RTM claim.

Paragraph 5.36

Recommendation 17.

14.17 We recommend that there should be no requirement for any link to exist between the buildings to be included in a multi-building RTM claim.

Paragraph 5.49

Recommendation 18.

14.18 We recommend that an additional building should be able to join an existing RTM provided that:

- (1) the qualification criteria are satisfied in respect of that additional building;
and
- (2) enough qualifying tenants from that building join the RTM company so as to satisfy the participation requirement for that additional building.

Paragraph 5.60

Recommendation 19.

14.19 We recommend that leaseholders of a building which has been included within a multi-building RTM should be able subsequently to form their own RTM company and acquire the RTM in respect of their building alone.

Paragraph 5.73

Recommendation 20.

14.20 We recommend that, where leaseholders of a building being managed by a multi-building RTM company wish to make a separate RTM claim in respect of their own building, there should be a defence to that RTM claim if the original multi-building claim took place within the preceding two years. Either the landlord or the existing multi-building RTM company should be able to raise the defence.

Paragraph 5.81

Recommendation 21.

14.21 We recommend that members of multi-building RTM companies should have the same voting rights as members of single-building RTM companies.

Paragraph 5.96

Recommendation 22.

14.22 We recommend that RTM companies should continue to be companies limited by guarantee.

Paragraph 6.10

Recommendation 23.

14.23 We recommend that there should be no prohibition on using RTM companies as nominee purchasers in collective freehold acquisitions.

Paragraph 6.20

Recommendation 24.

14.24 We recommend that more than one RTM company should be permitted to exist in relation to each premises.

Paragraph 6.37

Recommendation 25.

14.25 We recommend that the meaning of “leases” in the model articles should be clarified so that it refers only to “long leases”, as that expression is defined in the 2002 Act.

14.26 We recommend that the allocation of one vote to any landlord under a lease in the model articles of association should apply only to the freeholder who has not otherwise been allocated a vote; it should not apply to any intermediate landlords.

Paragraph 6.84

Recommendation 26.

14.27 We recommend that the model articles of association should be amended to require RTM company directors to hold a general meeting once a year. However, RTM companies with only one member should be exempt from this requirement, for as long as they continue to have only one member.

Paragraph 6.102

Recommendation 27.

14.28 We recommend that:

- (1) at least one director of each RTM company should be strongly encouraged to undertake online training; and
- (2) the fault-based grounds in Part 2 of the 1987 Act should be expanded to include circumstances where no director of the RTM company has undertaken training, and it is just and convenient to appoint a manager or terminate the RTM.

Paragraph 7.39

Recommendation 28.

14.29 We recommend that Government should ensure that training resources for RTM directors and prospective RTM directors are provided free of charge.

Paragraph 7.44

Recommendation 29.

14.30 We recommend that the requirement to serve notices inviting participation should be abolished.

Paragraph 8.25

Recommendation 30.

14.31 We recommend that the prescribed notes accompanying the claim notice should include a prominent statement that qualifying tenants are entitled to join the RTM company at any time.

Paragraph 8.26

Recommendation 31.

14.32 We recommend that:

- (1) there should be an explicit requirement that a claim notice be signed by or on behalf of the RTM company. The signature could be applied either by hand or electronically;
- (2) the signature should be that of either a single officer of the RTM company or of a person authorised by such an officer to sign on behalf of the RTM company; and
- (3) the requirement should be clearly emphasised in the prescribed form.

Paragraph 8.41

Recommendation 32.

14.33 We recommend that in order to fulfil the requirement to serve landlords with the claim notice, the RTM company should only be required to serve the freeholder (or freeholders, if more than one), as opposed to any interposed landlords in a chain of leases.

Paragraph 8.50

Recommendation 33.

14.34 We recommend that notices under the RTM legislation should be capable of being given by email.

Paragraph 8.84

Recommendation 34.

14.35 We recommend that an RTM company may give a notice or a copy of a notice to a qualifying tenant at an email address which the qualifying tenant has notified to the RTM company in writing as an email address for the service of notices under the RTM legislation.

Paragraph 8.85

Recommendation 35.

14.36 We recommend that:

- (1) Claim notices sent by post, delivered by hand or sent by email (as applicable) to the landlord at the prescribed categories of address should be deemed to have been served.
- (2) The prescribed categories of address should be divided into two groups, Group A and Group B. A leaseholder can only send or deliver the claim notices to addresses falling within Group B if an address within Group A cannot be identified.
- (3) Group A addresses should consist of:
 - (a) the landlord's current address; and
 - (b) the latest address (including an email address) that has been provided by the landlord:
 - (i) to either a leaseholder member of the RTM company or an officer of the RTM company as an address at which an RTM notice can be served; or
 - (ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or
 - (iii) for the purposes of serving notices generally (including notices in proceedings),but, in each case, only where the address has been provided within the 12 months preceding the service of the claim notice.
- (4) Group B addresses should consist of:
 - (a) the landlord's last known address; and
 - (b) the latest address (including an email address) that has been provided by the landlord:
 - (i) to either a leaseholder member of the RTM company or an officer of the RTM company as an address at which an RTM notice can be served; or
 - (ii) for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987; or
 - (iii) for the purposes of serving notices generally (including notices in proceedings),

but, in each case, where the address has been provided more than 12 months preceding the service of the claim notice.

- (5) Where a claim notice is served on a Group B address, the RTM company must also (in the case of registered land) serve the claim notice on each of the addresses given for the landlord as registered proprietor at HM Land Registry.
- (6) A landlord who has served a counter-notice should not be permitted to argue that the claim notice was not properly served.

Paragraph 8.102

Recommendation 36.

14.37 We recommend that an application to the Tribunal for a declaration as to whether the RTM company has acquired the RTM should be accompanied by:

- (1) the results of the specified checks reflecting the position at the date of service of the claim notice; or
- (2) other evidence that the results of the specified checks would not have affected the RTM company's decision to serve the claim notice on the landlord set out in the claim notice, or the address(es) to which the claim notice was sent.

14.38 We recommend that the specified checks should include:

- (1) A check of the records held at HM Land Registry.
- (2) Where the landlord is understood to be a corporate body whose details are registered at Companies House, a check of the records at Companies House.
- (3) In the case of service at a Group B address (rather than Group A) and where the landlord is understood to be an individual who is likely to be resident in England and Wales, the following additional checks:
 - (a) a search of the probate records; and
 - (b) a search of the Individual Insolvency Register.

14.39 We recommend that, before making an application to the Tribunal under the missing landlord procedure, the RTM company must:

- (1) If neither the landlord's identity or address is known, place an advertisement in the London Gazette inviting any landlords of the premises (or other relevant persons) to contact the RTM company within 28 days.
- (2) If the landlord's identity is known but the RTM company does not have a Group A or Group B address for the landlord, carry out the specified checks at (2) above before placing an advertisement in the London Gazette.

Paragraph 8.141

Recommendation 37.

14.40 We recommend that in certain circumstances the Group A address for service should be as follows:

- (1) If an individual landlord is dead, the Group A address for service should be the address of any personal representatives at the address given in any grant of probate or letters of administration or, where no such grant has been issued, the Public Trustee.
- (2) If an individual landlord is insolvent, the Group A address for service should be the address for his or her trustee in bankruptcy as shown on the Insolvency Service website.
- (3) If a corporate body is insolvent, the Group A address for service should be both:
 - (a) the corporate body's registered office address; and
 - (b) 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.
- (4) If a corporate body has been dissolved, the Group A address for service should be the Treasury Solicitor.

Paragraph 8.144

Recommendation 38.

14.41 We recommend that the Secretary of State be given power to make regulations setting out:

- (1) the specified checks that must be undertaken by an RTM company prior to making an application to the Tribunal for a declaration as to its right to acquire the RTM, or under the missing landlord procedure; and
- (2) the weight that should be attributed to the result of the specified check by the Tribunal when establishing whether it is satisfied as to either the identity of the landlord or whether a correct Group A or B address for service has been used.

Paragraph 8.145

Recommendation 39.

14.42 We recommend 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 either:

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

Paragraph 8.157

Recommendation 40.

14.43 We recommend that landlords should be required to state and explain all possible objections in the counter-notice and should not generally be permitted to raise new arguments at a later stage.

14.44 The Tribunal should only permit new grounds of objection to be made in exceptional circumstances where:

- (1) either the landlord did not have, and could not reasonably have had, the requisite knowledge of the new purported grounds of objection at the time of the counter-notice; or
- (2) was otherwise prevented from making the argument in question at the time the counter notice was served.

and may do so subject to such directions as it considers fit, including in respect of costs.

Paragraph 8.171

Recommendation 41.

14.45 We recommend that the current position – that if no counter-notice is served, the RTM is acquired on the date specified in the claim notice – should be retained.

14.46 We also recommend that the RTM company should have the right to apply to the Tribunal for a declaration:

- (1) that the RTM company is entitled to acquire the RTM;
- (2) as to the acquisition date on which the RTM was or will be acquired; and/or
- (3) as to the transfer of management functions in respect of non-exclusive appurtenant property.

Paragraph 8.192

Recommendation 42.

14.47 We recommend that:

- (1) In circumstances where no counter-notice is served and an RTM company applies to the Tribunal for a determination as to its acquisition of the RTM, the landlord should have to apply to the Tribunal for permission to participate in the proceedings before it can be heard.
- (2) The Tribunal should only allow the landlord's application if one or more of the following has occurred:
 - (a) The landlord was late serving the counter-notice, and had a reasonable excuse;
 - (b) The landlord did not serve a counter-notice but subsequently became aware of grounds for objection, and a reasonably diligent landlord could not have acquired this information before the service date of the counter-notice; or
 - (c) There is disagreement as to the management of non-exclusive appurtenant property.
- (3) The landlord should pay the RTM company's costs, and be confined to challenging only the grounds provided for in the application for permission to be heard.

Paragraph 8.194

Recommendation 43.

14.48 We recommend the abolition of deemed withdrawal for cases in which the RTM company does not respond to a counter-notice.

14.49 We recommend that if the RTM company does not respond to a valid negative counter-notice (by either modifying its claim, withdrawing the claim, or initiating a Tribunal determination) within six months of the date of service of that counter-notice, the landlord or any leaseholder may apply to the Tribunal to have the claim declared withdrawn. No such application shall be made unless the applicant has given the RTM company 14 days' written notice.

Paragraph 8.210

Recommendation 44.

14.50 We recommend that for the purposes of the RTM, the validity of notices should not be challengeable unless:

- (1) the relevant prescribed form has not been used;
or
- (2) in a claim notice, the notice fails to make clear to a reasonable recipient:
 - (a) that the RTM is being claimed;
 - (b) the identity of the RTM company; or
 - (c) the address at which any counter-notice should be served.or
- (3) in a counter-notice, the notice fails to make clear to a reasonable recipient of that notice:
 - (a) whether the RTM company's claim to acquire the RTM is admitted or denied;
 - (b) the basis for any denial of the RTM company's claim to acquire management; or
 - (c) the landlord's address for service;or
- (4) the notice has not been signed.

Paragraph 8.232

Recommendation 45.

14.51 We recommend that the parties should be able to agree to waive any defect in a claim notice which would otherwise render that notice invalid. The effect of such waiver will be to render the notice valid from the date on which it was served.

Paragraph 8.244

Recommendation 46.

14.52 We recommend that parties should be able to agree to amend a claim notice that is valid (including where a defect has been waived).

Paragraph 8.245

Recommendation 47.

14.53 We recommend that the Tribunal should, on the application of the RTM company at any time prior to the determination of the claim, have a power to:

- (1) waive a defect in a claim notice if that defect would otherwise render that notice invalid;
- (2) permit the RTM company to amend a defective claim notice where the defect does not affect the validity of the notice, or where a defect has been waived;
- (3) permit the RTM company to amend a claim notice that is not defective; and
- (4) make any consequential directions.

Paragraph 8.246

Recommendation 48.

14.54 We recommend that the parties should be able to agree to waive any defect in a counter-notice which would otherwise render that notice invalid. The effect of such an agreement will be to render the notice valid from the date on which it was served.

Paragraph 8.260

Recommendation 49.

14.55 We recommend that parties should be able to agree to amend a counter-notice that is valid (including following an agreement to waive a defect).

Paragraph 8.261

Recommendation 50.

14.56 We recommend that the Tribunal should, on application of the landlord during an existing proceeding concerning determination of the RTM claim or validity of the counter-notice, have a power to:

- (1) waive a defect in a counter-notice if that defect would otherwise render that notice invalid; and
- (2) make any consequential directions, including permitting amendment of the counter-notice.

Paragraph 8.262

Recommendation 51.

14.57 We recommend that, in exercising powers to waive defects or amend a notice, the Tribunal should consider all the circumstances of the case, including:

- (1) the need to ensure that RTM claims can be advanced fairly, at proportionate cost, and without undue delay;
- (2) the effect that refusing the application is likely to have on each of the parties;
- (3) the effect that granting the application is likely to have on each of the parties;
- (4) whether the party making the application has acted promptly and in good faith; and
- (5) (save where the relevant notice is not defective) whether the party opposing the application acted promptly in notifying the party making the application of the defect in the relevant notice.

Paragraph 8.264

Recommendation 52.

14.58 We recommend that where either no counter-notice or a positive counter-notice is served, the acquisition date should be the date nominated in the claim notice.

14.59 We recommend that the acquisition date nominated in the claim notice must be either:

- (1) a date between three months and one year after the deadline for the counter-notice specified in the claim notice; or
- (2) a date less than three month after the specified deadline for the counter-notice, if the RTM company obtains the written agreement of the landlord (or person acting as their agent).

Paragraph 8.282

Recommendation 53.

14.60 We recommend that the following should be included in the guidance notes that accompany the claim form:

- (1) A statement clarifying that the RTM company can nominate a date later than the minimum period if it would be more convenient (for example, a date which aligns with the service charge payment cycle).
- (2) A statement explaining that where the more convenient acquisition date is earlier than the three-month minimum period, the RTM company can nominate this earlier date but will require the landlord's consent to do so.

Paragraph 8.284

Recommendation 54.

14.61 We recommend that if a negative counter-notice is served, the minimum period between:

- (1) either:
 - (a) the date on which that negative counter-notice is withdrawn; or
 - (b) the date on which the Tribunal's determination that the RTM company is entitled to acquire the RTM becomes final; and
- (2) the acquisition date of the RTM

should be three months.

Paragraph 8.285

Recommendation 55.

14.62 We recommend that under no circumstances may the acquisition date be more than one year after the deadline for service of a counter-notice, whether that deadline is specified in the claim notice or deemed by law.

Paragraph 8.286

Recommendation 56.

14.63 We recommend that where no acquisition date is specified in the claim notice and the parties do not subsequently agree an acquisition date, the acquisition date will be deemed to be three months after the deadline specified in the claim notice for service of the counter-notice.

14.64 If no deadline for service of the counter-notice has been specified, that shall be deemed to be one month after the service of the claim notice. The acquisition date will accordingly be deemed to be four months after the service of the claim notice.

14.65 We recommend that neither failure to specify the acquisition date nor failure to specify the counter-notice deadline should render the claim notice invalid.

Paragraph 8.300

Recommendation 57.

14.66 We recommend that there be a statutory provision confirming that parties may agree to amend the acquisition date to any date earlier or later than the date originally specified in the claim notice.

14.67 We recommend that the RTM company (but not the landlord or relevant third party) should have the right to apply to the Tribunal to vary the acquisition date specified in the claim notice, if that date subsequently proves inadequate. This date may be earlier or later than originally specified.

14.68 The Tribunal should allow the amendment only if it is reasonable to ensure good management. If the RTM company has not attempted to reach agreement with the freeholder, this should weigh against the RTM company's application.

Paragraph 8.322

Recommendation 58.

14.69 We recommend that in addition to information reasonably required to complete the claim form, RTM companies should be entitled to inspect or obtain a copy of any information that they reasonably require to decide whether to claim the RTM.

Paragraph 9.32

Recommendation 59.

14.70 We recommend that RTM companies should have a right to obtain any information they reasonably require to decide whether to apply to the Tribunal for a determination that they are entitled to the RTM.

Paragraph 9.35

Recommendation 60.

14.71 We recommend that Government provide model forms that RTM companies can choose to use when exercising the right to obtain any information that they reasonably require in connection with the exercise of the RTM.

Paragraph 9.54

Recommendation 61.

14.72 We recommend that there should be a fixed time limit of two months for responding to a request for any information that is reasonably required to decide whether to acquire the RTM.

Paragraph 9.72

Recommendation 62.

14.73 We recommend that there should be a fixed time limit of 28 days for responding to a request for any information that is reasonably required in relation to a counter-notice alleging that the RTM company is not entitled to the RTM.

Paragraph 9.73

Recommendation 63.

14.74 We recommend that the existing right to obtain information under section 93 of the 2002 Act should be amended so that:

- (1) the RTM company may only serve this request on or after the determination date; but
- (2) the landlord must respond within 28 days to a request which is received on or after that date.

Paragraph 9.74

Recommendation 64.

14.75 In relation to information requested under section 82 of the 2002 Act (information required for purposes of completing a claim notice), we recommend that the landlord should have an obligation to notify the RTM company of material changes that occur between the date the information is provided, and the earlier of:

- (1) the date that the RTM company serves the claim notice; or
- (2) six months from the date on which the landlord responds to the RTM company's request for information.

Paragraph 9.120

Recommendation 65.

14.76 In relation to the new right to request information to decide whether to claim the RTM we recommend that:

- (1) If the RTM is acquired, the landlord should confirm on the acquisition date that there are no material changes to the information already provided.
- (2) The landlord should have an obligation to notify the RTM company of material changes which occur between the date that the information is provided and:
 - (a) if the RTM company issues a claim notice within six months of the landlord responding to the RTM company's request for information, the earlier of:
 - (i) the acquisition date;
 - (ii) the negative determination date; or
 - (iii) the date that the claim notice is withdrawn or deemed to be withdrawn; or
 - (b) if the RTM company does not issue a claim notice within six months of the landlord responding to the RTM company's request for information, six months from the date when the landlord responded to the request.

Paragraph 9.121

Recommendation 66.

14.77 In relation to the right to request information following a negative counter-notice, we recommend that the landlord's obligation should arise in relation to material changes that occur between the date the information is provided, and the earlier of:

- (1) the positive determination date;
- (2) the negative determination date; or
- (3) the date that the claim notice is withdrawn or deemed to be withdrawn.

Paragraph 9.122

Recommendation 67.

14.78 In relation to the right to request information reasonably required in connection with the exercise of the RTM under section 93 of the 2002 Act, we recommend that the landlord's obligation should arise in relation to material changes occurring between the date the information is provided, and the earlier of:

- (1) the acquisition date;
- (2) the negative determination date; or
- (3) the date that the claim notice is withdrawn or deemed to be withdrawn.

Paragraph 9.123

Recommendation 68.

14.79 We recommend that:

- (1) prior to service of the claim notice, the RTM company should bear the landlord or other relevant person's reasonable costs of complying with their duties to provide information; and
- (2) after service of the claim notice, the landlord or other relevant person should bear their own costs of complying with their duties to provide information.

Paragraph 9.148

Recommendation 69.

14.80 We recommend that, for management contracts entered into prior to the determination date, the landlord's obligation to provide the contract notice and contractor notice "as soon as possible after the determination date" should be subject to an outer limit of 14 days.

Paragraph 9.176

Recommendation 70.

14.81 We recommend that, for management contracts entered into between the determination date and acquisition date, the landlord should be required to provide the relevant notices on the date the contract is entered into, or as soon as is reasonably practicable after that date, and in any event before the acquisition date.

Paragraph 9.177

Recommendation 71.

14.82 We recommend that guidance on the definition of “management functions” should be included in the training and resources which are provided to RTM directors.

Paragraph 10.21

Recommendation 72.

14.83 We recommend that management functions which involve or are connected to the provision of regulated health and social care should be excluded from the definition of management functions which are acquired by RTM companies.

Paragraph 10.43

Recommendation 73.

14.84 We recommend that:

- (1) Landlords and RTM companies should seek to work together to procure suitable insurance cover in joint names.
- (2) Where no agreement is reached, the Tribunal should have jurisdiction to make determinations as to the insurance cover to be implemented, on the application of either party.
- (3) In the event of an application being submitted to the Tribunal, the landlord will continue to insure the premises up to the implementation of the determination.

Paragraph 10.80

Recommendation 74.

14.85 We recommend that when the RTM is acquired any landlord under a lease of the premises should have the rights under the 1985 Act to request a written summary of the insurance cover in place in relation to the premises, and to inspect or be sent a copy of the policy and associated documents.

Paragraph 10.90

Recommendation 75.

14.86 We recommend that an RTM company should be able to acquire management functions over non-exclusive appurtenant property if such property has been specified in the claim notice, and either:

- (1) the landlord does not submit a counter-notice objecting to the acquisition of the RTM in respect of that appurtenant property; or
- (2) the landlord does submit such a counter-notice objecting to the acquisition, which is subsequently withdrawn, or the Tribunal determines that it is appropriate for the RTM company to acquire management functions in respect of the non-exclusive property.

14.87 Where the Tribunal determines that the RTM company is to acquire management functions in respect of non-exclusive appurtenant property, the Tribunal may make directions as to how that property should be managed.

Paragraph 10.145

Recommendation 76.

14.88 We recommend that the Tribunal should have the power to order a variation to a lease if the acquisition of the RTM makes management of premises in accordance with the leases unworkable. This applies both to premises over which the RTM has been claimed and to other premises affected by the acquisition of the RTM.

Paragraph 10.154

Recommendation 77.

14.89 We recommend that landlords should be required to transfer any uncommitted service charges to the RTM company on the acquisition date. The term “uncommitted service charges” should mean:

- (1) the sums which should be in the service charge pot on the assumption that the landlord has collected sufficient sums from each leaseholder to cover their share of the actual service charge expenditure incurred; plus
- (2) any sums by which each leaseholder’s actual service charge contributions exceed their share of actual expenditure.

Paragraph 10.203

Recommendation 78.

14.90 We recommend that RTM companies should be permitted to recover certain prescribed costs of management as an additional service charge in circumstances where the lease does not provide for this to happen.

Paragraph 10.224

Recommendation 79.

14.91 We recommend that landlords should only have the right to receive notice of, and to object to, approvals relating to assignment, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use.

11.54 We further recommend that:

- (1) where an RTM company receives an application for such an approval, it should be under a duty to either notify the landlord (if it is minded to approve the application) or refuse the application within a reasonable time and in any within 30 days after receipt of the application; and
- (2) if the landlord wishes to object to an approval being granted by the RTM company, it should have to apply to the Tribunal for a determination as to whether consent should be granted. Such an application must be made within a reasonable time and in any event within 30 days after receiving notification of the approval from the RTM company.

Paragraph 11.53

Recommendation 80.

14.92 We recommend that Government considers clarifying the legislation to ensure that landlords cannot charge administration fees for lease consents after the RTM has been acquired.

Paragraph 11.63

Recommendation 81.

14.93 We recommend that RTM companies should not be entitled to grant an approval other than in accordance with the terms of a lease of the premises, and this should be made clear in training for RTM company directors.

Paragraph 11.76

Recommendation 82.

14.94 We recommend that RTM companies should not be required to include the landlord's name and address in any demand for sums payable under the lease.

Paragraph 11.91

Recommendation 83.

14.95 We recommend that the Tribunal should continue to have exclusive jurisdiction over any proceedings arising from the acquisition of the RTM.

Paragraph 12.23

Recommendation 84.

14.96 We recommend that the Tribunal be given exclusive jurisdiction to determine whether a requirement of the RTM provisions of the 2002 Act has been met.

Paragraph 12.38

Recommendation 85.

14.97 We recommend that RTM companies should not generally be required to contribute towards landlords' (or other relevant persons') non litigation costs.

Paragraph 12.95

Recommendation 86.

14.98 We recommend the landlord should be able to apply to the Tribunal to recover any reasonable non-litigation costs he or she has incurred where:

- (1) an RTM claim is withdrawn, deemed to be withdrawn, struck off, or otherwise ceases to have effect; and
- (2) the RTM company has acted unreasonably in serving or proceeding with the claim.

Paragraph 12.145

Recommendation 87.

14.99 We recommend that the parties should bear their own costs of any Tribunal proceedings relating to the acquisition and exercise of the RTM subject to the Tribunal's existing costs powers (for example, where there has been unreasonable conduct or wasted costs).

Paragraph 12.169

Recommendation 88.

14.100 We recommend that a landlord should be able to apply to the Tribunal for an order prohibiting an RTM company from bringing a further RTM claim without the permission of the Tribunal. Such an order may be made where a prescribed number of RTM claims, that are totally without merit, have been brought in relation to the same premises.

Paragraph 12.174

Recommendation 89.

14.101 We recommend that a Tribunal may grant permission to bring an RTM claim in relation to premises that are subject to a prohibition either with or without conditions.

Paragraph 12.175

Recommendation 90.

14.102 We recommend that a term of a lease should be unenforceable to the extent that it purports to enable a landlord or third party to recover any litigation or non-litigation costs arising from the RTM.

Paragraph 12.188

Recommendation 91.

14.103 We recommend that the scope of Part 2 of the 1987 Act be extended to apply to any premises in relation to which the RTM has been acquired.

Paragraph 13.53

Recommendation 92.

14.104 We recommend that once the RTM is acquired, an amendment to the premises specified in the articles of association of an RTM company should have no effect other than where:

- (1) the change is required to update or correct an error in the address; or
- (2) premises are being added to or removed from a multi-building RTM and the change is required so as to include or exclude the relevant premises.

Paragraph 13.105

Recommendation 93.

14.105 We recommend that, when considering whether to appoint a manager or order that the RTM be terminated under Part 2 of the 1987 Act, the Tribunal should take into account whether the RTM company's membership has fallen below the original participation requirement.

Paragraph 13.118

Recommendation 94.

14.106 We recommend that the RTM company should be able to apply to the Tribunal if it wishes to give up the RTM, including in relation to a particular building(s).

14.107 In determining such an application, the Tribunal should have discretion as to:

- (1) whether the RTM should terminate; and
- (2) if it should, whether management functions should transfer to either:
 - (a) the person responsible for those functions under the lease (or if that person no longer exists, the landlord); or
 - (b) a manager appointed by the Tribunal.

Paragraph 13.143

Recommendation 95.

14.108 We recommend that landlords should be able to participate in proceedings to determine an application brought by an RTM company wishing to give up the RTM.

Paragraph 13.146

Recommendation 96.

14.109 We recommend that the RTM should terminate upon the conversion of the premises to commonhold.

Paragraph 13.151

Recommendation 97.

14.110 We recommend that management functions should revert to whoever is responsible for exercising those functions under any leases of the premises when the RTM terminates in the following circumstances:

- (1) the RTM company and each person who is a landlord of the premises have agreed to terminate the RTM;
- (2) the RTM company has become insolvent, or voluntarily wound itself up;
- (3) a manager or receiver has been appointed over the RTM company;
- (4) the RTM company has been struck off the register of companies; or
- (5) the RTM company has ceased to be an RTM company in respect of the premises.

14.111 Management functions should instead transfer to the landlord if the party responsible for performing those functions under a lease of the premises no longer exists.

Paragraph 13.172

Recommendation 98.

14.112 We recommend that if the RTM has terminated following an application to the Tribunal then the Tribunal should determine whether the management functions should transfer to either:

- (1) a manager appointed by the Tribunal, or
- (2) the person responsible for performing those functions under the lease (or if that person no longer exists, the landlord).

Paragraph 13.177

Recommendation 99.

14.113 We recommend that:

- (1) once the RTM has terminated the person who has taken over the management functions should have a limited period to apply for the appointment of a manager to exercise those functions; and
- (2) an application to appoint a manager in these circumstances should have to be made within 90 days of the RTM ending.

Paragraph 13.194

Recommendation 100.

14.114 We recommend that when the RTM terminates, that the RTM company should be required to transfer any uncommitted service charges to the party taking over the management functions, immediately upon termination.

Paragraph 13.215

Recommendation 101.

14.115 We recommend that there should be a defence to an RTM claim where the premises have been the subject of previous RTM which has terminated within the preceding two years. This should replace the existing four-year restriction on successive RTM claims.

14.116 If the landlord raised the defence, the RTM company could apply to the Tribunal for an order that the RTM claim should proceed.

Paragraph 13.241

(signed) Sir Nicholas Green, Chairman
Professor Sarah Green
Professor Nick Hopkins
Professor Penney Lewis
Nicholas Paines QC

Phil Golding, Chief Executive

26 June 2020

Appendix 1: Terms of Reference

THE LAW COMMISSION: RESIDENTIAL LEASEHOLD LAW REFORM

TERMS OF REFERENCE

The project was announced in the Law Commission's *Thirteenth Programme of Law Reform* and in Government's response to its consultation *Tackling unfair practices in the leasehold market*.

The project will be a wide-ranging review of residential leasehold law, focussing in the first instance on reform to:

1. enfranchisement;
2. commonhold; and
3. the right to manage.

The Commission and Government are discussing other areas of residential leasehold reform that could be included in the project.

The Government has identified the following policy objectives for the Law Commission's recommended reforms:

Generally

- to promote transparency and fairness in the residential leasehold sector;
- to provide a better deal for leaseholders as consumers;

Enfranchisement

- to simplify enfranchisement legislation;
- to consider the case to improve access to enfranchisement and, where this is not possible, reforms that may be needed to better protect leaseholders, including the ability for leaseholders of houses to enfranchise on similar terms to leaseholders of flats;
- to examine the options to reduce the premium (price) payable by existing and future leaseholders to enfranchise, whilst ensuring sufficient compensation is paid to landlords to reflect their legitimate property interests;
- to make enfranchisement easier, quicker and more cost effective (by reducing the legal and other associated costs), particularly for leaseholders, including by introducing a clear prescribed methodology for calculating the premium (price), and by reducing or removing the requirements for leaseholders (i) to have owned their lease for two years before enfranchising, and (ii) to pay their landlord's costs of enfranchisement;

- to ensure that shared ownership leaseholders have the right to extend the lease of their house or flat, but not the right to acquire the freehold of their house or participate in a collective enfranchisement of their block of flats prior to having "staircased" their lease to 100%; and
- to bring forward proposals for leasehold flat owners, and house owners, but prioritising solutions for existing leaseholders of houses;

Commonhold

- to re-invigorate commonhold as a workable alternative to leasehold, for both existing and new homes.

Right to manage

- to facilitate and streamline the exercise of the right to manage.

(1) ENFRANCHISEMENT

Enfranchisement covers the statutory right of leaseholders to:

- purchase the freehold of their house;
- participate, with other leaseholders, in the collective purchase of the freehold of a group of flats; and
- extend the lease of their house or flat.

The project will consider the following issues:

1. *Qualifying criteria.* The Commission will review the qualifying criteria that must be satisfied to exercise the right to enfranchise, namely:
 - a. the premises that qualify for enfranchisement;
 - b. the leaseholders who can exercise the rights, including the two-year ownership requirement, and the proportion of tenants required to participate in a collective enfranchisement claim;
 - c. the landlords to whom the enfranchisement legislation applies; and
 - d. the leases to which the enfranchisement legislation applies.
2. *Valuation.* The Commission will seek to produce options for a simpler, clearer and consistent valuation methodology. The review will include consideration of:
 - a. the existing valuation assumptions;
 - b. the extent to which the ground rent (including any rent review clause) should feature in the valuation;
 - c. the role of yield and deferment rates and whether they could be standardised;

- d. the role of marriage value, hope value, and relativity, and the extent to which they should feature in the valuation;
 - e. whether to retain different valuation bases (as currently exist for enfranchisement of houses, depending on historic rateable values);
 - f. the valuation of the interest of any intermediate leaseholders.
3. *Procedure.* The Commission will consider reforms to make it easier, quicker and more cost effective to enfranchise. The review will include consideration of:
- a. introducing a simplified enfranchisement procedure which is, so far as possible, consistent across all enfranchisement claims;
 - b. the form, content, effect, service, and assignment of notices by leaseholders and landlords in the enfranchisement process;
 - c. how to reduce or remove the requirement for leaseholders to be responsible for landlords' costs of responding to enfranchisement claims;
 - d. the nature and role of the nominee purchaser in collective enfranchisement claims;
 - e. giving effect to the right to enfranchise, including the conveyancing procedure, the terms of the transfer of the freehold or extended lease, leasebacks to the landlord, and the role of third party funders (in a collective enfranchisement claim);
 - f. the forum for, and facilitation of, the resolution of disputes and enforcement of the statutory rights;
 - g. problems that arise where there are missing, incapacitated, recalcitrant, or insolvent landlords; and
 - h. the termination or suspension of an enfranchisement claim, and its effect.

(2) COMMONHOLD

Commonhold is a form of ownership of land which is designed to enable the freehold ownership of flats. There are various legal issues within the current commonhold legislation which affect market confidence and workability. The Commission will review those issues to enable commonhold to succeed.

The following legal issues will be considered:

1. *Creation of commonhold (including conversion).* The Commission will consider whether the procedure for creating and registering commonhold could be simplified and how it could be made easier for leaseholders to convert. In particular, the Commission will review whether, and if so how, it might be possible to convert to commonhold without the consent of:
 - a. the freeholder; and

- b. all of the leaseholders.
2. *Improving flexibility.* The Commission will consider reforms to make the commonhold model more sophisticated and flexible to meet the needs of communities and developers, including:
 - a. the creation of “layered” or “sub-commonholds” to deal with different parts of a commonhold scheme, especially in mixed-use developments; and
 - b. allowing different costs to be shared between unit-holders in ways that will better reflect actual use of amenities and services.
3. *Corporate structure.* The Commission will consider whether the commonhold association, which owns and manages the common parts of the commonhold, should remain a company limited by guarantee or whether there might be a more appropriate corporate structure.
4. *Shared ownership.* The Commission will consider ways of incorporating shared ownership within commonhold.
5. *Developer rights and consumer protection.* Ensuring developers have sufficient power to complete the development whilst affording protection to unit-holders.
6. *Commonhold Community Statement.* The Commission will review the model CCS which sets out the rights and obligations of unit-holders and the commonhold association. In particular, the Commission will seek to ensure the CCS is flexible enough to meet the local needs of a scheme, and consider the circumstances in which it can be varied.
7. *Dispute resolution.* The Commission will consider ways of facilitating the resolution of disputes within commonhold.
8. *Enforcement powers.* The Commission will consider whether the enforcement powers of the commonhold association, for instance to enforce the payment of commonhold costs, are sufficient or whether these powers should be enhanced. The Commission will also consider whether there are sufficient safeguards in place to protect unit-holders from unreasonable demands for costs.
9. *Insolvency.* The Commission will consider whether any mechanisms could usefully be put in place to prevent a commonhold association from becoming insolvent, for instance whether it might be appropriate for an administrator to be appointed. The Commission will also consider the effect of insolvency on a commonhold association and review whether homeowners and lenders are adequately protected.
10. *Voluntary termination.* The Commission will review the procedure for the termination of a commonhold association by unit-holders and consider whether lenders’ security is adequately protected.

The project will commence with the publication of a call for evidence. Other legal problems that emerge from that call for evidence will be included in the project by agreement with Government.

The Commission’s review will complement Government’s own work to remove incentives to use leasehold, and Government’s work to address non-legal issues to re-invigorate

commonhold such as education, publicity and supporting developers, lenders and conveyancers. As part of its call for evidence, the Commission will invite consultees' views on (i) whether, and if so how, commonhold should be incentivised or compelled, and (ii) the non-legal issues that must be addressed to re-invigorate commonhold, and report on the outcome of that consultation, without making recommendations.

(3) RIGHT TO MANAGE

The right to manage was introduced by the Commonhold and Leasehold Reform Act 2002. It is a right granted to leaseholders to take over the landlord's management functions through a company set up by the leaseholders for this purpose.

The Law Commission is asked to conduct a broad review of the existing right to manage legislation with a view to improving it. In particular, the Law Commission will:

1. consider the use currently made of the right to manage legislation and how far it meets the needs of users;
2. consider the case to improve access to the right to manage, including by modifying or abolishing existing qualification criteria; and
3. make recommendations to render the right to manage procedure simpler, quicker and more flexible, particularly for leaseholders.

Appendix 2: List of consultees

The list of consultees set out in this Appendix excludes any consultees who asked to remain anonymous, or for the response to be treated in confidence.

1 West India Quay Residents' Association	Associated Retirement Community Operators	Carrie Rollinson
Adam Vine	Association of British Insurers	Catherine Williams
Alan & Joanne Whitmore	Astrea Asset Management	Chalfont Dene Lease Owners Association
Alan West	Avril Pino	Charities' Property Association
Aldford House Residents Association; Aldford House Freehold Limited (Nominee Enfranchisement Company)	Barbara Farmer	Charles Peter Thrale Cantlay
Alia Alkhudairi	Barbara Newton	Charlotte Ann Denton
Alice Brown	Baroness Gardner of Parkes	Chris Holohan
Anchor Hanover	Barry Carpenter	Chris Wylie
Andreas Immel	Ben See	Christine Liptrott
Andrew Boorman	Bernard Altschuler	Church & Co Chartered Accountants
Andrew Ellwood	Birchall Blackburn Law	Claudine Ahrens-Hillman
Andrew Readman	Birmingham Law Society	Colin Greenbank
Ann Davies	Boodle Hatfield LLP	Conor Courtney
Ann Williams	BPL Solicitors Limited	Consensus Business Group
Annie Morris	Bramshott Place Village Residents Association	Damian Greenish
Anthony Harris	Brian Murphy	Daniel Allum
Anthony Mason	Bridget Murphy	Daniel Choudhury
Anthony Molloy	British Property Federation	Daniel Demmel
ARMA	Cadogan Group Limited	Daniel Hooley
	Carmen Montanel	

Daniel Watney as surveyors of the Dulwich Estate	Gary Gallagher	Jamie John Atkins
	Gary Keogh	Jane Gregory
Daniel Watney on behalf of the Charity of Richard Cloudesley	Geoffrey Andrews	Jane Hewland
	Gillian Weymouth	Jeanette Allen
Daniel Watney on behalf of Dame Alice Owen's Foundation	Giorgio Landon	Jennifer Studholme
	Gordon Clifton	Jeremy Bragg
David Cade	Grace Lee	Jill Lucas
David Jarvis	Graham Clegg	John Dillon
David Silverman	Graham Dixon	John Southall
David Whitworth	Greg Passeri	John Thomas
David Woolley	Han Yang Goh	John Wilkes
Deborah Hawkes	Harold Victor Lever Stone & Naomi Stone	Jonathan Alvin
Debra Wood	Helen Gibbons	Jonathan Scoffin
Defeng Wu	Heulwen Egerton	Jonathan Yee
Della Bramley	Hilary McDonagh	Joseph McGuigan
Denise Clark	Hitesh Doshi	Josephine Rostron
Des Kinsella	HM Land Registry	Judith Lewin
Devan Parekh	HomeGround (joint response with Long Harbour)	Judith Serota OBE
Dr Christine Nalletamby	Ian Fletcher	Julian Parsons
Druhin Banerjee	Igor Ribeiro	Karen Hildebrand
Emma Kuusela	Investment Technology Ltd t/a Canonbury Management	Karen Moss
First-tier Tribunal (Property Chamber)		Keith Hince
Francisco Javier Caldeiro Zamora		Kenneth O'Keefe
	Ivan Cross	Kenny Lee
Franciszka Mackiewicz-Lawrence	J Gardner	Kingsdown Park Chalet Owners Association
Garness Jones Limited	J Williams	Laura McGuinness

Law Society	Michael Byrne	Pat Meyrick
LB Tower Hamlets	Michael King	Patricia Fielden
Lidia Trahtman	Michael Tsio	Paul Davies
LifeCare Residences Limited	Michalis Kapsos	Paul Gothard
Linda Berriman	Michelle Goodrum	Paul Hillman
	Michelle Gracie	Paul Keith Davies
Long Harbour (joint response with Home Ground)	Millstream Management Services	Paul Lusby
Lorraine Jimenez	Mr & Mrs Lewis	Paul Robertson (Midway)
Lucie Gutfreundova	Mr & Mrs Scott	Pauline Field
Majella Murphy Altschuler	NAEA Propertymark	Peabody
Malcolm Wood	Nalini Burford	Peel Common Residents Association Limited
Malgorzata Zymła	Naseer Khudairi	Penny Atkinson
Man Chau Fung	National Leasehold Campaign	Peter Barlow
Maria Ciszynska	National Trust	Peter Milford
Maria Elisabetta Fenu	Neil Hammond	Peter Stevens
Marie Gallagher	Nina Salsotto Cassina	Philip Freedman
Marilyn Davis	Notting Hill Genesis	Professor Anthony J Naldrett
Mark Chick	Oakfield Court Residents' Association	Professor James Driscoll
Mark Hawkins	Oaktree Court RTM Company Limited	Property Bar Association
Mark Routley	Odile Bartolin	Property Litigation Association Law Reform Committee
Marsha Oza	Osborne Court Right to Manage Company	Ralph Hebgen
Martin Penson	Panorama House RTM Company Limited	Residential Landlords Association
Martyn Cund	Parkhurst Court RTM Company Ltd	Residential Management Group Limited
Mary Dudley Seaver		Richard Powell
Maryna Davydenko		
McCarthy & Stone		

Richard Stratford	Sofian Lignier	Trevor Price
Richard Tydeman	Sol Unsdorfer	Urang Property Management Limited
Rick Hewis	Sophie Whitmore	Utsav Boobna
Rizwan Malik	St George Wharf Residents Association	Victoria Bekir
Rob Sanderson	Stefania Maulucci	Wallace Partnership Group Limited
Robert Lewis	Stephen Bedford	Wendy Gallagher
Roger Edwards	Stephen Desmond	William Imbrogno
Ron Wheeldon	Stephen Lloyd	Wojciech Zymła
Rosemary Bischoff	Stephen Mark Kirk	Xi Yen Tan
Rotherhithe Property Management LLP	Steven Sai Ho Tai	Y&Y Management Ltd
Rothesay Life PLC	Susan Hunt	Yoke Peng Yuen
RSA	Susan M Rendell	Yvette McGreavy
Salim Khwaja	The Berkeley Group Holdings plc	
Samantha Cockburn	The Church Commissioners for England	
Sanchita Doshi	The Compton Group	
Sasha Andrews	The Leasehold Advisory Service (LEASE)	
Settlers Court RTM Company Limited	The Portman Estate	
Shira Baram	The Right to Manage Federation	
Shira Barum	The Wellcome Trust	
Shula Rich (Brighton Hove and District Leaseholders Association and FPRA)	Tim Madley	
Simon Cox	Tony Burke	
Simon Davies	Tony Hemming (A G Hemming)	
Simon Nicholas	Tracey Horton	
Society of Licensed Conveyancers		

Appendix 3: Voting rights in RTM companies

All citations relate to Article 33 of the RTM Companies (Model Articles) (England) Regulations 2009 (SI 2009 No 2767) and RTM Companies (Model Articles) (Wales) Regulations 2011 (SI 2011 No 2680).

Figure A: Current law

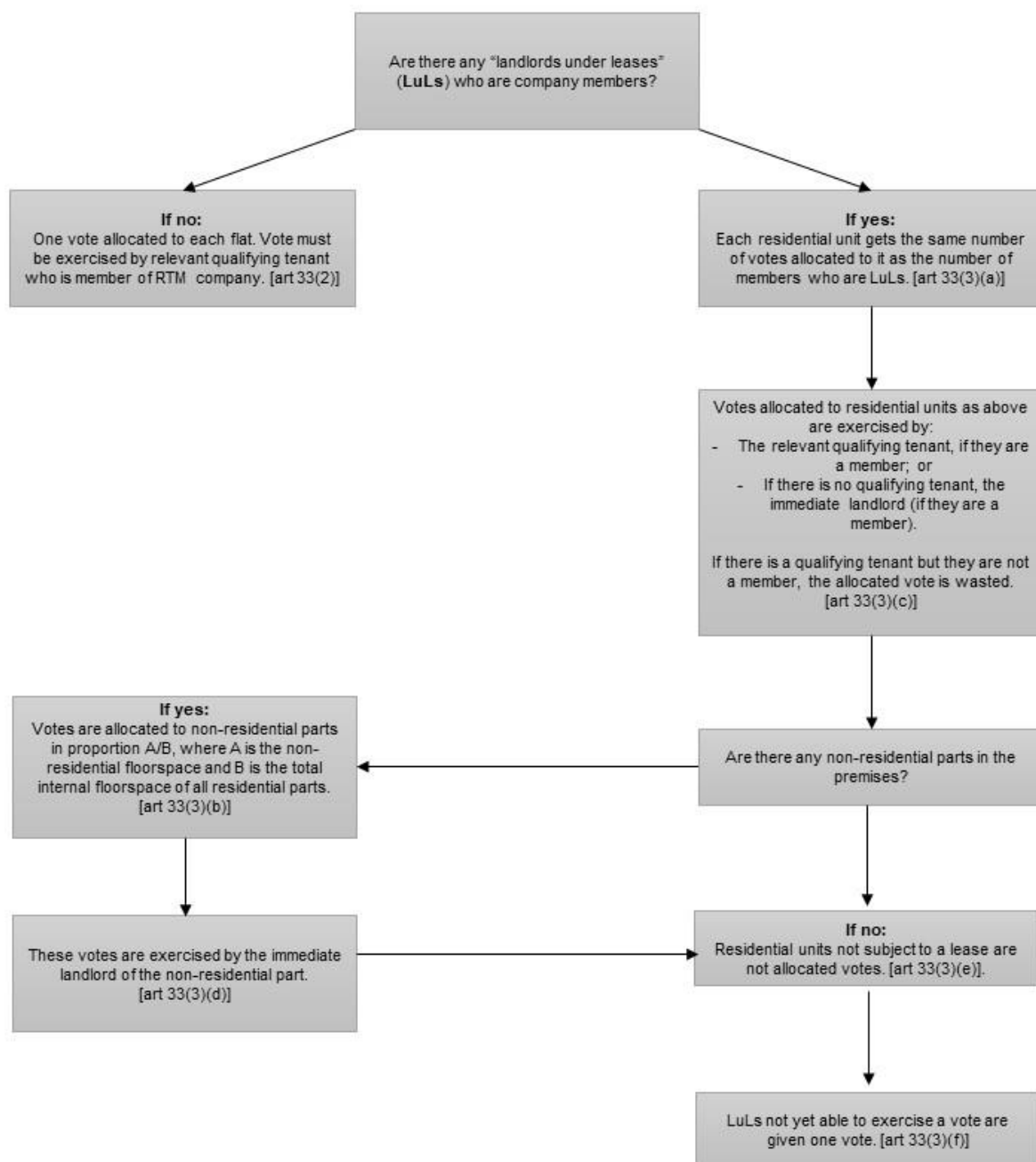


Figure B: Option 2

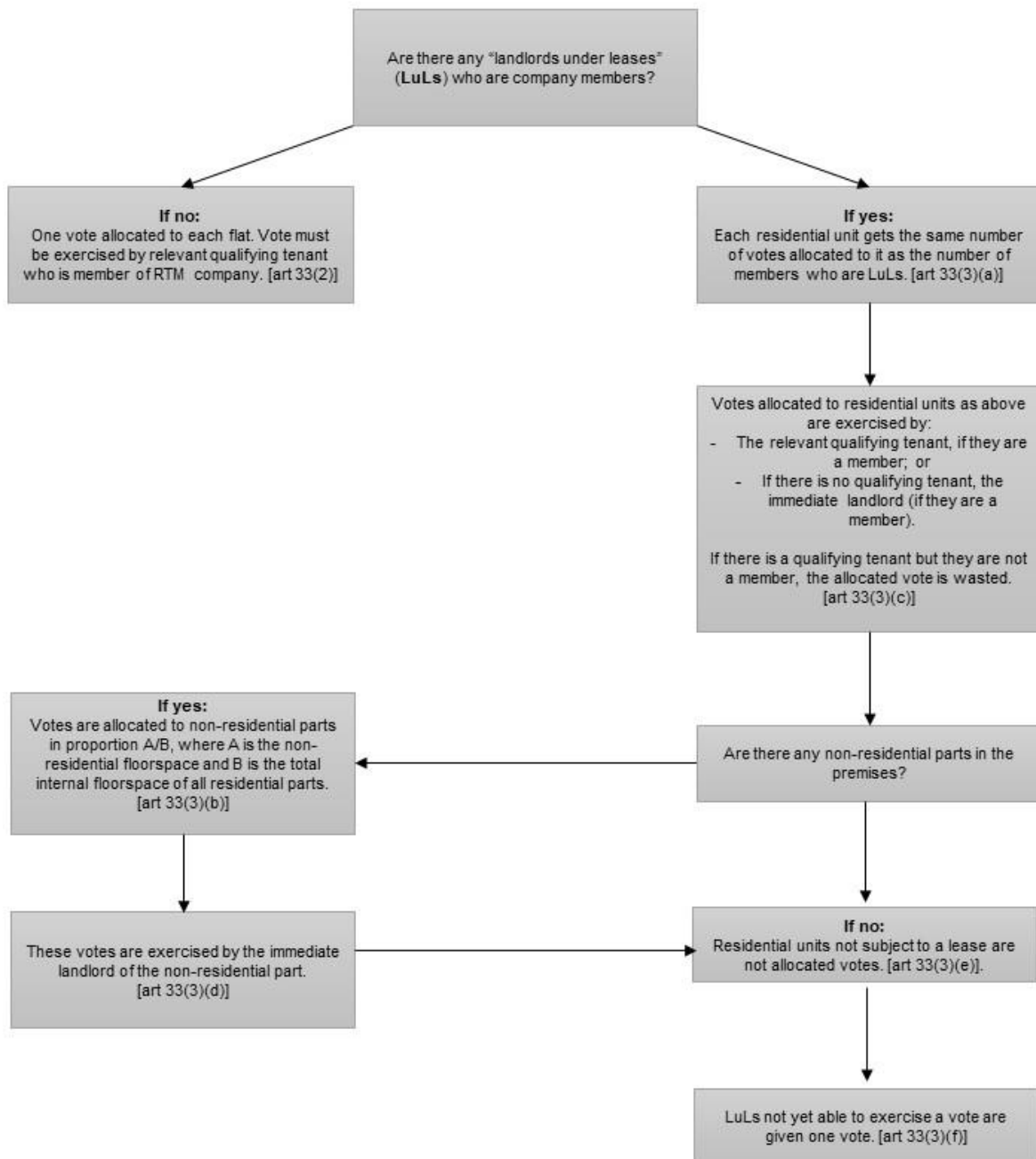
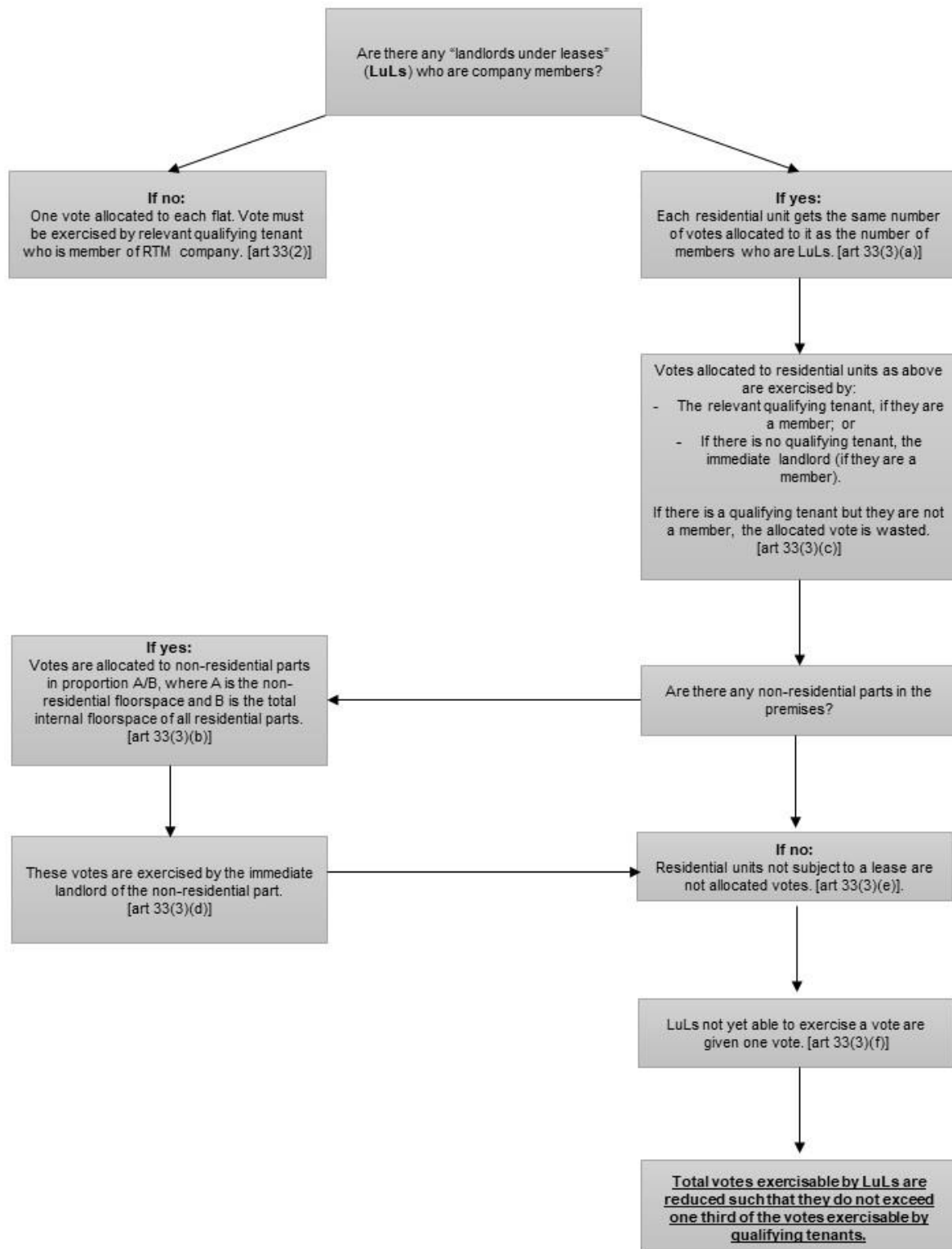


Figure C: Option 3



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