

**Written evidence submitted by Mark Loveday, Barrister and Editor of *service charges & management* (5<sup>th</sup> ed) (LFRB25)**

**1. WHO AM I?**

- 1.1 I am a practising barrister specialising in the law of property management, service charges and leasehold enfranchisement. I edit the leading legal textbook *Tanfield on Service Charges & Management*. In the past three years I have appeared in the first Right to Manage case to reach the Supreme Court (FirstPort v Settlers Court RTM), in the leading case which established leasehold rights for shared ownership leaseholders (Avon v Canary Gateway RTM), in the largest individual service charge case to date (Dell v 89 Holland Park Management) and have been instructed by the Association of Leasehold Enfranchisement Practitioners as intervenors in the forthcoming Supreme Court case of A1 Sunderland v Tudor Studios RTM.
- 1.2 In 2022, I led a delegation of specialist solicitors, managing agents and residents urging the minister (Lord Greenhalgh) to reform the law relating to the right to manage.

**2 SUMMARY OF SUBMISSION**

- 2.1 The provisions in Pt.2 of the Bill (clauses 22-25) relating to the right to manage are limited in effect.
- 2.2 They do not address the over-bureaucratic procedures that must be followed by leaseholders before they may seize control of the management of their properties. This is the single greatest obstacle to the exercise of the right to manage.
- 2.3 The Law Commission suggested various solutions.
- 2.4 But I suggest a simpler one clause amendment to the Bill which would give property tribunals a general power to waive procedural requirements in suitable cases.
- 2.5 There are other possible reforms to the right to manage, if legislative time allows.

**3 THE RIGHT TO MANAGE**

- 3.1 The right to manage appears in Ch.1 of Pt.2 of the Commonhold and Leasehold Reform Act 2022 (“CLRA”). It was succinctly described by Lord Briggs in Settlers Court RTM Co Ltd v FirstPort Property Services Ltd as follows:
- “In bare outline, the 2002 Act enables long leasehold tenants of residential flats to take over the management of the building of which their flats form part through the medium of a company (“the RTM Company”) of which they are members, in place either of the landlord or any other person upon whom management rights are conferred under the terms of the leases of the flats”.

3.2 From the start, the right to manage was intended as a simple cost-effective alternative to ownership of the freehold:

“The main objective is to grant residential long leaseholders of flats the right to take over the management of their building collectively without having either to prove fault on the part of the landlord or to pay any compensation. The procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. The allocation of responsibilities should be clear-cut, and the body through which the leaseholders take on management responsibility should enjoy all necessary powers to properly discharge its functions.”

The political significance is shown by the “Right to Manage” label - a conscious echo of the Right to Buy for local housing authority tenants in the Housing Act 1980.

#### **4 PROBLEMS WITH THE RIGHT TO MANAGE**

4.1 Despite these happy intentions, the right to manage proved problematic from the start. The problems were summarised by Law Commission’s Final Report on exercising the Right to Manage – one of the trilogy of residential leasehold law reform papers published in 2020:

“2.14 The “simple” RTM process envisaged in the original consultation which led to the 2002 Act 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. 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”.

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.”

4.2 These problems are famous amongst property lawyers. That have notoriously led to litigation on a truly industrial scale. The sheer volume of litigation is illustrated by the attached table, which lists some 49 appeals to the Upper Tribunal (Lands Chamber) and the higher courts over the past 10 years. The list does not of course include the hundreds of contested cases in the First-tier Tribunal (Property Chamber) in England and the Leasehold Valuation Tribunal in Wales. Note the repeat appearance of a small number of landlords in many of these appeals. This table has not been updated since February 2023, and there have been numerous cases since, including at least two Court of appeal decisions and another pending case in the Supreme Court.

4.3 Judges themselves have highlighted the unusually litigious nature of the Right to Manage:

- In Elim Court RTM Co Ltd v Avon Freeholds Ltd [2017] EWCA Civ 89 [2018] QB 571. Lewison L.J. described Right to Manage litigation as “trench warfare”. He went on to make this comment at [77]:

*“I have drawn attention to the Government's policy that the procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. That policy has not been implemented by the current procedures which still contain traps for the unwary. This is, we were told, the third attempt by the RTM company to acquire the right to manage Elim Court. **The Government may wish to consider simplifying the procedure further, or to grant the FTT 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.**”*

- In Avon Ground Rents Ltd v Canary Gateway (Block A) RTM Co the President of the Upper Tribunal, Fancourt J., said at [92]:

*“It is a matter of some regret that, once again, non-compliance in this case, which does not appear to have prejudiced any of the qualifying tenants, has provided an opportunity for Avon to delay the acquisition of the right to manage at the expense of the members of Canary A and Canary B. There can have been no prejudice to Avon, nor is Avon purporting to act in the best interests of MHT. However, the conclusion that I have reached is a consequence of the way that the legislation is drafted. In a consultation paper Leasehold home ownership: exercising the right to manage (January 2019), the Law Commission proposed abolition of the requirement for notices of invitation to participate on the grounds that they generally served little purpose and only increased costs and the opportunity for landlords to defeat claims. In its Report Leasehold home ownership: exercising the right to manage (July 2020), the Law Commission*

*confirmed its proposal. It may therefore be the case that the problem disappears, but in the meantime RTM companies need to be scrupulous to serve all qualifying tenants who are not already members of the RTM company and have not agreed to become a member with a notice in the right form.”*

## 5 REFORM PROPOSALS

5.1 The Law Commission made no fewer than 101 detailed recommendations for reform<sup>1</sup>. These received widespread support and are not controversial. For example, the Association of Leasehold Enfranchisement Practitioners welcomed the Law Commission recommendations unreservedly<sup>2</sup>. ALEP is the main professional body for specialist solicitors and surveyors in this area, representing both landlords and leaseholders.

5.2 On 11 January 2022, the government stated that it was considering further recommendations made by the Law Commission aimed at reforming the leasehold system. These included *inter alia* “expanding access to the right to manage [so that] ... more leaseholders will be able to take ... management responsibility for their buildings, if they choose to”. The government has now concluded its consultation on proposals that would “give significantly more leaseholders the power to ... take over management of their building under ‘right to manage’ powers”<sup>3</sup>.

5.3 The consultation did not expressly state the government intended to implement all 101 of the Law Commission’s Right to Manage recommendations. The consultation focussed solely on qualification for the right. Moreover, the consultation made it clear reforms would be in connection with extension of leaseholder rights in relation to collective enfranchisement under Leasehold Reform Housing & Urban Development Act 1993<sup>4</sup>.

## 6 THE BILL

6.1 The reforms to the right to manage as currently drafted are limited in effect. They can be summarised as follows:

- Leaseholders will be able to claim the right to manage provided no more than 50% of a building’s total floorspace is in non-residential use – rather than the current limit of 25% (clause 22).
- Costs provisions (clause 23).
- Minor changes to jurisdiction of courts and tribunals (clauses 24-25).

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<sup>1</sup> *Ibid*, Ch.14.

<sup>2</sup> <https://www.alep.org.uk/article/831/alep-responds-to-law-commission-rsquo-s-leasehold-reforms-recommendations>. The writer is a member of the ALEP Board.

<sup>3</sup> *Reforming the leasehold and commonhold systems in England and Wales*, consultation.

<sup>4</sup> *Ibid*, paras 40-44.

6.2 However, it should be noted that the Secretary of State has accepted the government is amenable to amendments to these provisions in Committee<sup>5</sup>.

6.3 Notably, they do not address the single most important problem with the right to manage, namely its procedural complexity.

## 7 THE MAIN PROPOSAL

7.1 The most obvious amendment would be the option suggested by Lord Justice Lewison above, namely granting the First-tier Tribunal (Property Chamber) in England (and the Leasehold Valuation Tribunal in Wales) the power to relieve against a failure to comply with the requirements if it is just and equitable to do so.

7.2 The Law Commission recommended a suite of reforms which would have had broadly the same effect. This included the abolition of Notices of intention to participate (recommendation 29), giving tribunals the power to waive defects in claim notices (recommendation 47), giving a similar power in relation to counter-notices (50) and giving the parties the power to agree to amend notices and counter-notices.

7.3 But Lord Justice Lewison's suggestion is a more elegant solution. It essentially mirrors the well-established formula in s.20ZA of the Landlord and Tenant Act 1985 for dispensation with consultation requirements.

7.4 The writer suggests a provision along the following lines:

“84ZA(1) Where an application is made to the appropriate tribunal under s.83(4) for a determination that an RTM company was on the relevant date entitled to acquire the right to manage the premises, the Tribunal may, if satisfied that it is reasonable to do so, dispense with:

- (a) service of any notice inviting participation;
- (b) service of any notice of claim;
- (c) any of the requirements in the provisions set out in subsection (2); or
- (d) any regulations made under this part of this Act.

(1) Subsection (1)(c) applies to the following provisions of this Act:

- (a) Section 73
- (b) Section 74
- (c) Section 78;
- (d) Section 79;

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<sup>5</sup> On 11 December 2023, the Secretary of State for Levelling Up Housing and Communities (Rt Hon. Michael Gove MP) suggested the right to manage was one of two areas “that we should look at in Committee” and that “I am very open to improving the Bill in Committee: Hansard HC Deb (11 December 2023) vol 742.

- (e) Section 80; and
- (f) Section 81.

## **8 FURTHER PROPOSAL**

8.1 The wording of the legislation has been interpreted to say that:

- Leaseholders of more than one block on an estate may not exercise a single Right to Manage: Triplerose v Ninety Broomfield Road RTM Co [2015] EWCA Civ 282.
- Leaseholders may not acquire management control over shared areas of an estate, such as the gardens and car parking areas: Settlers Court.

8.2 Both points frustrate the effective exercise of the Right to Manage in multi-block estates. The Law Commission proposed reforms to deal with both points, and they should be implemented.

## **9 CONCLUSIONS**

9.1 I share the government's wish to 're-boot' the Right to Manage and am happy to provide robust evidence of abuse to support the government's reform agenda.

9.2 Unlike other more controversial areas of leasehold reform (such as building safety, collective enfranchisement or commonhold), the Law Commission proposals for the Right to Manage have near universal support in the property industry. Early changes to the Right to Manage are an "easy win" for the Committee.

January 2024

**RTM appeals to February 2023**

22/03/22	<u>G &amp; A Gorrara Ltd</u>	Kenilworth Court Block E RTM Co	[2022] UKUT 0090 (LC)
12/01/22	<u>FirstPort Property Services</u>	Settlers Court RTM Co	[2022] UKSC 1
23/11/21	<u>Assethold Ltd</u>	36 Dunsmure Road RTM	[2021] UKUT 0295 (LC)
09/11/21	<u>Eastern Pyramid Group Corporation SA</u>	Spire House RTM Co	[2021] EWCA Civ 1658
08/01/21	<u>Benthan</u>	Lindsay Court (St Annes) RTM Co	[2021] UKUT 4 (LC)
20/07/20	<u>Assethold Ltd</u>	63 Holmes Road (London) RTM Co	[2020] UKUT 0228 (LC)
19/06/20	<u>Eastern Pyramid Group Corporation SA</u>	Spire House RTM Co	[2020] UKUT 0199 (LC)
16/12/20	<u>Avon Ground Rents Ltd</u>	Canary Gateway (Block A) RTM Co Ltd	[2020] UKUT 0358 (LC)
17/12/19	<u>European Investments &amp; Development (Properties) Ltd</u>	Lexham House RTM Co	[2019] UKUT 0390 (LC)
27/11/19	<u>Assethold Ltd</u>	20 Upper Wickham RTM Co	[2019] UKUT 0368 (LC)
15/08/19	<u>Westleigh Properties Ltd</u>	47 Park Hill (Carshalton) RTM Co	[2019] UKUT 0252 (LC)
15/08/19	<u>FirstPort Property Services</u>	Settlers Court RTM Co	[2019] UKUT 0243 (LC)
01/04/19	<u>The Lough's Property Management Ltd</u>	Robert Court RTM Co	[2019] UKUT 0105 (LC)
01/08/18	<u>Broad Quay North Block Freehold</u>	CQN RTM Co	[2018] UKUT 0183 (LC)
27/10/17	<u>Gibbs</u>	Clevedon Court (Dulwich) RTM Co	[2017] UKUT 0411 (LC)
01/08/17	<u>Assethold Ltd</u>	110 Boulevard RTM Co	[2017] UKUT 0316 (LC)
23/02/17	<u>Avon Freeholds Ltd</u> <u>Assethold Ltd</u>	Elim Court RTM Co	[2014] UKUT 0397 (LC)
14/02/17	<u>Avon Ground Rents Ltd</u>	51 Earls Court Square RTM Co	[2017] EWCA Civ 217
17/05/16	<u>Miltonland Ltd</u>	Platinum House (Harrow) RTM Co	[2016] EWCA Civ 732
29/02/16	<u>Gateway Property Holdings Ltd</u>	Ross Wharf RTM Co	[2016] UKUT 0097 (LC)
16/02/16	<u>Triplerose Ltd</u>	Mill House RTM Co	[2016] UKUT 0080 (LC)
11/02/16	<u>Triplerose Ltd</u>		[2016] UKUT 0077 (LC)

14/01/16	<u>Avon Ground Rents Ltd</u>	51 Earls Court Square RTM Co	[2016] UKUT 0022 (LC)
15/06/15	<u>Miltonland Ltd</u>	Platinum House (Harrow) RTM Co	[2015] UKUT 0236 (LC)
01/06/15	<u>Post Box Ground Rents Ltd</u>	The Post Box RTM Co	[2015] UKUT 0230 (LC)
22/05/15	<u>Sinclair Gardens Investments (Kensington) Ltd</u>	Darlaston Court RTM Ltd	[2015] UKUT 0277 (LC)
22/05/15	<u>Sinclair Gardens Investments (Kensington) Ltd</u>	The Maltings (Stanstead Abbots) Management Co	[2015] UKUT 0278 (LC)
27/03/15	<u>Triplerose Ltd</u>	Ninety Broomfield Road RTM Co	[2015] EWCA Civ 282
04/12/14	<u>(1) Fairhold NW Ltd</u> <u>(2) OM Property Management Ltd</u>	St Stephens Mansions RTM Co	[2014] UKUT 0541 (LC)
11/11/14	<u>Assethold Ltd</u>	37 Whatman Road RTM Co	[2014] UKUT 0505 (LC)
17/09/14	<u>Sinclair Gardens Investments (Kensington) Ltd</u>	Windermere Court Kenley RTM Co	[2014] UKUT 0420 (LC)
10/09/14	<u>Avon Freeholds Ltd</u> <u>Assethold Ltd</u>	Elim Court RTM Co	[2014] UKUT 0397 (LC)
30/01/14	<u>Columbia House Properties (No.3) Ltd</u>	Imperial Hall RTM Co	[2014] UKUT 0030 (LC)
28/01/14	<u>Fencott Ltd</u>	Lyttelton Court 1 14/34a RTM Co	[2014] UKUT 0027 (LC)
14/01/14	<u>Albion Residential Ltd</u>	Albion Riverside Residents RTM Co	[2014] UKUT 0006 (LC)
04/12/13	<u>Pineview Ltd</u>	83 Crampton Street RTM Co	[2013] UKUT 0598 (LC)
05/07/13	<u>Avon Freeholds Ltd</u>	Regent Court RTM Co	[2013] UKUT 0213 (LC)
28/11/13	<u>Triplerose Ltd</u>	Ninety Broomfield Road RTM Co	[2013] UKUT 0606 (LC)
28/11/13	<u>Assethold Ltd</u>	13/24 Romside Place RTM Co	[2013] UKUT 0603 (LC)
21/11/13	<u>No.1 Deansgate (Residential) Ltd</u>	No.1 Deansgate RTM	[2013] UKUT 0580 (LC)
16.10.13	<u>Assethold Ltd</u>	7 Sunny Gardens Road RTM Co	[2013] UKUT 0509 (LC)
07.10.13	<u>Fairhold (Yorkshire) Ltd</u>	Trinity Wharf (SE16) RTM Co	[2013] UKUT 0502 (LC)
23.10.13	<u>Gala Unity Ltd</u>	Ariadne Road RTM Co	[2012] EWCA Civ 1372
03/10/13	<u>Fairhold Mercury Ltd</u>	HQ (Block 1) Action Management Co	[2013] UKUT 0487 (LC)
05/07/13	<u>Avon Freeholds Ltd</u>	Regent Court RTM Co	[2013] UKUT 0213 (LC)
21/02/13	<u>Roseleb Ltd</u>	Corscombe Close Block 8 RTM Co	[2013] UKUT 081 (LC)

**ATTENDEES**

<b>ATTENDEES</b>	
<b>Professional advisers</b>	
Mark Loveday	Barrister, Tanfield Chambers Editor of <i>Service Charges &amp; Management</i> (5th Ed) Judge, First-tier Tribunal (Property Chamber)
Charlotte Collins	Solicitor, Jepsens. Represents RTM companies in leading cases, including <u>Settlers Court</u> , <u>Canary Gateway</u> , etc.
Paul Cleaver	Urang Property Management. Represents RTM companies
Richard Delaney	Haus Block Management. Represents RTM companies
<b>Lessees</b>	
TBA	