

**Welcome to Landmark Chambers'**

**Mixed-use Headaches and Hurdles: What to be aware  
of when dealing with residential & mixed-use  
developments**

The recording may be accessed [here](#).

Your speakers today are...



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# Scope of this presentation



## Overview: the key statutory provisions

### Landlord and Tenant Act 1985:

- Provision of information to tenants upon request re: landlord's identity (ss1/2)
- Service charge regulation (more on this later!) – ss.18-30 incl:
  - Consultation on major works: s.20 / s20ZA + Service Charges (Consultation Requirements) (England) Regs 2003
  - Right to request summary of relevant costs and to inspect accounts / vouchers etc: s21-25 – inc from superior landlord – criminal offence...
- Provision for recognised tenants' associations and their rights e.g. to be consulted about changes to managing agents.



## Overview: the key statutory provisions

### Landlord and Tenant Act 1987

- *Part 1*: Rights of first refusal ('s5 notices')
- *Part 2*: Appointment of a manager
- *Part 3*: Compulsory acquisition of L/L interest
- *Part 4*: Variation of leases
- *Part 5*: Statutory trust for residential S/C
- *Part 6*: Information to be given to tenants



## Overview: the key statutory provisions

### Commonhold and Leasehold Reform Act 2002

- Restrictions on forfeiture:
  - s.166: Prescribed form of demand for rent
  - s.167: 3 years / £350
  - s.168: Require determination of breach (non-rent)
- Insurance of houses: s164
- RTM (more later!): ss71-112 + sch. 6/7
- Limitations on administration charges: Sch.11



## Overview: the key statutory provisions

### The rest.....:

- Housing Act 1996:
  - s.81 – need for determination of s/c / admin chg pre. forfeiture
- Leasehold Reform Act 1967:
  - Enfranchisement / lease extensions: houses
- Leasehold Reform, Housing and Urban Development Act 1993:
  - Collective enfranchisement / lease extensions: flats
  - Provision for management audits
  - Codes of practice: RICS S/C Residential Management Code 3<sup>rd</sup> ed.



## Overview: the key statutory provisions

### The rest.....:

- Consumer protection legislation:
  - Unfair Terms in Consumer Contracts Regs 1999
  - Unfair Contract Terms Act 1977
  - Consumer Rights Act 2015
- Protection from Eviction Act 1977
  - Beware mixed use tenure where any part occupied as a dwelling: criminal offence / invalidates re-entry if do not forfeit by way of court proceedings:  
Patel v Pirabakaran [2006] EWCA Civ 685



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## Collective Enfranchisement

- Part I of the Leasehold Reform, Housing and Urban Development Act 1993
- 2 issues which may arise in practice:
  - a) Do the premises qualify?
  - b) What property may be acquired?
- Be careful different rules for enfranchisement of a 'house': Leasehold Reform Act 1967

# Collective Enfranchisement: do the premises qualify?

- Section 3(1) 3 conditions:
  1. Premises must consist of a self contained building or part of a building;
  2. Premises must contain 2 or more flats held by qualifying tenants; and
  3. The total number of flats held by such tenants is not less than 2/3 of the total number of flats in the premises
  
- Chapter 1 does not apply to premises if (section 4(1)):
  - a) Any part or parts of the premises is or are neither:
    - (i) Occupied or intended to be occupied for residential purposes, nor
    - (ii) Comprised in any common parts of the premises; and
  
  - (b) The internal area of that part or parts (taken together) exceeds 25% of the internal floor area of the premises

## Collective Enfranchisement: part non residential use

- Three types of areas:
  - a) Common parts;
  - b) Occupied or intended to be occupied for residential purposes; and
  - c) Neither occupied nor intended to be occupied for residential purposes
  
- Is c) more than 25% of the total internal floor area of the premises (disregarding common parts)?

### Common Parts

- Not necessary that the area is devoted to purposes as matter of obligation in the lease nor do Ts have to have access to it: ***Westbrook Dolphin Square v Friends Life*** [2015] 1 WLR 1713
  
- Area not demised used by 2 or more commercial occupants = common parts: ***Marine Court v Rother District Investments Ltd*** [2008 1 EGLR 39

## Collective Enfranchisement: what property may be acquired?

- Freehold of the premises in which the qualifying tenants flats are contained
- Appurtenant property demised by the lease of a Qualifying Tenant: s.1(3)(a);
- Property which a Qualifying Tenant is entitled under the terms of his lease to use in common with occupiers of other premises: s.1(3)(b)

## Collective Enfranchisement: what property may be acquired?

### Acquisition of leasehold interests

- MUST acquire the headlease to lease held by a QT of a flat: s.2(2)
- MAY acquire a leasehold interest which demises common parts (or additional property under s.1(2)(a)) if the acquisition is:
  - “*reasonably necessary for the proper management or maintenance of those common/additional parts*” s. 2(3)
- ***LM Homes Ltd v Queen Court Freehold Co Ltd*** [2020] 2 WLR 1135-  
airspace, basement and subsoil

## The Right to Manage – an outline

- What Right to Manage is
- How to qualify
- Procedure to bring RTM about
- No time to cover in any detail today



## The Right to Manage – what is it?

- Grants long-lessees the right to manage their block.
- Through a tenant-owned company (RTM company).
- Commonhold & Leasehold Reform Act 2002  
(Part 2, chapter 1 + sch 6 & 7)  
(NB: poorly drafted!)
- Cannot contract out: s106



## The Right to Manage – what it's not

- Not same as the right to appoint a manager:
  - Part II LTA 1987.
  - Fault-based.
  - Manager's power comes from Court Order vs RTM Co's rights in lease
- Is IS possible for RTM Co to be replaced by a manager and vice versa.



## The Right to Manage – qualification

- Must be a self-contained building or part of a building with / without appurtenant property that contains 2+ flats held by qualifying tenants.
- At least 2/3<sup>rds</sup> of flats to be held by qualifying tenants
  - QT: In essence a tenant of a flat under a long lease
- Exemption for a building with more than 25% “non-residential” (by reference to internal floor area): Sch. 6, para 1(1)
  - How to calculate? Indiana Investments v Taylor [2004] 3 EGLR 63 & Marine Court (St Leonards on Sea) Freeholds Ltd [2008] 1 EGLR 39
  - NB: lots of scope for argument over what is ‘common parts’ (disregarded)

## The Right to Manage – Rights Acquired

- RTM Co acquires: “Management functions”:
  - Functions with respect to services, repairs, maintenance, improvements, insurance and management (s96(5))
  - Approvals and enforcement of the covenants  
(subject to notifying landlord: ss98/99)
  - Obligations owed to landlord and tenants (s97(1))



## The Right to Manage – Rights Not Acquired

- The right to receive the ground rents
- Management functions **solely** relating to non-residential parts of the building or non-qualifying flats (s96(6)(a)).
- Functions relating to forfeiture and possession (s96(6)(b))



## The Right to Manage – The Reality?

### Common Issues:

- Acquisition process fraught with pitfalls
- Landlords drag out acquisition process for commercial (non-genuine?) reasons.
- Failure to comply with statutory requirements once acquire.
- Failure to comply with company requirements – voting, AGMs, shares, directors.
- Leaseholders change / fall out. No-one wants to be director.
- Expectations of leaseholders (often unrealistic) don't change.
- RTM Co also acquires right to manage wider estate services – maybe...
  - Gala Unity Ltd v Ariane Road RTM Co Ltd [2012] EWCA Civ 1372

# Tenants' Right of First Refusal and Mixed Use Premises

- Part 1 Landlord and Tenant Act 1987
- **Health warning**- difficult statutory provisions and limited case law
- 2 issues which may arise:
  - Does TRFR apply to the premises?
  - Do TRFR apply to a disposal of a solely commercial element?

## TRFR: very brief overview

- Triggered by a relevant disposal (s.4) of qualifying premises( s.1) known as the protected interest
- Does not apply to 'excluded disposals' (s.4(1)(a),(b) and 4(2))
- LL must serve a written 'offer notice' for relevant disposal (ss.5,5A-5E)
- Period (in offer notice) within which Ts may accept the offer and LL may not dispose of the protected interest except to a NP (s.6(1))
- If acceptance notice served by requisite majority of QT a 'protected period' from date of service of notice to end of period for identifying a NP (s.6)

## TRFR: very brief overview

- If acceptance notice served and NP nominated LL must either dispose of protected interest to NP or not dispose (s.8)
- If Ts fail to give notice LL may dispose of the protected interest (s.7)
- If LL fails to comply with provisions requisite majority of QT may serve a purchase notice to acquire the protected interest on the terms of the disposal (ss.12A-12C)
- Criminal offence for LL, without reasonable excuse, to make a relevant disposal of qualifying premises without serving an offer notice or complying with ss.6-10 (s.10A)

## TRFR: does it apply to the Premises?

- 3 conditions: s.1(2) Premises must:
  - i) Consist of the whole or part of a building;
  - ii) Contain 2 or more flats held by QT; and
  - iii) Total number of flats held by QT must exceed 50% of total number of flats
  
- Does not apply if: s.1(3)
  - i) A part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and
  - ii) The internal area of that part exceeds 50% of the total internal floor area (disregarding common parts)
  
- Common parts include “the structure and exterior of that buildings and any common facilities within it” (s.60(1))



## TRFR: does it apply to the Premises?

- Building (s.1(2)) includes appurtenances to it: ***Denetower Ltd v Toop*** [1991] 1 WLR 945
  
- Appurtenances include:
  - a) Areas over which Ts have rights under their leases;
  - b) Areas usually enjoyed with the building, including those to which access is required by the LL to comply with its obligations to repair and maintain the building: ***York House Ltd v Thompson*** [2019] EWHC 2203
  
- Common parts same meaning as for the 1993 Act: ***York House Ltd v Thompson*** [2019]

## TRFR: disposal of commercial element only

- Does a disposal of a solely commercial element trigger TRFR?
- Relevant Disposal = a disposal of any part of the qualifying building and **not** just of a part which is common parts or subject to rights held by 2 or more QT: ***York House Ltd v Thompson*** [2019], ***Dartmouth Court v Berisworth*** [2008] EWHC 350
- Relevant premises are identified objectively without reference to the subject matter of the disposal
- NB para 99 ***York House Ltd v Thompson*** ‘the point does not directly arise for decision in this case’

## TRFR: disposal of commercial element only

Some arguments for and against

Disposal of commercial element not caught

- A disposal pursuant to 1993 Act is not a relevant disposal (s.4(1)(da)) would be odd if a renewal pursuant to LTA 1954 was a relevant disposal
- Tenant of a business tenancy not a QT as he is not the T of a flat
- A tenancy of a single flat is not a relevant disposal (s.4(1)(a)) but a lease of a single unit specifically designed for business purposes would be?

Disposal of commercial element is caught

- Act applies to buildings which are essentially residential in character, Ts should have some control over commercial element
- Contemplated that the Act could apply to buildings with a commercial element (s.1(3))

## Service charge issues - Residential / Mixed-Use

- Huge topic, will just touch on a few aspects today
- An area where commercial operators inexperienced in residential leasehold management can come rapidly (and sometimes expensively) unstuck!
- Most of the key provisions found in LTA 1985



## Service charge issues - Residential / Mixed-Use

- Most statutory overlay in this regard only applies if the premises amount to a dwelling - s.38 LTA85:
  - *‘a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it’*
- Usually obvious, but can be very unclear at the margins e.g. student accommodation, or commercial with ancillary (e.g. caretaker) accommodation. What does ‘separate’ mean? When is something ‘intended’ to be occupied as a dwelling?
  - Oakfern v Ruddy [2006] EWCA Civ 1389 (note position of mesne landlord)
  - JLK v Ezekwe [2017] UKUT 0277 (LC)

## Service charge issues - Residential / Mixed-Use

- **s19:** ‘Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
  - only to the extent to which they are reasonably incurred; and
  - where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard,
  - and the amount payable shall be limited accordingly.
  
- **S27(1):** Can apply to FtT for a determination of payability of service charges, including (s27(3) prospectively – ‘if I incur costs, will they be payable?’

## Service charge issues - Residential / Mixed-Use

- What does 'reasonably incurred' mean?
  - Not just generic 'reasonableness' – more structured.
  - Doesn't mean 'cheapest', but comparator evidence is useful.
  - 2 stages – was the decision making process reasonable? And is the sum to be charged reasonable in light of market evidence?
  - Consider LB Hounslow v Waaler [2017] EWCA Civ 45 in this context, and the distinction between routine works and improvements in this context.



## Other service charge issues to be aware of...

- Consultation on major works: s.20 / s20ZA + Service Charges (Consultation Requirements) (England) Regs 2003
- Time limit for making demands (s20B) and requirement to give statement of rights and obligations (s21B)
- Limitations on costs recovery in challenges: s20C / para 5A
- s27A(6): void terms – real issues with apportionment in mixed-use developments - see Windermere Marina Village v Wild [2014] UKUT 163 and Williams v Aviva Investors [2020] UKUT 0111 (LC) (currently subj. to appeal to CA).



**Thank you!**

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