

# TANFIELD

## Management Issues at Mixed-Use Developments

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### Introduction

1. By their very nature, mixed-use developments involve multiple parties with competing interests. This often leads to disputes regarding the management of the estate and the cost of maintaining it and, ultimately, to leaseholders wanting to take control (either by exercising the right to collective enfranchisement or the right to manage).
2. This paper will consider the following (disparate) issues:
  - (1) Construction of service charge covenants
  - (2) Apportionment
  - (3) Consultation
  - (4) Variation of Leases
  - (5) The Right to Manage.

### Construction of Service Charge Clauses

3. In an ideal world, a service charge regime would be logical and 'fair' (or at least acceptable to the various parties) and, most importantly, the service charge provisions would clearly define the parties' obligations so that: (i) the parties understand their respective repairing obligations; (ii) the costs

of performing those obligations can be recovered in full; and (iii) the apportionment of the costs between the respective parties is clear. In practice, all too often, the drafting of the leases is poor.

4. The principles that apply to contractual interpretation are well established. Those principles apply when interpreting service charge clauses.
5. In the particular context of service charges, the most important feature of the background which tends to fall for consideration is the fact that the provisions constitute a scheme whereby the landlord seeks to recover from the tenant(s) the cost of works. That consideration has, however, given rise to somewhat conflicting results.
6. In *Universities Superannuation Scheme Ltd v Marks & Spencer Plc* [1999] 1 E.G.L.R. 13 the relevant provisions were construed having regard to the need for the landlord of a shopping centre to recover the full cost of maintaining the centre for the benefit of its tenants. But in *Gilje v Charlgrove Securities Ltd* [2002] 1 E.G.L.R. 41 the Court of Appeal held that that same consideration should lead to an approach which was more favourable to the tenant. The landlord, in that case, was held not to be entitled to recover the notional rental cost of a flat which it was obliged to provide to a resident caretaker.
7. There is no presumption that a landlord is entitled to recover 100 per cent of his costs: see *Rapid Results College v Angell* [1986] 1 E.G.L.R. 53.
8. Generally, in a residential context, any lack of clarity is likely to be resolved in favour of the paying party: see *Jollybird v Fairzone* [1990] 2 E.G.L.R. 55 and *Paddington Basin Developments Ltd and ors v Gritz & ors* [2013] UKUT 0338. The distinction between residential and commercial leases in this context was also specifically remarked upon by the Chancellor in *Wembley Stadium Ltd v Wembley (London Ltd)* [2008] 1 P.& C.R. 3 at [44].

9. Other examples of cases in which it has been held, following this approach, that the liability of the tenant was not sufficiently clearly spelt out to be recoverable are:

- *Woodtrek v Jezeck* [1999] 1 E.G.L.R. 13 (the cost of collection of rent);
- *Boldmark v Cohen* [2002] 1 E.G.L.R. 41 (the recovery of interest on money borrowed by the landlord);
- *Williams v LB Southwark* (2001) 33 H.L.R. 22 (the full cost of an insurance policy where the landlord enjoys a discount given by way of a “loyalty bonus”); and
- *Mullany v Maybourne Grange (Croydon) Management Co Ltd* (1986) 277 E.G. 1350 (the cost of replacement of windows, under a clause permitting recovery for “providing and maintaining additional services or amenities”).

10. These cases represent a line of authority, culminating in *McHale v Earl Cadogan* [2010] 1 E.G.L.R. 51, in support of the principle that service charge clauses are to be construed restrictively. In *McHale v Earl Cadogan* Rix LJ said at [17]:

“... it is the policy of the authorities not to bring within the general words of a service charge clause anything that does not clearly belong there. To put the matter another way, service charge provisions have been construed restrictively.”

11. In *Arnold v Britton* [2015] UKSC 36; [2015] 2 W.L.R. 1593, however, the Supreme Court rejected a submission that service charge clauses are to be construed restrictively. It held that service charge clauses are not subject to any special rule of contractual interpretation. The case concerned the proper interpretation of a clause which provided that the service charge was a fixed sum with a fixed annual increase. The alarming consequence of the court’s interpretation (for example, as regards a lease granted in 1980, the service charge would be over £2,500 in 2015 and over

£550,000 by 2072) was not a convincing argument for departing from the natural meaning of the clause.

12. Two common issues that arise are: (i) a commercial tenant's liability to contribute towards services and facilities from which it receives no benefit; and (ii) the recovery of legal costs under 'sweeping up clauses'.
13. A commercial tenant (of say, ground floor premises in a block of residential flats) always has an uphill struggle arguing that it should not contribute to the same items of expenditure as the lessees of flats where the service charge provisions in the leases are similar. This is so, even where the clause provides that the tenant is liable contribute towards the cost of maintaining and repairing those areas to which it "uses and enjoys" notwithstanding that the commercial premises are self-contained and the tenant may not have access to the common parts of the residential block above.

#### "Sweeping up clauses"

14. There is conflicting authority on what costs can be recovered under such clauses. In *Lloyds Bank v Bowker Orford* [1992] 2 EGLR 44 (Ch D) David Neuberger QC held that a clause which allowed the landlord to recover the costs of providing "any other beneficial services" did not entitle it to recover costs relating to external repairs, internal decoration and repair of the common parts.
15. In *Holding & Management Ltd v Property Holding & Investment Trust Plc* [1989] 1 W.L.R. 1313 the lease allowed the landlord to recover "such ... works ... as the maintenance trustee shall consider necessary to maintain the building as a block of first class residential flats". The maintenance trustee was not entitled to recover the cost of substantial external works under the sweeping up clause. There was already a detailed repairing provision in the lease. The Court of Appeal held that the clause did not give the maintenance trustee "a free hand to require the residents to pay for all

works, whatever they might be, which the [maintenance trustee] might consider necessary to maintain the building as a block of first class residential flats.” The clause was directed at works which were necessary to maintain the amenities and facilities which from time to time are appropriate for the building as a block of first class residential flats.

16. By contrast, landlords were successful in recovering the cost of works under sweeping up clauses in *Sutton (Hastoe) Housing Association v Williams* (1988) 20 H.L.R. 321 (replacing wooden windows with UPVC ones) and *Sun Alliance and London Assurance Co Ltd v BRB* [1989] 2 E.G.L.R. 237 (window cleaning systems).
17. In *Canary Riverside Property Limited v Schilling* LRX/65/2005 the Upper Tribunal held that the costs of resisting an application to appoint a manager under s.24 of the 1987 Act fell within a charging provision which entitled the landlord to recover the “proper and reasonable fees and disbursements of managing agents, solicitors, counsel, surveyors ... employed or retained by the Landlord for or in connection with the general overall management and administration and supervision of the building.”
18. In *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC) the Deputy President held that the costs of dealing with a s.24 application were costs incurred “in the management of the building”. At [42] Deputy President said “The management of a complex residential building necessarily and routinely involves dealing with inquiries, complaints and criticism. If leaseholders seek the appointment of a new manager, or seek to persuade a landlord to make changes in the style or approach to management, the landlord's participation in such discussions would, in my view, also be “in the management of the building”.”
19. In *Assethold Ltd v Watts* [2014] UKUT 537 (LC) the Upper Tribunal (Martin Rodger QC, Deputy President) held that legal costs incurred by a landlord in bringing proceedings to obtain a party wall award were recoverable

under the landlord's general obligation to do whatever acts were necessary to preserve the safety and amenity of the building.

20. *Geyfords Limited v O'Sullivan* [2015] UKUT 683 (LC) is the most recent case in this line of authority. The landlord incurred professional costs in both County Court and LVT proceedings and subsequently sought to recover a contribution towards them through the service charges for the three accounting years from 2011 to 2014. The lessee covenanted to contribute a sum called "the Maintenance Contribution" which was to be one-twelfth of the "costs expenses outgoings and matters" mentioned in the Fourth Schedule. Para 6 of the Fourth Schedule refers to: "All other expenses (if any) incurred by the Lessors or their managing agents in and about the maintenance and proper and convenient management and running of the Development." As a preliminary issue, the FTT determined that legal costs were not recoverable under para 6 of the Fourth Schedule. The landlord appealed.
21. On appeal, Martin Rodger QC, Deputy President, reviewed a number of authorities on the recovery of legal costs, including *Reston Ltd v Hudson* [1990] 2 EGLR 51 and *Sella House Ltd v Mears* [1989] 1 EGLR 65, in the light of the Supreme Court's recent decision in *Arnold v Britton*. The Deputy President held that the language of para 6 was "less clear than [was] to be expected if the cost of proceedings against defaulting leaseholders had been intended to be recovered as costs and expenses of "proper and convenient management and running of the Development". Moreover, the President held that "commercial common sense would lead one to expect the employment of clear language to impose onerous and unpredictable burdens." Accordingly, the landlord's appeal was dismissed.
22. For many years, the courts and tribunals adopted a restrictive approach to the construction of service charge clauses (e.g. *Sella House*, culminating in Rix LJ's comments in *McHale v Earl Cadogan*). In recent years, it appeared that the courts were adopting a more relaxed approach (exemplified by the decision in *Assethold v Watts*), making it more likely

that a landlord could recover legal costs under a sweeper clause. That trend looked set to continue following the Supreme Court's decision in *Arnold v Britton*. It may be said, however, that *Geyfords Limited v O'Sullivan* marks a slight retreat to the old approach that legal costs will not be recoverable through a service charge in the absence of clear words. The decision will not be welcomed by landlords.

## Apportionment

23. This is one of the most common sources of disputes.
24. There are a number of methods of apportionment: a specified fixed percentage, rateable value, floor area, number of bedrooms or "living space factor". All have their advantages and disadvantages and all will produce, to some extent, winners and losers. Alternatively, the lease might provide that the tenant is to pay a "fair and reasonable" proportion, as determined by the landlord, its managing agent or its surveyor (acting reasonably). Some leases provide for a combination of methods.
25. The apportionment of service charges can be a complex matter in a building with a variety of modes of occupation (business, leisure, residential) or as between different buildings on a large estate. Different contributions may be appropriate to different users and there may be more than one fair or reasonable method which may be adopted.
26. In *Rowner Estates Ltd*, LRX/3/2006 (Lands Tribunal, unreported, 2007) which concerned the "due proportion" to be paid by the residential tenants of the landlord's costs of maintaining a mixed use development, the Lands Tribunal approved an apportionment which disregarded the relative floor-space of the residential and commercial parts but took into account the difficulty the estate company was having in letting commercial units.

27. The RICS Real Estate Management Standards, 1<sup>st</sup> Ed. (March 2013) states at para 3.1.9:

“The basis and method of apportionment of service charges should be demonstrably fair and reasonable to ensure that individual occupiers bear an appropriate proportion of the total service charge expenditure, reflecting the availability, benefit and use of services. It is very common within mixed use developments that not all the occupiers benefit from the services to the same extent. In such circumstances, the costs will be allocated to separate schedules and the costs apportioned only to those tenants that receive the benefit or use of the service. Apportioning the costs within that schedule can then itself be ‘weighted’ on the perceived extent of benefit and use.”

28. Para 4.7 of Managing Mixed Use Developments: RICS Guidance Note (September 2012) states:

“There can be a difference between benefit and use. For example, an office occupier decides not to use the lift and instead utilises the stairs to reach his demise. Whilst he might choose not to use the lift, he still benefits from the availability of the lift service and should therefore contribute to the on-going maintenance costs. The principle as to the amount of the contribution will vary on a case by case basis. A discounted charge may be appropriate in some circumstances, with the costs being weighted towards each occupancy and use type.”

29. Allocating costs to schedules can itself be contentious. It may not be obvious which schedule the cost should be allocated to and, in many cases, it can be argued that the cost could properly be allocated to more than one schedule. The allocation of costs to schedules may determine whether the tenant is liable to contribute to those costs at all and, if so, the proportion of such contribution. The tenant will obviously want to minimise his service charge liability. Whether a cost has been properly allocated is really a question of construction.

“Fair and reasonable”

30. It is often desirable, particularly in large mixed-use developments, for the freeholder/head leasee to retain an amount of flexibility when apportioning costs. Thus, the discretion to determine a “fair and reasonable” proportion is common. What is “fair and reasonable” is a matter of construction and will depend on the circumstances of each case.

31. In the commercial context, where a landlord carries out expensive and long-term repairs rather than short-term patch repairs and the unexpired term of the lease is short the tenant's fair proportion of those costs should be determined by reference to fact that the tenant enjoyed the benefit of the repairs for a short period of their lifespan: see *Scottish Mutual Assurance Plc v Jardine Public Relations Ltd* (1999) EGCS 43.
32. In *Friends Life Management Services v A&A Express Building* [2014] EWHC 1463 (Ch), Morgan J observed that at [55]:

“No doubt that apportionment exercise should involve a consideration of the significance of that item to the Premises as distinct from other parts of the building, which includes property in addition to the Premises. It might be, for example, that the landlord would apportion the expenditure on an item by reference to the floor area of the Premises as a proportion of the total floor area of the Premises and the other property.”
33. In that case, the tenant of office premises and a car park sought a determination of the service charge payable for the last accounting period under the lease. The tenant exercised a break clause to determine the lease on 24 March 2010. Thereafter, in 2010 and 2011 the landlord procured the carrying out of major works to the premises at a cost of over £1m.
34. Morgan J held, amongst other things, that (1) the last accounting period of the lease was the year to 31 December 2010 (as opposed to 24 March); (2) the costs actually incurred on major works in 2011 should not have been included gross annual expenditure in the accounts; and (3) as regards apportionment, it was implicit that there should be an apportionment by reference to the duration of the tenancy during the last service charge year and the right method of apportionment to imply was apportionment on a day to day basis.
35. These issues are unlikely to arise in a residential context, save perhaps in the case of forfeiture.

36. That case also applied the principle that the service charge must be demanded in accordance with the lease. As is commonly the case, the lease required the service charge to be certified at the year-end and the service of the certificate was a condition precedent to the tenant's liability to pay. As the
37. Apportionment in the certificate was not in accordance with the instructions of the lease the certificate was invalid. Thus, if apportionment is a matter for the certificate, an apportionment which is not in compliance with the lease will in all likelihood invalidate the certificate.
38. In the residential context, the approach to determining a "fair and reasonable" proportion is likely to be similar to that when assessing reasonableness for the purposes of s.19: The question is whether the decision is a reasonable one in all the circumstances, even if other reasonable decisions could also be taken (see *Lord Mayor and Citizens of Westminster v Fleury* [2010] UKUT 136 (LC)).
39. In *Windermere Marina Village Ltd v Wild* [2014] UKUT 0163 (LC) the tenants covenanted "To pay a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding) of the expense of all communal services etc." The Upper Tribunal held that this clause was void by s.27A(6) of the 1985 Act (this subsection renders void any agreement by the tenant which "purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application under subsection (1) or (3)"). That meant that the LVT was entitled to consider the issue of apportionment afresh: it was not limited to substituting its own view only if it was satisfied that the landlord's method was unfair.
40. In *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC), [2015] L. & T.R. 19 the decision in *Windermere* was extended to a clause in a head lease which provided that the apportionment of expenditure was to be

determined by the landlord or its surveyor. The freeholder argued that s.27A(6) only rendered void those clauses which expressed the determination by the landlord (or its surveyor) as being “final and binding”. In rejecting that submission, Martin Rodger QC, Deputy President, said at [73] “A determination of proportions by the landlord's surveyor is such a provision, whether it is said to be final and binding or not.” Accordingly, the residential tenants were entitled to make an application challenging the apportionment under the head lease, notwithstanding the fact that they were not parties to the head lease.

41. The consequences of these decisions are far-reaching: where a residential lease gives the landlord (or its managing agent or surveyor) a discretion to determine a “fair and reasonable” proportion and provides that such determination shall be final and binding, the landlord will lose all control over the apportionment. The clause will be void and the FTT has jurisdiction to determine the apportionment. A determination under section 27A(1) binds only those who are party to it but the tribunal should bear in mind the possibility of competing interests amongst different occupiers. In such cases, it may be appropriate for notice of the proceedings to be given to any third party (including commercial tenants) who may wish to make representations.
42. It is questionable whether the decisions in *Windermere* and *Gater* are correct. Indeed, the writer is involved in a case transferred directly to the Upper Tribunal in which this issue (with others) shall be further considered.

### Varying the apportionment

43. A lease may provide for the tenant's contribution to be varied in certain circumstances or, more generally, at the landlord's discretion. If the lease specifies that any adjustment must be certified (usually by the landlord's surveyor), a failure to comply with such a requirement will result in any

variation being ineffective: see *Warrior Quay Management Company Ltd v Joachim* LRX/43/2006 (Land Tribunal, unreported, 2008).

44. A decision-maker's discretion will, however, be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality: *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] Bus.L.R. 1304.

## Consultation

45. Two fairly recent cases are worth noting in the context of mixed-use developments.
46. In *BDW Trading Ltd & Comet Square Phase 2 Block Management Co Ltd v South Anglia Housing Ltd* [2013] EWHC 2169 (Ch) it was held consultation requirements in respect of qualifying long term agreements (“QLTAs”) do not apply to agreements entered into in relation to buildings which have not yet been constructed or which are not let at the time of the agreement. Section 20 did not apply because the definition of a QLTA in s.20ZA referred to “the landlord”, denoting an existing tenancy.
47. This accords with plain common sense. It would be absurd to interpret the consultation requirements as imposing an obligation to consult with non-existent consultees. The point for developers is that they can easily avoid the requirement to consult by entering into long-term agreements before letting flats, (although the tenants will still have the protection of s.19).
48. In the residential sphere, the Court of Appeal ([2014] EWCA Civ 1395) has at long last reversed the headache caused by the Chancellor’s decision in *Philips v Francis* [2012] EWHC 3650 (Ch D). It held that the “aggregating approach” (which required a landlord to consult the tenants on any service

charge items, however small, once the £250 limit for contributions had been reached) is wrong. To apply that obligation to every item of maintenance and repair gave rise to serious practical and administrative problems and could not have been intended by Parliament. Rather, the correct approach is to identify whether works are parts of a set of works. The question of what a single set of qualifying works comprised has to be determined in a common sense way, taking into account factors which are likely to include where the items of work are to be carried out, whether they are the subject of the same contract, whether they are to be done at the same time or different times, and whether they are different from or connected with each other.

## Variation of Leases under Part IV of the 1987 Act

49. The 1987 Act allows a party to a long lease of a flat to apply to vary the terms of the lease if it fails to make satisfactory provision for various matters. These include repair and maintenance, insurance, the provision of services and computation of service charges. Where an application is made to vary a lease, any other party to the same lease can make a counter-application to the tribunal for the variation of other leases in the block so that they all have similar provisions. However, there is no power to vary commercial leases.
50. There are two procedures available in Part IV of the 1987 Act. Section 37 governs applications which are desired by a majority of the leaseholders. Section 35 allows the FTT to vary leases which fail to make “satisfactory provision”.
51. The FTT can only order variations under s. 35 on very specific grounds. For example, one of the grounds is that the lease fails to make satisfactory provision for the recovery by one party to the lease from another party to it

of expenditure incurred for the benefit of the other. Where, however, a landlord applied to vary leases to allow the recovery of a management charge on the basis that some leases in the block provided for the recovery of such a charge and others did not, the application was refused. The Upper Tribunal (George Bartlett QC, President) said that requiring the lessees to pay for the landlord's managing agent would be of no benefit to them: *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC).

52. The Act also allows for variation of the service charge percentages in the leases but only if the aggregate of the service charges for the block do not add up to 100%. So where the service charges add up to 100% but the landlord adds an additional flat on the roof, the LVT would have no jurisdiction to amend the percentages of service charge payable. Where an order is made the variation can be imposed retrospectively: *Brickfield Properties Ltd v Botten* [2013] UKUT 133 (LC).

53. The Tribunal must not make a variation where the variation would substantially prejudice any respondent to the application or any person who is not a party to the application and an award of monetary compensation would not be adequate. Again the power is discretionary, and the Tribunal can refuse an application where it would not be reasonable in all the circumstances: s.38.

54. Some leases allow the landlord to determine what the service charge proportion should be and to vary it where appropriate. For example, the lease may say that the tenant is required "to pay a reasonable proportion of the service charge such proportion to be determined by the landlord". This should get round the problem of under-recovery because if there is any change in circumstances the landlord can simply vary the service charges.

## The Right to Manage

55. The cost of exercising the right to collective enfranchisement in mixed-use premises can be prohibitive because commercial units are usually let on short leases at a rack rent and therefore have a much higher freehold value.
56. An attractive alternative is exercising the right to manage under the Commonhold and Leasehold Reform Act 2002. The right to manage is a no-fault right, exercisable without proving any complaint against the landlord or his managing agents. It confers on qualifying leaseholders of flats (broadly speaking those with leases granted for terms in excess of 21 years) the right to take over the management of their block of flats through the vehicle of a dedicated, tenant-owned company known as an RTM company.
57. Once the right to manage is acquired, the RTM company takes over the landlord's "management functions" under the leases. These functions are those with respect to services, repairs, maintenance, improvements, insurance and management. They do not include collecting ground rent.
58. There are three major differences between what the RTM company can do and what the landlord can do, namely:
- (1) The RTM company does not have a right to forfeit any lease; in practice it can be difficult to persuade a landlord to engage in the forfeiture procedure if it is no longer managing the building.
  - (2) The RTM company only takes over the management functions from the date on which it acquires them. It cannot, for example, sue for arrears which arose before that date.
  - (3) The RTM company does not take over the management functions of the landlord in relation to flats or units not held by a qualifying tenant. So the RTM Company cannot manage flats retained by the landlord and let on short leases or commercial units within the building. The landlord of a mixed-use development will therefore retain its obligations in relation to these units. This can potentially lead to clashes and there is no mechanism in the 2002 Act for

resolving conflicts of management between the separate parts of the building.

59. In the context of mixed-use developments, the first question will be whether the premises qualify. Two particular issues commonly arise:

- (1) is the building a “self-contained building or part of a building” within the meaning of the 2002 Act?
- (2) is the building excluded from the provisions of the Act because too much of it is not occupied for residential purposes?

## Premises to which RTM applies

60. The building will qualify for the right to manage if:

- (1) it is a self-contained building or part of a building with or without appurtenant property;
- (2) it contains two or more flats held by “qualifying tenants”; and
- (3) the total number of flats held by “qualifying tenants” is not less than two-thirds of the total number of flats contained in the premises.

## Self-Contained

61. Section 72 provides:

- “(2) A building is a self-contained building if it is structurally detached.
- (3) A part of a building is a self-contained part of a building if:
  - (a) it constitutes a vertical division of the building,
  - (b) the structure of the building is such that it could be redeveloped independently of the rest of the building and
  - (c) subsection (4) applies in relation to it.

- (4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it:
- (a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
  - (b) Could be so provided without involving the carrying out of works likely to result in a significant interruption of the provision of any relevant services for occupiers of the rest of the building.”

62. The test is the same as that in the 1993 Act.

63. So, for example, in *Re Holding and Management (Solitaire) Ltd* [2008] 02 EG 152 (a case under the 193 Act), the building did not qualify because the whole of the basement consisted of an underground car park which ran underneath the block and an adjoining block so that there was no qualifying vertical division.

64. In *Albion Residential Limited v Albion Riverside Residents RTM Company Limited* [2014] UKUT 0006 (LC), it was held that a building was not structurally detached because there was an underground car park which was structurally attached to multiple buildings above ground.

65. The phrase “self-contained part of a building” does not, however, require that self-contained part to be the smallest possible self-contained part of a property. So for example, if the premises form part of a terrace and are themselves capable of vertical severance into two self-contained parts, it is not necessary for there to be a sufficient proportion of qualifying tenants in both self-contained parts: *Crafrule Ltd v 41- 60 Albert Palace Mansions (Freehold) Ltd* [2011] EWCA Civ 185.

66. There has been a long debate as to whether the reference to “a” self-contained building restricts a single RTM company to acquiring a single building rather than a whole estate containing multiple buildings. This issue has finally been resolved. In *Triplerose Ltd v Ninety Broomfield Road RTM*

*Company Ltd* [2015] EWCA Civ 282, the Court of Appeal resolved this question finding that a single RTM Co only has the right to acquire the right to manage a single block. This means that where the block is on an estate, only the qualifying tenants of the particular block are entitled to be members of the RTM Company which is intended to manage that block. It also means that the each building has to qualify.

## Exceptions

67. The Right to manage does not apply if:

- (1) the internal floor area of any non-residential part of the building exceeds 25 % of the internal floor area of the premises as a whole.
- (2) the landlord is a resident landlord and the premises do not contain more than four units.
- (3) different persons own the freehold of different parts of premises and any of those parts is a self-contained part of a building.
- (4) the premises are owned by a local authority; or
- (5) the right to manage is already being exercised by a RTM company.

68. The case of *KW RTM Co Ltd v Lemonland (Kings Wharf) Ltd* LON/00AM/LEE/2006/0003 (LVT, unreported) involved mixed-use units designed for occupiers to live on one floor with a mezzanine work-space. The issue arose as to the status of mezzanine floors. On the evidence, it appeared that most of the units were in fact occupied solely for residential purposes and that the mezzanine floors were used as residential accommodation. The LVT held that actual occupation for residential purposes sufficed to satisfy the “residential purposes” requirement. However, this must now be considered against the Court of Appeal decision in *Henley v Cohen* [2013] EWCA 480 which concerned an enfranchisement claim under the 1967 Act. It was held that the lessees could not rely on their own breaches of covenant so as to bring the property within the definition of “house” for the purposes of that Act.

## Appurtenant Property

69. As well as acquiring the right to manage the building, the tenants are entitled to manage “appurtenant property” which is defined by s. 112(1) of the 2002 Act as follows:

“Appurtenant property”, in relation to a part of a building or part of a building or a flat means any garage, outhouse, garden, yard, or appurtenances belonging to, or usually enjoyed with, the building or part or flat”.

70. The question of what could be regarded as appurtenant property arose in the case of *Gala Unity Ltd v Ariadne Road RTM Company Ltd* [2012] EWCA Civ 1372. *Gala Unity* concerned a modern residential development which comprised two blocks of flats and two free-standing “coach houses”. The tenants of the two blocks of flats claimed the right to manage those two blocks and the common parts of the estate which served not just their blocks but also the coach houses. The tenants had the right to use and were required to pay service charge in respect of the estate’s common parts which included estate roads, cycle stores, landscaped gardens and so on. While the blocks themselves were clearly “self-contained”, a dispute arose as to what other parts of the estate the tenants were entitled to manage as “appurtenant property”. The Lands Tribunal took the view that the right to manage extended over the land which tenants of the flats had a right to use even though this was used in common with others. The Court of Appeal agreed.

71. At first instance, *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2013] UKUT 606 (LC) also decided that the fact that one RTM company is exercising the right over property where there are shared rights between the RTM and the freeholder does not prevent another RTM company exercising the right over the same shared property (e.g. roads, paths, gardens and car parking spaces). It follows that an RTM claim is not invalidated by the specification of premises which include shared appurtenant property rights, which are already the subject of another RTM. This means that, in principle,

multiple RTMs may have to share management functions. This will not be a happy prospect for any leaseholder who was sufficiently motivated to acquire the right to manage in the first place. The issue was not considered by the Court of Appeal ([2015] EWCA Civ 282).

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TANFIELD CHAMBERS