



The right to enfranchise (RTE) provisions Consultation



The right to enfranchise (RTE) provisions Consultation

May 2009

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Summary of Consultation

Scope of the consultation

Topic of this consultation:	<p>This consultation paper sets out the Government's proposal for the non-implementation and repeal of the RTE provisions in the 2002 Commonhold and Leasehold Reform Act (the 2002 Act). Sections 121 – 124 of the 2002 Act when implemented would have required existing rights of leaseholders to purchase the freehold of the building containing their flats (collective enfranchisement) to be exercised through a RTE company with membership being open to all qualifying leaseholders.</p>
Scope of this consultation:	<p>The aim is to seek the views of consultees upon the Government's proposal for non-implementation and repeal of the RTE provisions taking into account the practical difficulties set out in the paper, that have been identified with the operation of those provisions.</p>
Geographical scope:	<p>This consultation is being carried out in respect of properties in England. The Welsh Assembly Government will consult separately in respect of any similar provisions affecting properties in Wales.</p>
Impact Assessment:	<p>There is no impact assessment accompanying this consultation document as this proposal will have no impact upon the private, public or third sectors. An implementation stage impact assessment may be provided if considered necessary.</p>

Basic Information

To:	This consultation is primarily aimed at long leaseholders of flats and professionals such as solicitors and valuer surveyors in the field of collective enfranchisement.
Body/bodies responsible for the consultation:	Communities and Local Government Leasehold and Park Homes Policy Team
Duration:	12 weeks – Consultation begins 12 May 2009 and ends 3 August 2009
Enquiries:	Samya Muddathir (020 7944 6226) or Chris Humphreys (020 7944 3552) samya.muddathir@communities.gsi.gov.uk chris.humphreys@communities.gsi.gov.uk
How to respond:	Responses can be submitted by email to: leasehold.reform@communities.gsi.gov.uk Alternatively , hard copy responses should be sent to: Samya Muddathir Communities and Local Government Leasehold and Park Homes Team Zone 1/C3 Eland House Bressenden Place London SW1E 5DU
Additional ways to become involved:	A written exercise only is proposed during the consultation stage
After the consultation:	A summary of responses to the consultation will be published on the Department's website within three months of the closing date for consultation i.e. by 3 November 2009. Information on the Department's consultations is available from: www.communities.gov.uk/corporate/publications/consultations Subject to consideration of the consultation responses, the Department will then look for a legislative opportunity to repeal the RTE provisions.
Compliance with the Code of Practice on Consultation:	This consultation complies with HM Government's Code of Practice on Consultation

Background

<p>Getting to this stage:</p>	<p>Implementation of the RTE provisions required a number of issues to be considered in detail including how the terms of participation of individual leaseholders would be determined. This process identified certain difficulties which became clearer following further legal advice and consultation with stakeholders. As a result it has been concluded that implementation of the RTE provisions would introduce disproportionate burdens into the collective enfranchisement process that would significantly outweigh the intended benefits.</p>
<p>Previous engagement:</p>	<p>There has been consultation with a number of practitioners experienced in the field of leasehold enfranchisement in developing this proposal for the non-implementation and repeal of the RTE provisions.</p>

Introduction

Background and context

1. The right for leaseholders of flats to join together to buy the freehold of the building containing their flats and certain associated property (collective enfranchisement) was introduced by the 1993 Leasehold Reform, Housing and Urban Development Act.
2. Subsequent legislation culminating in the 2002 Commonhold and Leasehold Reform Act (the 2002 Act) has amended the original provisions. Such amendments have primarily been aimed at removing unreasonable barriers to enfranchisement by making it easier for leaseholders to join together to enfranchise. This included reducing the proportion of leaseholders in the building required to form the enfranchising group from at least two-thirds of the qualifying leaseholders to at least one-half.
3. The 2002 Act also sought through the right to enfranchise (RTE) provisions to prevent what was at that time acknowledged to be a fairly limited problem; of qualifying leaseholders being deliberately excluded from a collective enfranchisement action by other leaseholders. However the RTE provisions could not be brought into force without first addressing an issue that was fundamental to achieving this objective. This concerned the need for an effective mechanism for determining in default of agreement between participants how the costs and expenses of collective enfranchisement would be apportioned between them. In this paper we set out the possible options that have been identified for dealing with this issue. The paper then goes on to explain that after extensive consideration and with the benefit of further advice, it has been concluded that the RTE provisions cannot be made to work without introducing disproportionate burdens into the collective enfranchisement process, and how it is proposed that they should not be implemented but repealed.
4. This paper seeks your views on the viability of the options identified for the implementation of the RTE provisions and our proposal for their non-implementation and repeal. This consultation is being carried out in respect of properties in England. The Welsh Assembly Government will consult separately in respect of any similar provisions affecting properties in Wales.

Publication of responses

5. Information provided in response to this consultation, including personal information, may be published, or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
6. If you want any of the information that you provide to be treated as confidential you should be aware that under the FOIA, there is a statutory code of practice with which public authorities must comply, and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.
7. The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.
8. Individual responses will not be acknowledged unless specifically requested.
9. Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Alternative formats under Disability Discrimination Act (DDA)

10. If you require this publication in an alternative format (e.g. Braille or audio) please email alternativeformats@communities.gsi.gov.uk quoting the title and product code/ISBN of the publication, and your address and telephone number.

Chapter 1: Background

Collective enfranchisement

1. The 1993 Leasehold Reform, Housing and Urban Development Act introduced a right called collective enfranchisement for 'qualifying tenants'¹ to join together to purchase the freehold of the building containing their flats and certain associated property. This right is exercisable by a specified proportion of qualifying tenants in the relevant building and the purchase is conducted on their behalf by a 'nominee purchaser' of their choice. The process is begun by the service of an 'initial notice' and the price to be paid can be determined in default of agreement by a leasehold valuation tribunal (LVT) applying the valuation principles set out in the legislation.
2. Further reform of the original legislation sought to remove unreasonable barriers to enfranchisement. Following provisions introduced by the 2002 Commonhold and Leasehold Reform Act (the 2002 Act), the position has now been reached so that where at least two-thirds of the flats in the building are held on long leases, the qualifying tenants of at least half of the flats in a qualifying building can join together to exercise a right of collective enfranchisement. There is also no longer a requirement for any of those tenants to satisfy a residence test. The 2002 Act also included provisions to introduce a right to enfranchise which was designed to prevent qualifying tenants being deliberately excluded from the enfranchisement process. However these measures have yet to be introduced because of serious concerns about their workability.
3. Therefore the position remains that subject to meeting the minimum eligibility requirements, a group of qualifying tenants are able to decide upon both the composition of the participating group and the terms of their participation. This process has worked well in the main for over 15 years, although it means that eligible tenants can be excluded from the process directly or possibly indirectly by them being offered unfavourable participation terms. The participating leaseholders are also currently free to choose an appropriate nominee purchaser, which could be a company or group of individuals whereas this option would not be available under the RTE provisions.

¹ Qualifying tenant is defined in section 5 of the 1993 Act as a tenant of a flat under a long lease. "Long lease" is defined in section 7 of the 1993 Act.

Right to enfranchise (RTE)

Previous consultation

4. The consultation paper issued in November 1998 (*Residential Leasehold Reform in England and Wales – A consultation paper*) first proposed the introduction of a right to participate, although in the paper it was acknowledged by the Government that it had no evidence of leaseholders being excluded from the enfranchisement process and that the indications were that in practice there was a general interest in maximising participation. In this way the professional costs incurred are spread more widely.
5. It was also recognised that the effectiveness of any right to participate depended upon there being a certain amount of prescription about the vehicle used to exercise the right. However the Government was conscious of the need to avoid disproportionately complicating the whole enfranchisement process and compromising the flexibility that was a characteristic of the existing system. This flexibility included the ability to choose the form and constitution of the vehicle used as the nominee purchaser. For those reasons the Government was not at that time persuaded of the overall case for a right to participate.
6. However a significant proportion of the 78 people who commented on the proposal, expressed some degree of support for it. More detailed RTE proposals were then developed and put forward as a proposal in the draft Bill and consultation paper on Commonhold and Leasehold Reform of August 2000. This included proposals for a standardised corporate structure for the nominee purchaser and a process involving notices and timescales intended to provide all qualifying tenants with the opportunity to join the RTE company and therefore participate in a collective enfranchisement action.
7. There was a more mixed response to the proposals in this paper with just under half of the respondents appearing to agree with a right for all qualifying tenants to participate in a collective enfranchisement action although there was more support for the prescribing of a corporate structure for the nominee purchaser. Provisions based upon these proposals were included in the subsequent Bill that received the Royal Assent in May 2002 and became the 2002 Commonhold and Leasehold Reform Act. As mentioned earlier, sections 121 – 124 and Schedule 8 of the 2002 Act which deal with the creation of the RTE Company and the right to participate, have yet to be commenced. Sections 121 – 123 of the 2002 Act are included at Annex B of this Paper. Section 124 and Schedule 8 of the 2002 Act contain amendments to existing legislation and are not included at Annex B.
8. A final consultation paper was issued in September 2002 containing and seeking views on a draft memorandum and articles for RTE companies.

Right exercisable by RTE company

9. Sections 121 – 124 of the 2002 Act introduced the following provisions which if implemented, would amend the 1993 Act:
- collective enfranchisement would be exercised through a RTE company. This would replace the current provision whereby the freehold is purchased by a nominated purchaser of choice on behalf of the qualifying tenants participating in the process

RTE company:

- an RTE company would be one limited by guarantee. This follows the model of Right to Manage (RTM) companies formed under Part 2, Chapter 1 (sections 71 to 113) of the 2002 Act². The intention was that RTM companies could also be RTE companies
- members of an RTE company would be qualifying tenants of flats in the premises or landlords under leases of premises managed by a RTM company. To become a member of the RTE company, a qualifying tenant would need to give a participation notice to the company before the end of the 'participation period'. The participation period is the period starting on the date that the RTE company serves the initial notice upon the landlord and ending six months after this date (or such other time specified by the Secretary of State) or immediately before the company enters into a binding contract to purchase the freehold, whichever is the earlier
- the Secretary of State was given powers to make regulations regarding the memorandum and articles of the company. No regulations have been made

Notice of invitation to participate

- the RTE company would send the initial notice to the landlord setting out the intention to purchase the freehold. Before doing so it would need to send a notice to all qualifying tenants who have not already agreed to become a participating member of the RTE company inviting them to become a participating member of the company. Any tenant who sends in a participation notice within the participation period would be entitled to be a member of the RTE company and to take part in the RTE process

Apportioning the costs and expenses of enfranchisement (the problems)

10. In trying to take forward the implementation of the RTE provisions it became clear following input from stakeholders and further legal advice that certain issues would still need to be addressed. Of primary concern was the matter of how the costs and expenses of enfranchisement would be apportioned amongst the members of the RTE company

² Right to Manage provisions involving the use of RTM Companies were introduced by the 2002 Act to enable tenants to take over the management of premises in which they held leases. Similar qualifying criteria apply to those for the RTE provisions both in relation to the building and tenants required to support an application.

and how agreements on such matters would be enforced. It had been envisaged that the members of the RTE Company would be able to decide upon the apportioning of costs and that company law mechanisms would then provide for the enforcement of any agreements and the resolution of any disputes.

11. However it became apparent that there were a number of problems with this approach. First it would not be appropriate for any decision about the rights and liabilities of members of a company to be determined by those members in a general meeting. Rather these terms of participation should be clear to those members at the outset. Further where there was a lack of clarity about such a fundamental term of the agreement between members, it would not be the role of the court to determine any disputes upon such matters.
12. There was also nothing to prevent discrimination in the terms of participation offered and particularly in the apportionment of the costs of enfranchisement that 'qualifying tenants' could be offered.
13. In the absence of a mechanism to ensure that all such tenants were offered fair and reasonable participation terms, any 'right to participate', could be of little real value, which was not the intention behind the policy. Human rights issues were also likely to arise since any right to participate would be regarded as a civil right. Therefore in the event of a person having a dispute about the exercise of such a right including the terms upon which it could be exercised, he would have the right to go to court to determine that dispute.
14. Finally the extended participation period allowed under the RTE provisions for qualifying tenants to decide whether they wanted to commit themselves to an enfranchisement action, was also not particularly helpful to the overall process. Leaseholders could effectively decide at any time up until the date of purchase of the freehold whether to exercise their right to participate. This made the task of valuing the freehold interest being bought and determining how the overall costs of enfranchisement should be apportioned, substantially more problematic, particularly since 'marriage value'³ is only payable where relevant on the flats of participating leaseholders. Indeed this problem was likely to be increased by the fact that there would appear to be little real incentive for qualifying tenants to commit themselves to the process at an early stage.

³ Marriage value is any extra value brought about by the freehold and leasehold interests being under the same control. Paragraph 4 (1) of Schedule 6 to the 1993 Act now provides that the freeholder is entitled to 50 per cent of the marriage value.

Stamp duty land tax

15. When leaseholders jointly purchase their freehold the rate and amount of stamp duty land tax (SDLT) payable was determined by reference to the total consideration payable on the transaction. Section 74 of the 2003 Finance Act (the 2003 Act) provided for a special SDLT treatment for transactions in which leaseholders exercised a 'right of collective enfranchisement' through a RTE company. The wording of section 74 of the 2003 Act defined the 'right of collective enfranchisement' to include both the right to enfranchise under the 1993 Act and the right of first refusal under the 1987 Landlord and Tenant Act (the 1987 Act).
16. Section 74 of the 2003 Act set the rate of SDLT payable according to the value of the total consideration payable divided by the number of flats in respect of which the 'right of collective enfranchisement' is being exercised. This means that the rate of SDLT payable is brought into line with that which would have been payable had each participating leaseholder separately bought a share of their freehold. However since this tax relief was only referable to relevant transactions entered into by RTE companies it was not available until provisions providing for such companies were introduced, unless amendments were made to section 74 of the 2003 Act.
17. The Government's view was that section 74 of the 2003 Finance Act should be amended so that the SDLT relief provided became available on transactions entered into in pursuance of existing rights of collective enfranchisement and the right of first refusal. Measures to this effect have been announced as part of the 2009 Finance Bill and came into effect on 22 April. This is consistent with the policy of making it easier for 'qualifying tenants' to acquire the freehold of their premises and for a fairer tax treatment of those transactions. This will not preclude the introduction of the RTE provisions or the introduction of SDLT relief for transactions entered in pursuance of those provisions should it be decided to introduce them.

Chapter 2: Options for introducing the RTE provisions

Amendments to current RTE provisions

1. As outlined in Chapter 1 above, it became clear that the RTE provisions in the 2002 Commonhold and Leasehold Reform Act (the 2002 Act) could not be implemented until certain issues were resolved. One possibility is to further amend the legislation so that the period allowed for leaseholders to decide whether to become members of the RTE company (participation period) is completed before the service of the notice of claim. This would allow for greater certainty to be provided about the terms that qualifying tenants could be offered for their participation which would make the overall process more workable.
2. However the more fundamental issue to be addressed concerns the need for specific provisions to deal with apportioning the costs of enfranchisement. It is considered that such apportionment would need to be included as part of the terms agreed before the notice of claim is served in order to provide the necessary degree of contractual certainty about those terms. In the intervening period since the passage of the 2002 Act extensive efforts have been made in conjunction with stakeholders, including specialists in the field, to try and find a workable way of dealing with these issues. This has included trying to establish a basis for apportioning such costs that could be incorporated into the RTE process to ensure all qualifying tenants had a fair right to participate. However it has been concluded that it would be too difficult to do this through a prescribed formula since it would be impossible to deal adequately in this way with all the diverse range of circumstances that would in practice need to be taken into account.
3. The alternative would be to try and put in place within the RTE process an effective mechanism for determining fair terms of participation for those wishing to join a RTE company.
4. It is recognised however that since any such mechanism would need to include a right for qualifying tenants to refer such disputes concerning their rights as members of company to a court or tribunal, the most effective approach would be to establish a specific dispute resolution mechanism for this purpose.

Question 1: Do you agree that the RTE provisions in sections 121 – 124 of the 2002 Act should not be introduced in their current form? If not please say why.

Question 2: Do you agree that these RTE provisions could not be introduced without making amendments to ensure that the participation period allowed for participating tenants to join the process is completed before the service of the initial notice by the RTE company? If not please say why this would not be necessary.

Question 3: Do you agree that it would also be necessary to introduce a specific dispute resolution process to determine questions about the apportionment of the costs of enfranchisement into the RTE process? If not please say why.

Introducing a dispute resolution process into the RTE provisions

5. Taking into account the existing statutory framework for enfranchisement we have been advised that any dispute resolution procedure to determine the terms of participation for qualifying tenants would need to contain the following provisions as a minimum requirement:
 - RTE company would send out a notice of invitation to participate to all qualifying tenants containing certain prescribed information including proposals for the terms of participation for each tenant
 - qualifying tenants would be given a minimum period (1 month) in which to indicate whether they wish to participate and if so whether they accept the terms or suggest alternative terms
 - if agreement by *all* qualifying tenants indicating that they wish to participate and accept the terms offered is received then RTE company can serve an initial notice.
 - if there is *no* agreement by *all* qualifying tenants who have said that they wish to participate then an initial notice cannot be served.
 - a period of negotiation would then be provided after the receipt of a notice indicating rejection of terms offered before the RTE company could make an application to the LVT to determine the terms of participation.
 - decision would be made by the LVT.
 - there would be a right of appeal to Lands Tribunal.
 - once either decision of LVT or Lands Tribunal becomes final the RTE company would serve an initial notice and the normal procedure contained in the 1993 Act would apply.

Question 4: Do you agree that any such dispute resolution process would need to be based upon the model set out in paragraph 5 of this Chapter? If not please say how it could differ from this.

6. It became clear to us that the incorporation of any dispute mechanism into the RTE procedures would inevitably add quite substantially to the length, complexity and cost of the whole process. This was confirmed by feedback from specialists in the field. Within the process there would be a need to establish detailed procedures involving notices containing prescribed information from both the RTE company and individual 'qualifying tenants' thereby increasing the scope for dispute and delay.
7. Further practical difficulties could also arise from the greater scope that the RTE provisions would provide for RTE companies to have to disclose information to the landlord including its advice and negotiating position on the price to be offered for the freehold particularly where the landlord is also a 'qualifying tenant'

Question 5: Do you agree that introducing a dispute resolution process into the RTE provisions would make collective enfranchisement more complex and difficult to complete? Please provide reasons why you agree or disagree with this.

Right to join the RTE company after enfranchisement

8. An alternative to providing a right to participate at the time of acquisition of the freehold would be to provide a right for qualifying tenants to join the RTE company once the freehold had been acquired under existing rights. In this way the potential difficulties outlined above would be removed from the collective enfranchisement process, whilst preserving the right to participate. There would also seem to be an argument for extending any right to join in later not just to those 'qualifying tenants' who did not for whatever reason join the RTE company when it purchased the freehold, but also to their assignees.
9. However there would still be a need for a dispute resolution process in order to ensure that a qualifying tenant was again not unfairly prevented from exercising a right to join the RTE company. This process would have to consist of a modified version of that outlined in paragraph 5 above with prescribed notices and time periods for compliance and rights to refer disputes to an LVT and on appeal to the Lands Tribunal.
10. There would of course still be the scope under these proposals for fairly protracted disputes to occur, particularly about the terms of participation being offered to qualifying tenants. Whilst such disputes would not interfere with and potentially jeopardise the enfranchisement process itself, it is likely that they would merely be put back to a later date and further could occur for an indefinite period into the future.
11. Under this option a number of potentially complex valuation issues would also arise. Indeed these issues were outlined in the 2000 draft Bill and consultation paper which also sought views on a right for

qualifying tenants to buy into the RTE company after enfranchisement has taken place with there being no real consensus amongst respondents about how they should be dealt with.

12. To begin with those joining the RTE company later would have benefited from not having to pay any of the costs associated with the enfranchisement. This then raises the question of whether an additional amount should be payable as a contribution towards those costs and if so how it should be calculated.
13. Further a qualifying tenant wishing to join the RTE company would undoubtedly want to do so on the basis that he would be entitled to extend his lease upon becoming a member of the company. Indeed this is generally one of the main incentives for leaseholders to buy a share of their freehold. Therefore it could be established that the price to be paid by the individual leaseholder wishing to join the RTE company could be based upon the price that he would be required to pay for a lease extension should he exercise his statutory rights under the 1993 Leasehold Reform Housing and Urban Development Act.
14. However this approach would not take account of the fact that the leaseholders who participated in the original freehold purchase would have paid for the entire value of the freeholder's interest in the premises as a whole, whereas the price paid by the new participant reflects the value of the freehold interest in his flat only. Therefore on that basis and since the new participant would be paying less than he would have done had he participated in the original freehold purchase, he should not be entitled to an equal share in the freehold value of the premises as a whole.
15. To address this issue we examined with valuers whether it would be possible to establish workable guidelines for adjusting the share that the new participant would acquire in the premises. This could be expressed as a 'fair and reasonable proportion'. Alternatively to create greater certainty, a formula could be set out based upon the proportion that the diminution in the value of the freehold interest in the flat bears to the value of the freehold interest in the premises. However complications arise from the fact that the current value of the freehold may have been reduced since the earlier purchase if, as is likely, the leases of the participating leaseholders have been subsequently extended.
16. There may also be a need to make further adjustments to take account of changes in the value of the elements making up the price to be paid by the individual tenant that have occurred since the freehold was purchased. Such changes could be significant if the unexpired length of the lease in question subsequently falls below 80 years for example, meaning that marriage value would be payable. Finally differing share entitlements including possibly fractions of shares could give rise to complications for the running of the RTE company.

17. Providing a right for a qualifying tenant to join the RTE company after the freehold has been acquired also raises a question about whether specific provision should be made about the payment of 'hope value' to the former landlord in relation to the flats of those leaseholders. Hope value in this context being that landlord's expectation that he could have extended the leases of the other non-participating leaseholders in return for a share of the marriage value payable on those transactions. The current legislation does not make any provision for the payment of hope value.
18. If such provision was introduced as part of the right for non participating qualifying tenants to join the RTE company then it would be necessary to decide how this form of 'claw back' of hope value would work in practice. However this would be difficult to put into practice and a number of issues would need to be addressed. These would include whether the amount of marriage value should be that which would have been payable at the time of the collective enfranchisement or the sum actually payable by the new participant? Should there be a right to refer any dispute about the hope value payable on a negotiated sale to a body such as an LVT? Should the 'claw back' provisions continue to be in force for a definite or indefinite period? There is also the scenario to take account of where a non participant negotiates a lease extension and then at some time later decides to become a member of the RTE company.

Question 6: Do you think that introducing a right to become a member of the RTE company after collective enfranchisement has taken place would be a workable alternative way of providing a right to participate? Please give reasons and explain how you think this could work in practice.

Question 7: Do you agree that the valuation issues outlined in paragraphs 11 to 16 would arise with a right to become a member of the RTE company at a later date? If so, how do you think that they could be dealt with effectively? Please give details.

Conclusions

19. Detailed consideration was given to possible options for introducing a right to enfranchise by calling upon the knowledge and experience of a range of specialists. It would appear that with certain amendments to the existing legislation, alongside detailed procedures concerning the resolution of disputes, it would be possible to introduce a right to participate based upon the RTE provisions in sections 121 to 124 of the 2002 Act or an amended form of those provisions.
20. However it became clear to us that this could only be done by introducing a significant amount of additional burdens, complexity and cost into the enfranchisement process. There is a very real danger that

increasing the complexity and cost of the process in this way could act as a significant obstacle and disincentive for leaseholders wishing to exercise enfranchisement rights. In this way the impact of other provisions in the 2002 Act and previous legislation designed to make enfranchisement easier could be seriously undermined.

Question 8: Do you agree with the conclusion that any right to participate would involve introducing a significant amount of additional burden, complexity and cost into the collective enfranchisement process? If not please say why.

Question 9: Do you think that the additional burden, complexity and cost that is likely to be created by the introduction of a right to participate would serve as a significant obstacle and disincentive for leaseholders wishing to collectively enfranchise?

Chapter 3: Non-commencement of RTE provisions

1. Chapter 1 provided the background to the RTE provisions and the issues that had arisen which had prevented their introduction.
2. Chapter 2 set out the options that had been identified for how those provisions could be introduced in order to try and provide all qualifying tenants with a right to participate. This involved making changes to the participation period during the enfranchisement process that leaseholders had been allowed for choosing to join the RTE company. Further it was explained how it would be necessary to make provision for a set of additional procedures for determining in the event of a dispute, the terms upon which the individual leaseholder should be entitled to become a member of the RTE company.
3. Chapter 2 seeks views on the options that had been identified for implementing the right to participate provisions. It also set out how following extensive consultation involving specialists in the field the view of Communities and Local Government (CLG) is that introducing any of these procedures would inevitably make the collective enfranchisement process significantly more complex, time consuming and ultimately more costly than at present. With this comes the likelihood that many more enfranchisement actions will fail or not even get off the ground because of long drawn out disputes or the prospect of such disputes. Whilst under the alternative proposals the RTE company may subsequently find itself facing many potentially drawn out applications to join the Company by non-participating leaseholders.
4. It could be argued that there would be a real incentive for all parties to agree fair and reasonable terms for the participation of all interested qualifying tenants in order to avoid drawn out and costly disputes. However this is outweighed by the very real risk that one or two leaseholders could unreasonably hold up the entire process. This could mean that the enfranchising group would be faced with the dilemma of either accepting those leaseholders' terms or embarking upon a protracted and potentially costly process of having the matter determined by an LVT or ultimately by a Lands Tribunal.
5. CLG understands that the current procedures are working well and that in practice (despite only 50 per cent of leaseholders needing to agree to participate in the collective enfranchisement process) everyone who is eligible is almost always invited to join in. In this way the professional costs incurred are spread more widely. We are aware

that there is little appetite amongst professionals in the collective enfranchisement field for introducing a new series of detailed requirements that will make the process potentially far more complex and costly for all concerned.

6. There is also the real danger as mentioned earlier in the paper that the introduction of a right to enfranchise will seriously undermine the impact of previous legislative attempts to make collective enfranchisement more widely available.
7. We have concluded therefore that the most appropriate way forward is to not implement a right to enfranchise and to repeal the RTE provisions in the 2002 Commonhold and Leasehold Reform Act (the 2002 Act).

Question 10: Do you feel that the current law on collective enfranchisement is working effectively? If not please say why.

Question 11: Do you agree that any change to the right to enfranchise along the lines contained in sections 121 to 124 of the 2002 Act would involve introducing a disproportionate amount of additional burden, complexity and cost into the enfranchisement process and that the RTE provisions in sections 121 to 124 of the 2002 Act should be repealed? If not please say why.

Prescribed corporate structure for collective enfranchisement

8. As outlined in Chapter 1 above, the introduction of a standard corporate structure for the nominee purchaser was regarded as an integral part of the mechanism under which the RTE provisions would operate. The view was also taken that this would also serve as a means of ensuring that an appropriate vehicle was used in all cases both for the enfranchisement process and subsequent management of the relevant premises. It was also a means of ensuring a level of consistency with RTM and Commonhold and facilitate conversion of a RTE company to a Commonhold Association.
9. The RTE provisions in the 2002 Act also provided for the initial notice claiming the right of collective enfranchisement to be given by the RTE company rather than by the requisite number of qualifying tenants as under the current legislation. This would have meant that instead of each of the participating tenants having to sign the notice this could be done on their behalf by the RTE company of which they were members. This could be seen to be an advantage particularly from the point of view of the participating tenants and those acting for them.

10. However if it is decided that the RTE provisions should not be implemented then the reasons for prescribing a corporate structure for the enfranchising vehicle would be significantly reduced. Further it could be argued that the additional flexibility that this would provide for the enfranchising group to decide upon the most appropriate structure for the nominee purchaser would outweigh the possible benefits of providing a standardised corporate structure for this purpose. We are also aware of a view amongst collective enfranchisement professionals that the ability to choose the exact form of the enfranchisement vehicle (whether it be a company or group of individuals) also provides an important degree of flexibility and that there is no need for this to be prescribed in order for the process to run smoothly.

Annex A

List of questions

Chapter 2: Options for introducing the RTE provisions

Amendments to current RTE provisions

Question 1: Do you agree that the RTE provisions in sections 121 – 4 of the 2002 Act should not be introduced in their current form? If not please say why.

Question 2: Do you agree that these RTE provisions could not be introduced without making amendments to ensure that the participation period allowed for participating tenants to join the process is completed before the service of the initial notice by the RTE company? If not please say why this would not be necessary.

Question 3: Do you agree that it would also be necessary to introduce a specific dispute resolution process to determine questions about the apportionment of the costs of enfranchisement into the RTE process? If not please say why.

Introducing a dispute resolution process into the RTE provisions

Question 4: Do you agree that any such dispute resolution process into the RTE provisions would need to be based upon the model set out in paragraph 5 of this Chapter? If not please say how it could differ from this.

Question 5: Do you agree that introducing a dispute resolution process into the RTE provisions would make collective enfranchisement more complex and difficult to complete? Please provide reasons why you agree or disagree with this.

Right to join the RTE company after enfranchisement

Question 6: Do you think that introducing a right to become a member of the RTE company after collective enfranchisement has taken place would be a workable alternative way of providing a right to participate? Please give reasons and explain how you think this could work in practice.

Question 7: Do you agree that the valuation issues outlined in paragraphs 11 to 16 would arise with a right to become a member of the RTE company at a later date? If so, how do you think that they could be dealt with effectively? Please give details.

Conclusions

Question 8: Do you agree with the conclusion that any right to participate would involve introducing a significant amount of additional burden, complexity and cost into the collective enfranchisement process? If not please say why.

Question 9: Do you think that the additional burden, complexity and cost that is likely to be created by the introduction of a right to participate would serve as a significant obstacle and disincentive for leaseholders wishing to collectively enfranchise?

Chapter 3: Non-commencement of RTE provisions

Question 10: Do you feel that the current law on collective enfranchisement is working effectively? If not please say why.

Question 11: Do you agree that any change to the right to enfranchise along the lines contained in sections 121 to 124 of the 2002 Act would involve introducing a disproportionate amount of additional burden, complexity and cost into the enfranchisement process and that the RTE provisions in sections 121 to 124 of the 2002 Act should be repealed? If not please say why.

Annex B: Sections 121–123 Commonhold and Leasehold Reform Act 2002

Exercise of right

121 Right exercisable only by RTE company

(1) Section 13 of the 1993 Act is amended as follows.

(2) In paragraph (b) of subsection (2), after “given by” insert “a RTE company which has among its participating members”.

(3) After that subsection insert—

“(2ZA) But in a case where, at the relevant date, there are only two qualifying tenants of flats contained in the premises, subsection (2)(b) is not satisfied unless both are participating members of the RTE company.”

122 RTE companies

After section 4 of the 1993 Act insert—

“4A RTE companies

(1) A company is a RTE company in relation to premises if—

(a) it is a private company limited by guarantee, and

(b) its memorandum of association states that its object, or one of its objects, is the exercise of the right to collective enfranchisement with respect to the premises.

(2) But a company is not a RTE company if it is a commonhold association (within the meaning of Part 1 of the Commonhold and Leasehold Reform Act 2002).

(3) And a company is not a RTE company in relation to premises if another company which is a RTE company in relation to—

(a) the premises, or

(b) any premises containing or contained in the premises,

has given a notice under section 13 with respect to the premises, or any premises containing or contained in the premises, and the notice continues in force in accordance with subsection (11) of that section.

4B RTE companies: membership

(1) Before the execution of a relevant conveyance to a company which is a RTE company in relation to any premises the following persons are entitled to be members of the company—

- (a) qualifying tenants of flats contained in the premises, and
- (b) if the company is also a RTM company which has acquired the right to manage the premises, landlords under leases of the whole or any part of the premises.

(2) In this section—

“relevant conveyance” means a conveyance of the freehold of the premises or of any premises containing or contained in the premises; and

“RTM company” has the same meaning as in Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002.

(3) On the execution of a relevant conveyance to the RTE company, any member of the company who is not a participating member ceases to be a member.

(4) In this Chapter “participating member”, in relation to a RTE company, means a person who is a member by virtue of subsection (1)(a) of this section and who—

- (a) has given a participation notice to the company before the date when the company gives a notice under section 13 or during the participation period, or
- (b) is a participating member by virtue of either of the following two subsections.

(5) A member who is the assignee of a lease by virtue of which a participating member was a qualifying tenant of his flat is a participating member if he has given a participation notice to the company within the period beginning with the date of the assignment and ending 28 days later (or, if earlier, on the execution of a relevant conveyance to the company).

(6) And if the personal representatives of a participating member are a member, they are a participating member if they have given a participation notice to the company at any time (before the execution of a relevant conveyance to the company).

(7) In this section “participation notice”, in relation to a member of the company, means a notice stating that he wishes to be a participating member.

(8) For the purposes of this section a participation notice given to the company during the period—

- (a) beginning with the date when the company gives a notice under section 13, and

(b) ending immediately before a binding contract is entered into in pursuance of the notice under section 13,

is of no effect unless a copy of the participation notice has been given during that period to the person who (in accordance with section 9) is the reversioner in respect of the premises.

(9) For the purposes of this section “the participation period” is the period beginning with the date when the company gives a notice under section 13 and ending—

(a) six months, or such other time as the Secretary of State may by order specify, after that date, or

(b) immediately before a binding contract is entered into in pursuance of the notice under section 13,

whichever is the earlier.

(10) In this section references to assignment include an assent by personal representatives, and assignment by operation of law where the assignment is to a trustee in bankruptcy or to a mortgagee under section 89(2) of the Law of Property Act 1925 (c. 20) (foreclosure of leasehold mortgage); and references to an assignee shall be construed accordingly.

4C RTE companies: regulations

(1) The Secretary of State shall by regulations make provision about the content and form of the memorandum of association and articles of association of RTE companies.

(2) A RTE company may adopt provisions of the regulations for its memorandum or articles.

(3) The regulations may include provision which is to have effect for a RTE company whether or not it is adopted by the company.

(4) A provision of the memorandum or articles of a RTE company has no effect to the extent that it is inconsistent with the regulations.

(5) The regulations have effect in relation to a memorandum or articles—

(a) irrespective of the date of the memorandum or articles, but

(b) subject to any transitional provisions of the regulations.

(6) The following provisions of the Companies Act 1985 (c. 6) do not apply to a RTE company—

(a) sections 2(7) and 3 (memorandum), and

(b) section 8 (articles).”

123 Invitation to participate

(1) After section 12 of the 1993 Act insert—

“The notice of invitation to participate

12A Notice by RTE company inviting participation

- (1) Before making a claim to exercise the right to collective enfranchisement with respect to any premises, a RTE company must give notice to each person who at the time when the notice is given—
- (a) is the qualifying tenant of a flat contained in the premises, but
 - (b) neither is nor has agreed to become a participating member of the RTE company.
- (2) A notice given under this section (a “notice of invitation to participate”) must—
- (a) state that the RTE company intends to exercise the right to collective enfranchisement with respect to the premises,
 - (b) state the names of the participating members of the RTE company,
 - (c) explain the rights and obligations of the members of the RTE company with respect to the exercise of the right (including their rights and obligations in relation to meeting the price payable in respect of the freehold, and any other interests to be acquired in pursuance of this Chapter, and associated costs),
 - (d) include an estimate of that price and those costs, and
 - (e) invite the recipients of the notice to become participating members of the RTE company.
- (3) A notice of invitation to participate must either—
- (a) be accompanied by a copy of the memorandum of association and articles of association of the RTE company, or
 - (b) include a statement about inspection and copying of the memorandum of association and articles of association of the RTE company.
- (4) A statement under subsection (3)(b) must—
- (a) specify a place (in England or Wales) at which the memorandum of association and articles of association may be inspected,
 - (b) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given,
 - (c) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered, and
 - (d) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it.
- (5) Where a notice given to a person includes a statement under subsection (3)(b), the notice is to be treated as not having been given to him if he is not

allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement.

(6) A notice of invitation to participate shall not be invalidated by any inaccuracy in any of the particulars required by or by virtue of this section.”

(2) In section 13 of the 1993 Act, after subsection (2ZA) (inserted by section 121(3)) insert—

“(2ZB) The initial notice may not be given unless each person required to be given a notice of invitation to participate has been given such a notice at least 14 days before.”

Annex C: Consultation process

This consultation document and consultation process have been planned to adhere to the Code of Practice on Consultation issued by the Department for Business Enterprise and Regulatory Reform and is in line with the seven consultation criteria, which are:

- Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Are you satisfied that this consultation has followed these criteria? If not or you have any other observations about how we can improve the process please contact:

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