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## Disclaimer



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## The Twin Powers

Nicholas Kissen  
The Leasehold Advisory Service  
14 October 2014

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### Relevant legislation



- Landlord and Tenant Act 1985
- Landlord and Tenant Act 1987
- Housing Act 1996
- Commonhold and Leasehold Reform Act 2002

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### And what are those powers?



- Appointment of a manager by the tribunal
  - Part II of the 1987 Act
    - As amended by the 1996 Act
- Acquisition order
  - Part III of the 1987 Act

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### The appropriate tribunal



- The First-tier Tribunal (Property Chamber)
  - England
- The Leasehold Valuation Tribunal
  - Wales

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### Tribunal procedure

- Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules
  - SI 2013/1169
- Leasehold Valuation Tribunals (Procedure) (Wales) Regulations
  - SI 2004/681

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## THE APPOINTMENT OF A MANAGER

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### Important factors

- Fault-based grounds
- May include more than one building
- Can apply even if substantial commercial areas
- Order appointing manager can override lease terms
- Possible path to an acquisition order

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### What does being a Tribunal-appointed manager mean?

- Manager nominated by applicants
- Tribunal-appointed official
- Neutral party to manage building in best interests of the parties
- **Powers and functions come from the Tribunal order and not from the leases**



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### The main steps

- Preliminary notice
- Application to the appropriate tribunal
- Prove grounds of appointment
- Show appointment just and convenient in all the circumstances
- Order made
- Registration



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### The premises

- The whole or part of a building
- Must contain two or more flats



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### Two or more premises

- Application to appoint a manager can be made in respect of two or more premises provided that they are premises to which Part II of the 1987 Act applies
  - Eg Multi-block estate

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### What is a flat?

- A separate set of premises
  - Whether or not on the same floor
  - Which forms part of a building
  - Is divided horizontally from some other part of the building and
  - Is constructed/adapted for use for the purposes of a dwelling

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### Who may apply?

- One tenant
  - Need not be a long lease
- Joint tenants
  - One or more of them may apply
- Tenants of different flats
  - Application can be made jointly
  - Even if the flats are in different buildings

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### Two or more premises



- Application made jointly by at least one tenant in each of the premises

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### Right to Manage



- A landlord under a lease of the whole or part of the premises can apply for appointment of a manager by the appropriate tribunal

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### Who cannot apply?



- Business tenant
  - Protected under Part II of the Landlord and Tenant Act 1954

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### When an application cannot be made

- Exempt landlords
- Resident landlords
- Premises within functional land of a charity



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### Exempt landlords

- Most local authorities
- Registered social landlords
- The Common Council of the City of London
- Others listed in Section 58(1) of the 1987 Act



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### Resident landlords

- Premises are not, and do not form part of, a purpose-built block of flats
- Landlord occupies a flat as only or principal residence
- Has so occupied throughout a continuous period of not less than 12 months



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### Resident landlord

- This exception **DOES NOT APPLY** if at least half of the flats are held on long leases which are not tenancies to which Part II of the 1954 Act applies
- Long leases includes leases granted for a term certain exceeding 21 years

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### Functional land of a charity

- Charity as defined in Charities Act 1993
- Occupied for the charity or by its trustees
- Wholly or mainly used for charitable purposes

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### Crown tenancies

- The provisions in relation to appointment of a manager under Part II of the 1987 Act apply to Crown land

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### Grounds for the appointment of a manager

- The landlord is in breach of obligation owed to tenants
- Unreasonable service charges
- Unreasonable variable administration charges
- Breach of Code of Practice
- Other circumstances



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### Breach of obligation

• Any **relevant person** is either in breach of an obligation owed by him to the tenant under his tenancy and *relating to the management of the premises* in question or any part thereof or (where the obligation is dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give appropriate notice, *and in either case that it is just and convenient to make the order in all the circumstances*



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### Relevant person

- Landlord
- Management companies
- Management trustees
- Right to Manage companies



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### Unreasonable service charges



- Unreasonable service charges have been made, or are proposed or are likely to be made, and that it is *just and convenient to make the order in all the circumstances of the case*

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### Unreasonable variable administration charges



- Unreasonable variable administration charges have been made, or are proposed or are likely to be made and that it is *just and convenient to make the order in all the circumstances of the case*

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### Code breaking



- That any relevant person has failed to comply with any relevant provision of a code of management practice approved by the Secretary of State under Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 and that it is *just and convenient to make the order in all the circumstances*

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### Other circumstances

- Where the Tribunal is satisfied that other circumstances exist which make it just and convenient to make the Order

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### Breach of obligation

- Owed under lease
- Relating to management
  - Repairs
  - Maintenance
  - Insurance
  - Services

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### Service charges defined - Section 18 of the 1985 Act

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

- (a) which is payable, directly or indirectly, for services, repairs, maintenance improvements or insurance or the landlord's costs of management, and
- (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

- (a) "costs" includes overheads, and
- (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

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### Unreasonable service charges



- The amount is unreasonable having regard to the items for which it is payable
- If the items for which it is payable are of an unreasonably high standard
- If the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred

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### Unreasonable variable administration charges - Schedule 11 of the 2002 Act



- An amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  - a) For or in connection with the grant of approvals under his lease, or applications for such approvals
  - b) For or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  - c) In respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  - d) In connection with a breach (or alleged breach) of a covenant or condition in his lease

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### Codes of Practice



- RICS Service Charge Residential Management Code
- RICS Rent Only Management Code
- The Association of Retirement Housing Managers' Code of Practice for the Management of Leasehold Sheltered Housing

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### The preliminary notice - who to serve?

- The landlord
- Any other person who owes obligations relating to the management of the building to the tenant



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### Preliminary notice - content

Specify

- Leaseholder's name
- Address of flat
- Address to serve notices on leaseholder
  - Address in England and Wales
  - Including notices in proceedings



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### Preliminary notice - content

State

- Intention to make application for a management order
- Will not do so if requirement for breach to be remedied as spelt out in the notice is complied with
  - If applicable



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### Preliminary notice - content



Specify

- Grounds on which Tribunal would be asked to make the order and
- Matters relied on for purpose of establishing those grounds

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### Preliminary notice - content



**Where matters capable of remedy** require recipient

- Within such reasonable period
  - (As specified)
- To take such steps
  - (As specified)
- For the purposes of remedying them

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### Period for remedy



- A reasonable one
- How much information to provide?
- What if breach not capable of remedy?

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### Preliminary notice - missing information

The appropriate Tribunal can if it thinks fit make a management order notwithstanding

- The notice failed to comply with any of the content requirements or
- The notice failed to allow a reasonable period for the landlord to remedy breaches

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### Preliminary notice - requirements

- Must be in writing
- May be sent by post
  - Section 7 of the Interpretation Act 1978

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### Preliminary notice - requirements

- If landlord's interest subject to mortgage the landlord must serve a copy of the notice on the mortgagee as soon as reasonably practicable after receiving it

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### When can Tribunal dispense with notice?



- If satisfied that it would **not be reasonably practicable** to serve such a notice on the relevant person
  - Eg Missing landlord
- The Tribunal may direct that such other notices are served, or such other steps be taken, as it thinks fit

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### Tribunal application



- Use Form Leasehold 02
- Specify proposed manager
  - Including professional qualification(if any)

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### When can an application to the Tribunal be made?



**Where preliminary notice served**

- Period specified in the notice for remedying matters has expired without recipient taking required steps or
- Matters complained of were not capable of remedy

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### When can an application to the Tribunal be made?

Where requirement to serve preliminary notice been dispensed with

- Any notices Tribunal required to be served have been served or
- Any steps which were required to be taken have been taken or
- No direction was made in making the dispensing order

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### The just and convenient test

- Landlord's likely future conduct
- Identity of the manager and their plans

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### Just and convenient - factors

- Seriousness of covenant breaches
- Length of time involved
- How did landlord respond to preliminary notice
- Does landlord have serious proposals to remedy situation?

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### Just and convenient - factors



- Are other remedies available?
- Failure to comply with Section 20 consultation
- Identity of proposed manager

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### Identity of the manager



- Experience
- Qualifications
- Suitability
- Understanding of role
  - Officer of the Tribunal
- Enough time and resources
- Management plans

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### Identity of the manager



- Financial stability
- Professional insurance
- Independence
- Knowledge
  - Building
  - Lease(s)
  - Relevant Code of Practice

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### Identity of the manager



THE MANAGER SHOULD EXPECT TO ATTEND THE HEARING AND BE EXAMINED BY THE TRIBUNAL AND PERHAPS BY THE OTHER PARTY

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### What order can the Tribunal make?



- Appoint a manager *whether interlocutory or final* to undertake such functions in connection with the management of the premises, or such functions of a receiver, or both, as the Tribunal thinks fit
- May be for a specified time only

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### Management



Includes

- Repair
- Maintenance
- Improvements
- Insurance

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### Types of order



- May be given subject to conditions fixed by the Tribunal
- May be suspended on terms fixed by the Tribunal

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### Ambit of area covered by the order



- May be in respect of premises which are either more or less extensive than those specified in the application
- Amenity land
- *Cawsand Fort Management Company Limited v Stafford and Others [2007] EWCA Civ 1187; [2007] 48 EG 145*
  - Causal link

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### Ambit of area covered by the order



- May include/exclude commercial areas
- What if service charges pay for both?

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### Types of order



- The Tribunal may make provisions with respect to such matters relating to the exercise by the manager of his functions under the order and such incidental or ancillary matters as the tribunal shall think fit

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### The order may provide for...



- Rights and liabilities arising under contracts to which manager is not a party to become rights and liabilities of the manager
- The manager to be entitled to prosecute claims in respect of causes of action (whether in contract or tort) accruing before/after date of appointment

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### The order may provide for...



- Remuneration to be paid to the manager by any relevant person or by the tenants of the premises in respect of which the order is made, or by all or any of those persons
- For the manager's functions to be exercisable by him either during a specified period or without a limit of time

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### The importance of the order



**Functions powers and duties of manager contained in the Order**

- Repair
- Maintenance
- Improvements
- Insurance
- Levying service charges
- Spell out in detail what manager will do

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### The lease



- The Tribunal order may go beyond the provisions of the lease
- Lease may be defective
  - Advance service charges
  - Sinking fund
  - Repairs
  - Building insurance

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### Management orders - useful tip



- Look at previous Tribunal decisions with Orders attached
- Important that nothing crucial is missed out of the Order and it meets the needs of the premises

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### Period of appointment

- Best for a fixed and realistic period
- Seek extension of appointment where time elapses and need to continue

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### Directions from the Tribunal

- Manager can apply to the appropriate tribunal for directions to be given with respect to the exercise of his functions
- OFFICER OF THE TRIBUNAL

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### Registration of Order

- Land Charges Act 1972
- Land Registration Act 2002

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### Variation and discharge of the order

- Application to the Tribunal by any person interested
- May vary/discharge order
- Conditionally or unconditionally
- Order to cancel entry at relevant land register

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### When can tribunal vary/discharge Order?

**Application by landlord or relevant person**

- Tribunal must be satisfied that variation/discharge will not lead to a recurrence of the offending circumstances and that it is just and convenient to do so

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# ACQUISITION ORDERS

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### The Order

- Acquire landlord's interest in premises without his consent
- May include more than one building
- May include any yard, garden, outhouse or appurtenance belonging to or usually enjoyed with the premises
- May exclude parts of the specified premises

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### Procedure

- Serve preliminary notice
- Apply to the county court for an acquisition order
- Register order
- Appropriate Tribunal decides price if cannot be agreed
- Complete purchase of landlord's interest

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### The premises

- Whole or part of a building
- Must contain at least two flats held by qualifying tenants
- At least two-thirds of flats contained in the premises are held by qualifying tenants
- Must meet criteria up to the time the court considers granting an acquisition order

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### More than one premises



- Made jointly by the requisite majority of qualifying tenants in each set of premises
- Multi-block estate

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### Qualifying tenant



- Long lease unless falls within one of the exceptions
  - Includes granted for a term in excess of 21 years

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### Qualifying tenants - exceptions



- Business tenancies
- Owners of three or more flats
  - Associated companies
- Sub-tenants where landlord is qualifying tenant

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### Where an application cannot be made

- Exempt landlords
- Resident landlords
- Certain mixed-use buildings
- Functional land of a charity
- Crown land



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### Exempt landlord

- Local authority
- Urban development corporation
- Registered housing association
- Charitable housing trust



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### Resident landlords

- Building not purpose-built
- Less than one-half of flats are let on long leases
- Landlord resident for continuous period of last 12 months as only or principal residence



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### Mixed use buildings



- Over 50% "non-residential" internal floor area
  - Neither occupied or intended to be occupied for residential purposes
- Disregard common areas

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### How many needed to apply?



- Not less than two-thirds of qualifying tenants required to proceed
- "Requisite majority" on date notice served
- May be different persons comprising requisite majority at date court application made
- One vote per flat

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### Where to apply



- Local county court
- Serve on landlord preliminary notice unless dispensation order
  - Section 27

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### Grounds for making the application

- Landlord in breach of obligation relating to repair, maintenance insurance or management of the premises and such circumstances likely to continue OR
- A Tribunal-appointed manager has been in place for two years prior to application being made and appointment in force at date of application
  - Appointment made by reason of an act/omission on the part of the landlord
- **In either case the court considers it appropriate to make an acquisition order in the circumstances**

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### Preliminary notice - content

- Specify
  - Names of qualifying tenants by whom served
  - Addresses of their flats
  - Name and address in England and Wales of a person on whom the landlord may serve notices

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### Preliminary notice - content

- State qualifying tenants intend to apply for acquisition order unless (if applicable) requirements set out in notice regarding matters capable of being remedied are addressed
- Specify grounds on which the order will be sought, and the matters which will be relied on to establish them; and
- Regarding matters capable of being remedied, require landlord to take steps to do so within reasonable time (as specified)
  - Steps specified in the notice

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### Preliminary notice - missing information

The court can if it thinks fit make an acquisition order notwithstanding

- The notice failed to comply with any of the content requirements or
- The notice failed to allow a reasonable period for the landlord to remedy breaches

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### Service of the notice

- Shall be in writing
- May be sent by post
  - Section 7 of the Interpretation Act 1978

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### Application to the county court

- If landlord fails to remedy matters set out in the preliminary notice
- Service of the notice dispensed with by the court and any directions made as to further steps or notices have been complied with

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### Who makes the application to court?

- The requisite majority of qualifying tenants
- The participating leaseholders named as Claimants

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### Who are the defendants?

- Landlord and nominated person (if not a claimant)
- Nominated person may be a company comprising the participating leaseholders

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### How is it made?

- CPR Part 8 Claim Form
- Paras.8.2 to 8.4 of the Practice Direction supplementing CPR 56
  - Form, content and service of Claim Form

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### What will the court consider?

- Premises fall within Part III of the 1987 Act
- Proof of condition relied upon
- Appropriate to make order
  - E.g. likelihood of future poor management



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### When are the court obliged to refuse to make order?

- Application relates to part only of more extensive premises in which landlord has an interest and
- That interest is not reasonably capable of being severed from the more extensive premises



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### What can the court do?

- Impose conditions
- Suspend on conditions
- Order costs against landlord



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### Terms of Order



- Acquisition by nominee purchaser on such terms as may be agreed between the claimant qualifying tenants and the landlord or in default decided by the appropriate Tribunal

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### Absent landlord



- Court order to dispense with preliminary notice
- Where it is satisfied that it would not be reasonably practicable to serve such a notice on the landlord
- Terms of acquisition determined by the court
- Price determined by surveyor selected by the Senior President of the Tribunals
- Must also pay any outstanding amounts due under the lease eg ground rent

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### Registration of Order



- Land Charges Act 1972
- Land Registration Act 2002

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### Role of the Tribunal



- Application by the nominee purchaser
- To decide the price
- To determine the *appropriate terms* of the transfer
  - Fair and reasonable

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### The price



- What landlord's interest expected to realise if sold on the open market on the *appropriate terms* by a willing seller and assuming none of the tenants are in the market
- **No marriage value where under 80 years left on lease(s)**

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### The price



- No assumption that property valued in the "no-Act world"
- No specific disregard of value of tenant's improvements
- On the face of it price favourable to qualifying tenants

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### Discharge of the order



- Landlord may apply to court to discharge acquisition order where
- Can satisfy court that nominated person failed to complete acquisition within a reasonable time or
- Number of qualifying tenants falls below requisite majority or
- Where Part III of 1987 Act no longer applies to premises

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### Withdrawal



- Qualifying tenants or nominated person may serve on landlord a notice indicating they no longer wish to proceed
- Must be served
  - Where number of qualifying tenants participating drops below requisite majority; or
  - Where Part III of 1987 Act no longer applies to premises

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### Costs



- Landlord can recover costs (other than those incurred at Tribunal) where
  - Acquisition order discharged
  - Notice of withdrawal served
  - Nominated person no longer willing to act and no replacement
  - Number of qualifying tenants falls below requisite majority
  - Where Part III of 1987 Act no longer applies to premises

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### Arrowgame Limited v Wildsmith and Others, EWHC 3315 (Ch)

- High Court, Chancery Division
- Judgment dated 22 November 2012



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### Who were the respondents?

- Flats 1-10 and Flat 12 Colebrook Court, Sloane Avenue London SW3 (leaseholders)
- Nominee purchaser (company)



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### Who was the appellant?

- Head-lessee: Arrowgame Limited
- Head-lease: 99 years from September 1966
- Bought headlease on 18th February 1993 for £5,500
- “Long term investment and development opportunity”



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### What happened at the building?

- Managed by professional firm and then by a leaseholder
- 2006: LVT appointed manager under LTA 1987
- Section 27 preliminary notice alleged
  - Tribunal-appointed manager in place for two years
  - Appointment of manager not resolved problems experienced with manager
  - Failure by Appellant to co-operate with LVT – appointed manager

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### What did the High Court decide?

- Primary purpose of notice is to inform landlord of case they have to answer and not provide opportunity to mend ways
- In simple terms the notice had to spell out reasons why appropriate case to make an acquisition order
- Not required to include in the notice a requirement that the landlord remedy any of the matters complained of within a reasonable time

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### Alternatives

- Collective Enfranchisement
- Right to Manage
- Right of First Refusal
- Recognised Tenants Association
  - Appointment of a Surveyor
- Management Audit

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## Questions?

The Leasehold Advisory Service  
020 7832 2500  
info@lease-advice.org  
www.lease-advice.org  
Fleetbank House, 2-6 Salisbury Square  
London EC4Y 8JX

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## Upcoming LEASE training

<b>Service charges - 30 October 2014 – Manchester</b>	<b>25 November 2014</b>
	<b>Webinar:</b>
	<b>Variation of leases</b>
<b>Lease extension – 13 November 2014 - London</b>	<ul style="list-style-type: none"><li>• Why vary the lease?</li><li>• Variation by Deed</li><li>• Grounds for seeking variation at the Tribunal</li><li>• Majority application to the Tribunal</li><li>• Contents of Tribunal application</li><li>• Possible Tribunal orders and compensation</li><li>• Unfair Contracts</li><li>• Terms in Consumer Contracts Regulations 1999</li></ul>
<b>Park Homes – 25 November - Manchester</b>	

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