THE SUPREME COURT REDEFINES APPURTENANT PROPERTY FOR RIGHT TO MANAGE

In an important decision for RTM companies and following years of criticism and challenges to the Court of Appeal Decision in Gala Unity the Supreme Court has handed down its decision in the case of *Firstport Property Services Ltd v Settlers Court RTM Company Limited [2022] UKSC 1.* In the judgment five Law Lords unanimously decided that the statutory right to manage does not encompass the management of shared estate facilities.

THE CENTRAL ISSUE

The central issue is specific to estates comprised of multiple buildings, all contributing to the upkeep of the wider estate via a common service charge. it is essentially a dispute about the interpretation of s.72(1)(a) of the 2002 Act which states that the right to manage "*applies to premises if they consist of a self-contained part of a building, with or without appurtenant property*." The definition of "appurtenant property" is given at s.112(1) of the Act, which states that "'*appurtenant property' in relation to a building or 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*."

At estates with multiple buildings it is commonplace for residents to 'enjoy' shared spaces such as gardens and car parks. Controversially, in Gala Unity, the court determined that a right to manage company acquiring RTM for one of the multiple buildings automatically acquires the right to manage the whole of the shared appurtenant property, not just that for which it has exclusive use.

GALA UNITY - UNSATISFACTORY CONSEQUENCES

As pointed out by the Law Commission in its detailed report on RTM published in July 2020, the Gala Unity decision results in various unsatisfactory consequences, such as the possibility that a small block of say ten units acquiring RTM would acquire equal management rights with the estate landlord over all the communal spaces enjoyed by residents of all other buildings on the estate, which could comprise hundreds of flats.

In Gala Unity it was suggested this disparity should be resolved by the RTM Company and the estate landlord sharing management of the wider estate on agreed terms, but the court fell short of providing a solution if the parties could not agree, which is precisely the longstanding situation between Firstport and Settlers Court RTM that gave rise to the appeal.

In a desperate attempt to offer a solution to this issue Counsel for Settlers Court RTM suggested that it could be resolved by leaseholders of the RTM Company making an application to the tribunal to appoint a manager under s.24 of the 1987 Act. Unsurprisingly this fanciful submission was firmly rejected by the court. Lord Briggs said "*In my view it is genuinely absurd to think that the 2002 Act was framed with this route in mind as a tie-breaker solution*". From a practical point of view it is difficult to imagine why leaseholders would throw away what is often a hard fought battle to obtain RTM in return for a finite period of management by a court appointed manager.

In arriving at its decision the Supreme Court was also influenced by an extract from the 'Commonhold & Leasehold Reform Draft Bill and Consultation Paper, published in August 2000, which stated, in relation to an estate of multiple blocks, "*Responsibility for the management of the common facilities would remain as allocated under the lease, as would the liability of the leaseholders to pay toward the costs incurred*."

THE OUTCOME

The effect of the Supreme Court decision appears to be as follows: -

1. An RTM Company seeking to acquire RTM for a building on a multi-building estate WILL NOT acquire management rights over those parts of the wider estate that are shared with leasehold occupiers of other buildings that together contribute to the estate upkeep via a common service charge. It will only acquire management rights of the specific parts over which leaseholders in the applicant building have exclusive rights.

For example, if there are car parking spaces specifically and exclusively assigned to the applicant building under the leases, then the RTM Company will acquire RTM for those spaces. On the other hand, if the estate grounds include communal parking for the general use of occupiers of all the buildings on the estate, the RTM Company will

not acquire RTM rights over this space, which will continue to be managed by the freeholder.

The same will apply if the wider estate is comprised of the single applicant building and multiple leasehold houses or bungalows. Because the wider estate is shared with these other properties, management of the shared parts will not transfer to the RTM Company.

Although this is now the default position there appears to be nothing to stop the RTM Company and the landlord entering into an agreement to vary the management structure to suit their practical purposes as anticipated by s.97(2)(c) of the Act.

2. An RTM Company seeking to acquire RTM for a self-contained building that is the only building on the estate grounds and whose leaseholders have exclusive use of all the common parts of the estate, WILL automatically acquire RTM of the whole of the estate for which they pay a maintenance service charge.

SUMMARY

The Supreme Court Judgment makes sense and is clearly what Parliament intended and eliminates the absurdities in consequence of Gala Unity.

The one downside to the judgment is that it applies retrospectively. The basic rule is that Parliament sets the law and the courts interpret the law. So when the courts make a ruling on the interpretation of a statute, it means it has always carried that meaning. The same situation applied to the Triplerose judgment in 2015, which determined that an RTM company could only manage a single building. Triplerose is still causing problems for hundreds of RTM companies that acquired RTM for multiple blocks and following Triplerose are deemed to have been operating illegally, with profound implications for their RTM directors.

The same situation will now apply to RTM Companies that have already acquired RTM over the wider estate and been implementing management and service charge arrangements accordingly. Somehow this mess will need to be unraveled and one hopes that landlords of estates where this applies will cooperate with RTM companies in the appropriate restructuring without resorting to unnecessary litigation.

The difficulties caused by retrospective judgments was acknowledged by Lord Briggs in the final paragraph of the Judgment but not considered "*sufficient reason to perpetuate an interpretation which is contrary to the purpose of the statute*." Unfortunately prospective overruling, which could have resolved this issue, has not yet been adopted as a practice in this country. Perhaps it is time for this to be reviewed.

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