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RTM: Who Manages the Shared Services on an Estate?

Since its introduction by the Commonhold and Leasehold Reform Act 2002, many leaseholders have acquired the right to manage their block. By acquiring the right to manage, leaseholders get the right to perform the "management functions" in place either of the landlord or any other person upon whom management rights are conferred under the terms of the leases of the flats.

But often a block of flats forms part of a wider estate, containing other blocks of flats or houses. And there's likely to be shared facilities or amenities. These so-called estate facilities will be managed either by a common landlord or other third party, and the associated costs recovered from lessees and owners within the estate.

An issue that (until now) has caused problems with the ongoing management of the estate facilities was what rights of management the RTM company has in relation to the estate facilities.

This was the issue under consideration by the Supreme Court in *FirstPort Property Services Ltd v Settlers Court RTM Company Ltd and others*.

Given the importance of this issue, ARMA were given permission to intervene in the appeal, and were represented by Rupert Cohen (of Landmark Chambers) and Cassandra Zanelli (of Property Management Legal Services Limited). ARMA duly produced a witness statement from Dr Nigel Glen, CEO of ARMA, describing the real-world challenges arising from shared management responsibility which accompanied its written submissions. Its involvement as intervener was assisted by the responses received from ARMA members who explained some of the common challenges and difficulties they faced when managing estates where there are shared services (i.e., between the RTM block and other parts of the estate).

The issue and the problems caused by *Gala Unity*

In *Settlers* Court, the Supreme Court recognised the "abundance" of authority on, or relevant to, the right to manage under the 2002 Act.

In *Gala Unity* the relevant estate consisted of two blocks of flats and two detached coach houses. Each coach house contained a single first floor flat, above parking spaces. There was also further adjacent land including residents' parking, footpaths, roads, visitor parking and grassed areas, used by the occupants of both blocks and the coach house flats in common. The RTM company had given separate claim notices to manage each of the two blocks, but not the coach houses. It claimed to be entitled to manage all the parts of the estate in common use (including the parking areas under the coach houses). The RTM company succeeded at all levels, LVT, the Upper Tribunal (Lands Chamber) and Court of Appeal.
The Upper Tribunal in *Gala Unity* held that the premises included the appurtenant property under section 72(1)(a) of the 2002 Act.

The Upper Tribunal expressed a hope that the RTM company, the freeholder and the management company under the leases (still responsible under the coach house leases for the management of the estate common parts), could agree some workable scheme.

This was shared by the Court of Appeal in *Gala Unity,* who decided that the RTM did extend to facilities on an estate which were shared between the block of flats over which the RTM had been

exercised and other dwellings, even though this would potentially leave both the RTM company and the pre-existing manager responsible to different groups of lessees for providing the same services simultaneously.

This introduced the prospect of “dual responsibility” for the management of appurtenant property between the RTM Company and the previous “manager” (i.e. the landlord or management company who remains, pursuant to covenants owed to lessees in property not subject to the Right to Manage, responsible for the upkeep and maintenance of that “shared” property). In ARMA’s survey of its members, it became clear that there were problems associated with this.

The problems highlighted in *Settlers Court*

The dispute in *Settlers Court* concerned the Virginia Quay Estate. It was developed between 1999 and 2002 as a residential estate containing ten blocks of flats (ranging from five to 11 storeys) and rows of three storey freehold terraced houses. The blocks of flats and houses are surrounded by communal areas including accessways, gardens and grounds together with a river wall separating the estate from the Thames. The communal areas, including the river wall, are all “estate facilities”, because they serve or are used by all the residential occupiers of the blocks of flats and houses.

The estate includes 778 residential units in all.

One of the blocks of flats is called Settlers Court. It contains 76 flats, all let on 999-year leases in substantially identical terms. FirstPort Property Services Ltd (“FirstPort”) is named in all the leases of flats within the estate as the management company (then called Peverel OM Ltd) responsible for the management of the buildings, houses and estate facilities throughout the estate, and entitled to payment of service charges from lessees (and freehold rentcharges from owners of the freehold houses).

The services consisting of managing the estate facilities include maintenance of all the communal areas (including the river wall), secure parking control systems, CCTV camera installations, on-site concierge and management facilities. In 2015-16 the recoverable cost amounted to £379,702.78, and the aggregate share of them payable by the lessees within Settlers Court was 15.2% of the total.

On 8 November 2014, the RTM company acquired the right to manage Settlers Court under the 2002 Act. From that date, the RTM company has had both the exclusive responsibility and the exclusive right to manage the Settlers Court block itself, and the exclusive right to charge the lessees of Settlers Court for the provision of those management services, in place of FirstPort.

But a dispute arose about whether the RTM company had both the responsibility and the right to provide the estate services, and the right to levy a proportion of the estate charges on the lessees of Settlers Court.

In practice, and in default of any agreement, FirstPort had continued to provide the estate services, so as to avoid being in breach of its covenants to do so (given to the lessees of flats in the other blocks and to the freehold owners of the terraced houses). However, some of the lessees of Settlers Court had denied liability to contribute a share of the estate charges, and the RTM company had done nothing (with very minor exceptions) to contribute in kind to the provision of the estate services, pending agreement about some form of sharing of the cost.

The net effect of this is that FirstPort have been incurring a shortfall of approximately 15% between its cost of providing the estate services and the estate charges being received from all the other residential occupants of units within the estate.

Proceedings in the FTT and Upper Tribunal

Because the parties were unable to reach agreement as to how the estate facilities should be managed and the estate charges levied, in December 2017, FirstPort applied to the First Tier Tribunal (Property Chamber) to determine whether it was entitled to levy estate charges from the lessees of the flats in Settlers Court.

The FTT found against FirstPort, considering itself bound by the decision of the Court of Appeal in *Gala Unity.*

The Upper Tribunal dismissed the FirstPort's appeal on the basis that, amongst other things, it too was bound by *Gala Unity*. The UT did however issue a leapfrog certificate for an appeal directly to the Supreme Court. This was the first time that the UT has issued such a certificate.

Decision of the Supreme Court

The Supreme Court unanimously allowed the appeal and, in doing so, held that *Gala Unity* was wrongly decided.

The right to manage grants the RTM company the right to perform the relevant management functions over "the premises" to the exclusion of any other person such as the existing manager.

The Court recognised that treating the right to manage as applying to shared common facilities raised insuperable problems including the fact that lessees of flats in blocks other than that over which the RTM has been exercised would be effectively disenfranchised by having shared estate services provided by an RTM Company with which they had no formal legal relationship. This would also be contrary to the terms of their leases and was the opposite of what the RTM under the 2002 Act was supposed to achieve.

The statutory language in the 2002 Act, which had to be construed in light of the context and purpose of the Act, included numerous signposts pointing against the estate facilities forming part of the "premises" over which the RTM was exercisable. As such, the RTM could not grant the RTM company the right or obligation to provide the Estate Services. That construction of the 2002 Act was confirmed, but no more than that, by the Consultation Paper which accompanied the draft bill which later became the 2002 Act.

The particular facts of *Gala Unity* had served to obscure the real difficulties created by the Court of Appeal's decision in that case and the existence of overlapping rights to provide the Estate Services between a manager and an RTM Company.

It was recognised that, if the RTM company were correct in their argument that they acquired management of the estate facilities, it would lead to outcomes which were both absurd and unworkable.

If the RTM company was responsible for the estate services, it would be entitled to recover estate charges only from the lessees of the building in respect of which it had been set up.

In this case that would mean only 15% of the costs of providing the estate services could be recovered by the RTM company (given that the leases of the lessees of Settlers Court obliged them to contribute only 15% of the cost of Estate Services). This would pose insurmountable solvency issues for it.

Conversely, if FirstPort retained responsibility for providing the estate services, as it was bound to do under the terms of the leases held by the lessees of buildings other than that over which the RTM had been exercised, it could not recover the costs of doing so from the lessees who had exercised the RTM. In this case, that meant that, absent some agreement with the RTM company, FirstPort could recover only 85% of the costs of providing the estate services to the estate as a whole. Whilst in some cases the RTM company and the manager might reach agreement, there was no obligation on an RTM company to do so. The Court made clear that it was obviously preferable to interpret the 2002 Act in a way which did not lead to an unworkable situation absent such agreement.

For those reasons, the Supreme Court found that the right to manage **does not** therefore extend to the RTM company managing the shared estate facilities, which do not form part of the "premises" over which the RTM is exercisable.

The Court found that FirstPort remains the sole party responsible for providing the estate services to all lessees on the estate and entitled to levy estate charges accordingly, including from the lessees of flats in Settlers Court.

As the Court explained:

> *"I consider that the right to manage scheme in Chapter 1 of Part 2 of the 2002 Act makes no provision within the statutory right to manage for management by the RTM company of shared estate facilities. It is concerned only with management of the relevant premises, that is the relevant building or part of a building, together with appurtenant property (if any) which means nearby physical property over which the occupants of the relevant building (or part) have exclusive rights. The right to manage is an exclusive right in the RTM company to manage the relevant premises, and no provision is made in Chapter 1 for any shared management of anything, save only where the RTM company chooses to agree otherwise."*

Gala Unity was wrongly decided and is now overruled.

What does this mean for agents?

This decision is welcome clarification on the dual management issue, and we now have a clear decision from the Supreme Court on who performs the estate facilities, and how the associated costs are recovered. The practical challenges of dual management were highlighted in the submissions made by ARMA, as intervener. Those submissions and the witness statement of Dr Nigel Glen, CEO of ARMA formed a core part of the Court's reasoning and were commented on with approval in the judgment at paragraph 55.

It was also recognised that *Gala Unity* has stood as binding authority for several years, and that estate facilities in many estates may at present be being managed under sharing agreements made by RTM companies and others on the assumption that the law was as set out in that case. No further guidance was given by the Court as to what happens in these circumstances.

The decision leaves a few other questions, too.

Firstly, how does this affect the proposals of the Law Commission on RTM reform?

Secondly, as touched on above, what happens to RTM companies who have been performing estate functions? Will managing agents now see requests from lessees from the wider estate for the return of monies which have been paid to the RTM company?

Thirdly, will we now see disputes over identifying where a block ends and an estate starts?

Although the Supreme Court have answered the headline question, there are still some supplementary questions that will need to be answered.

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