To Manage or Not to Manage under the Commonhold and Leasehold Reform Act 2002?

Matthew Feldman from Cornerstone Barristers looks at the recent Supreme Court case of FirstPort Property Services Ltd v Settlers Court RTM Company Ltd and others [2022] 1 WLR 519 concerning the extent of the "right to manage" conferred by Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').

The Background

Settlers Court is a self-contained block of flats on the Virginia Quay Estate in East London comprising 76 flats all let on 999-year leases in substantially identical terms. A management company was responsible for the management of the buildings, houses and estate facilities throughout the residential estate, comprising ten blocks of flats and freehold houses surrounded by communal areas. As part of its responsibilities, the management company provided certain estate services, receiving a share of the costs of providing those services from the lessees of each flat.

On 8 November 2014, a Right to Manage Company ('RTM company') formed by the lessees of Settlers Court, acquired the right to manage that block pursuant to Chapter 1 of Part 2 of the 2002 Act. The management company continued to provide estate services and to seek to recover a proportion of the estate charges from the lessees of Settlers Court. The RTM company applied to the First-tier Tribunal for a determination as to the amount of estate charges payable by the lessees of the block to the management company, if any.

The tribunal concluded that it was bound by Court of Appeal authority namely, *Gala Unity Ltd v Ariadne Road RTM Co Ltd [2013]* 1 WLR 988, that in acquiring the right to manage the block the RTM company had acquired a right to share in the management of the estate services, and that the terms on which the cost of providing those services were to be allocated was to be resolved by agreement between the RTM company and the management company; and that in the absence of any such agreement, no estate charges were payable by the lessees of the block to the management company. The Upper Tribunal dismissed the management company's appeal, but did issue a certificate under s14A of the Tribunals, Courts and Enforcement Act 2007 for permission to appeal directly to the Supreme Court (by way of a 'leapfrog' appeal), and such permission was granted on 2 November 2020.

The Decision of the Supreme Court

The Supreme Court unanimously allowed the appeal. In doing so, it held that on a true construction of Chapter 1 of Part 2 of the 2002 Act, the right to manage conferred on a RTM company was limited to that which the RTM

company could manage on its own, namely the structure and facilities within the building (or part thereof) constituting the relevant premises and, where they existed, those facilities outside it which were exclusively used by the occupants of the relevant premises; that the apparently unconstrained right of an RTM company to perform its management functions on its own would run into insuperable problems if those functions were construed to include management of shared estate facilities, which a landlord or third party manager would have the right and obligation to manage (see para 36).

It was held further that construing the right to manage as extending to the management of estate facilities used by leaseholders who were complete strangers to the RTM company would contradict the fundamental purpose of the 2002 Act which was to confer management rights and responsibilities on a RTM company which was accountable to and controlled by the tenants who would be affected by the conduct of its management through their right to be members of the RTM company, rather than by either the landlord or a third party manager (see para 38).

Further, a construction of the 2002 Act which either conferred sole management of estate facilities on a RTM company with a right to manage one block or forced the RTM company and the former manager or RTM companies managing other blocks into a shared management relationship was both absurd and unworkable; and it followed that the right to manage scheme in Chapter 1 of Part 2 of the 2002 Act was concerned only with management of the relevant premises, that is, the relevant building or part thereof, together with appurtenant property (if any) over which the occupants of the relevant building (or part thereof) had exclusive rights (see para 54).

The scheme made no provision within the statutory right to manage for management by an RTM company of shared estate facilities, so that in the instant case, the RTM company had not acquired the right to manage the estate services, which remained the sole responsibility of the management company. In so concluding, Gala Unity Ltd was held to have been wrongly decided and was overruled (see paras 62 and 63).

Comment

This decision was eagerly awaited, and the clarity provided in this area will be welcomed by those managing large estates containing several blocks of flats. Currently, many estates will be managed under sharing agreements made by RTM companies based on the decision in Gala Unity Ltd and it remains to be seen how such agreements will be dealt with in the future.

The Supreme Court held that the effect of the position contended for by the Respondents would have meant that 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, so that only about 15% of the costs of providing the estate services could be recovered by the RTM company, with potentially disastrous financial consequences. That is because the only tenants with whom the RTM company had a contractual relationship under s96 of the 2002 Act were the Settlers Court tenants.

Yet further, on the Respondents' analysis, if the existing manager retained responsibility for providing estate services, it could only recover about 85% of the costs of providing such services to the estate as a whole (see paras 56 and 57). The Supreme Court emphasized that it would lean against a construction that would produce absurd or unworkable results if there was an available alternative construction.

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