UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 243 (LC)
UTLC Case Number: LRX/112/2018

LANDLORD AND TENANT – right to manage – whether Gala Unity v Ariadne Road RTM Co Ltd decided per incuriam – appurtenant property – extent of management rights on acquisition.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

FIRSTPORT PROPERTY SERVICES LIMITED

Appellant

and

SETTLERS COURT RTM COMPANY LIMITED AND OTHERS

Respondents

Re: Settlers Court,
17 Newport Avenue,
London, E14 2DG

Before: Judge Siobhan McGrath

Sitting at: Royal Courts of Justice
on
29 April 2019

Simon Allison instructed by in-house solicitors forFirstPort Property Services Limited for the appellant:
Grigory Lazerev in-house solicitor for Settlers Court RTM Co Ltd for the respondent

The following cases are referred to in this decision:

Gala Unity Ltd v Ariadne Road RTM Co Ltd [2012] EWCA Civ 1372
Fencott Ltd v Lyttleton Court RTM Co Ltd [2014] UKUT 27
Ninety Broomfield Road RTM Co Ltd v Triplerose [2016] 1 WLR 275
Methuen-Campell v Walters [1979] QB 525
Cadogan Viscount Chelsea v McGirk (1997) 29 HLR 294
Cawsand Fort Management Ltd v Stafford LRX/145/2005, [2006] EWLands LRX_145_2005
Trim v Sturminster Rural District Council [1938] 2 KB 508
Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402
Stock v Fran Jones (Tipton) Ltd [1978] 1 WLR 231
R (on the application of Noone) v The Governor of HMP Drake Hall [2010] UKSC 30
Secretary of State for Culture Media and Sport v BT Pension Scheme Trustee Ltd [2014] EWCA Civ 958
Greenwich v London Borough of Wandsworth [2008] EWCA Civ 910
Morelle v Wakeling [1955] 2 QB 379

Introduction

1. This appeal is concerned with an important issue relating to the management rights and obligations of a company which has exercised the statutory Right to Manage (RTM) under the Commonhold and Leasehold Reform Act 2002.

2. In this case the respondent, Settlers Court RTM Company Ltd., had, in November 2014, exercised the right to manage in respect of a block of flats known as Settlers Court which is situated on the Virginia Quay Estate, London E14. The appellants, Firstport Property Services Limited (Firstport), is the named management company under a tripartite lease of flats in the blocks on the Estate, as well as under the terms of freehold transfers of the houses. Proxima GR Properties Limited, the freeholders, are not parties in the case.

3. In 2018, the RTM Company made an application to the First-tier Tribunal (Property Chamber) (FTT) for a determination of the payability of services charges said to be due from a number of leaseholders for the management of the Estate. In a decision made in May 2018, the FTT determined: that the service charges were not payable to Firstport; that it was bound by the Court of Appeal decision in the case of *Gala Unity Ltd v Ariadne Road RTM Co Ltd* [2012] EWCA Civ 1372; that the management functions under the residential leases had passed from Firstport to the RTM company on the date the right to manage was acquired and that those functions related to both block and estate services.

4. Firstport sought permission to appeal that decision on the basis that *Gala Unity* had been wrongly decided to the extent that it determined that a Right to Manage Company acquires the right to manage the wider estate where there is more than one block on a development. Permission was refused by the FTT but was granted by the Deputy President of the Upper Tribunal, Martin Rodger QC, who observed:

> "The proposed appeal is arguable for the reasons given in the applicant's grounds and has a realistic chance of success. If *Gala Unity* cannot be distinguished or be said to be *per incuriam* and so is a bar to the prospects of success of the appeal in this Tribunal, the issue raised by the appeal is nevertheless one of considerable practical importance which requires to be resolved definitively at a higher level."

5. The appeal was considered at a hearing on 29th April 2019. Firstportt was represented by Mr Simon Allison of counsel. Settlers Court RTM Co Ltd, together with the respondent lessees, were represented by Mr Grigory Lazarev, in-house solicitor for the RTM Company. I am grateful for the assistance of both Mr Allison and Mr Lazarev in making their comprehensive submissions in the case.

The Property

6. In its determination the FTT described Settlers Court and the Virginia Quay Estate as follows:

> "6. The Estate is situated on a Riverside site on the north bank of the Thames, opposite the 02 Dome in Greenwich. In the current year, there are 654 contributors to the Estate Charges.
>
> 7. The Estate was developed by Barrett Homes around 1999 to 2001. It is a substantial development which includes flats in 10 blocks ranging from around 5 to 11 stories in height, and rows of three-story, freehold terraced houses. There are around 778 units in total.
>
> 8. Most of the blocks are brick faced under pitched roofs. There are designated parking areas adjacent to some of the blocks which have security entry gates. Other blocks have ground and lower ground floor parking areas directly beneath them.
>
> 9. There is a pleasant and extensive waterside paved area and two separate, small, single-story buildings for the on-site concierge and the respondent's management team. The Estate communal areas include access ways, gardens and grounds, and the Riverside paved area.
>
> 10. The services provided include the maintenance of the communal areas (including the river wall), secure parking control systems, CCTV camera installations, the concierge and management facilities."

The conduct of the Right to Manage

7. The RTM Company acquired the right to manage on 8th November 2014 and thereafter assumed responsibility for providing services to the Block at Settlers Court. There is no issue between the parties about those services. The issue instead concerns the estate services and charges. In early 2015, Firstport wrote to the agents for the RTM Company proposing an agreement whereby it would continue to provide the estate services and collect service charges for the same. After an exchange of correspondence, a draft agreement was produced. However, the FTT found that the parties did not agree binding terms and there is no appeal in respect of that aspect of the Tribunal decision.

8. In fact, following the acquisition of the Right to Manage, Firstport did continue (and still continues) to provide the estate services. It has little choice but to do so because of its obligations to lessees and freeholders in other parts of the estate. It also sought to recover estate service charge costs from the lessees in Settlers Court. In late 2017, the solicitors for the RTM Company indicated that they disputed the right of Firstport to continue to manage the estate and to demand/collect service charges in respect of those services. They also challenged the reasonableness of the fees and raised a discrete point on the management costs.

The statutory framework

9. The 2002 Act created a new right for the appropriate proportion of qualifying leaseholders of flats in a self-contained building or self-contained part of a building to establish a RTM company and to take over the management of that building.

10. Section 72(1) provides that the right to manage applies to premises if they consist of a self-contained building or part of a building, with or without appurtenant property; they contain two or more flats held by qualifying tenants, and the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises. By subsection (2), a building is a self-contained building if it is structurally detached.

11. Section 79(1) provides that a claim to acquire the right to manage any premises is made by giving notice of the claim; and under section 80(2) the claim notice "must specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which this Chapter applies." Section 79(1) specifies the persons to whom the claim notice must be given.

12. Where the RTM company has acquired the right to manage the premises, section 96(2) provides that management functions which a person who is landlord under a lease of the whole or part of the premises has under the lease are instead functions of the company; and section 96(5) provides that "management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management. Under section 97(2) the landlord is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96 except in accordance with an agreement made by him and the RTM company.

13. Specifically, chapter 1 of Part 2 to the Act provides as follows:

> **"s.72 Premises to which Chapter applies**
>
> (1) This Chapter applies to premises if -
> (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
> (b) they contain two or more flats held by qualifying tenants, and
> (c) the total number of flats held by such tenants is not less than two thirds of the total number of flats contained in the premises.
> (2) A building is a self-contained building if it is structurally detached.
> …….
>
> **s.96 Management functions under leases**
>
> (1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.

(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

(3) And where a person is a party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.

(4) Accordingly, any provisions of the lease making provision about the relationship of –

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect.

(5) "Management Functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.

(6) But this section does not apply in relation to –

(a) functions with respect to a matter concerning only part of the premises consisting of a flat or of the units held under a lease by a qualifying tenant, or

(b) functions relating to re-entry or forfeiture.

……..

s.97 Management functions: supplementary

(1) any obligation owed by the RTM company by virtue of section 96 to a tenant under a lease of the whole or any part of the premises is also owed to each person who is landlord under the lease.

(2) A person who is –

…….

(b)party to such a lease otherwise than as landlord or tenant

…….

is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue section 96, except in accordance with an agreement made by him and the RTM company.

…….

s.112 Definitions

.....

"appurtenant property", in relation to 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..

Gala Unity

14. *Gala Unity* concerned two blocks of flats on land which also included two free-standing "coach houses", which were first-floor flats with parking spaces underneath. One of the blocks contained 10 flats and the other contained 2 flats. Two of the parking spaces below the coach houses were allocated to the coach houses and the others to some of the leasehold flat owners. There was a free-standing dustbin store serving all the flats on the land. A single RTM company was set up seeking to claim the RTM over both blocks of flats. The blocks and coach houses shared common accessways and circulation areas. The service charges paid by the leaseholders fell into several categories including: the estate common parts; the building main structure; the building common parts, the car park and insurance.

15. The lessees were given rights of way over and along the roads, drives, forecourts and pavements, the right to use appropriate areas of the estate, the right to use car parking spaces available for common use and the right to use the dustbin area.

16. At first instance the landlord had argued that because of the car-ports underneath the coach-houses and the shared access road and visitors' parking spaces, the buildings were not structurally detached or self-contained. This contention was firmly rejected and at first instance it was determined that the RTM Company should have control of all of the service-charge categories set out above. The Tribunal observed:

> "This means that they will take on responsibility for all the common areas, both those shared with the coach-houses and those exclusively for the use of those in the other two blocks…..In effect, there may be some duplication of service provision initially, but nothing in this decision precludes the lessees of the coach-houses from applying to a leasehold valuation tribunal for variation of their leases, or for a decision as to reasonableness of service charges…."

17. In the Upper Tribunal, the President agreed with this determination, finding that appurtenant property is of two sorts: first, appurtenances for the exclusive use of the flat such as a car port or car parking space that is included in the demise and secondly incorporeal appurtenances such as rights of way and other rights granted under the leases. He concluded that appurtenant property need not be confined to land or rights appertaining exclusively to the premises despite the fact that this would mean that both the landlord and the RTM company would be obliged to provide certain categories of service on "shared" land.

18. The landlord appealed the decision to the Court of Appeal. Lord Justice Sullivan giving the leading judgement stated:

> "14. As the President said in paragraph 16 of his decision, there is nothing in the wording of the Act which suggests that appurtenant property is limited to property that is exclusively appurtenant to the self-contained building.
>
> 15. The fact that the definition is not limited to appurtenances which belong to the building in question is a powerful indication that Parliament did not intend that appurtenant property for the purpose of section 72(1)(a) should be limited to property that is exclusively appurtenant to the self-contained building in question. In effect, Mr McGurk's approach is an attempt to substitute in section 72(1)(a) the words "self contained premises" for premises which consist of a self-contained building together with appurtenant property."
>
> 16. In my judgement, the wording of section 72(1)(a) is clear: there is no requirement that the appurtenant property should appertain exclusively to the self contained building which is the subject of the claim to acquire the right to manage...."

19. At Settlers Court, the position now is that at least some of the leaseholders at Settlers Court have refused to pay the estate charges, notwithstanding that they have had the benefit of the services. I understand that there are outstanding arrears of service charges relating to Settlers Court. The lessees in default rely on the 2002 Act, the fact that management functions have passed to the RTM Company and the prohibition contained in section 97(2). Their contention is that those service charge costs are not payable to the Applicant.

The Preliminary Issue

20. Before turning to the detailed submissions in the case, it is necessary first to consider a preliminary issue raised on behalf of the RTM company and lessees. Mr Lazarev says that the applicant was or ought to have been aware of the decision in *Gala Unity* when it served its counter-notice on the RTM Company. In those circumstances, he says any contention that *Gala Unity* had been wrongly decided ought to have been raised at that time. He submits that it makes no sense for the appellants to have waited until after the RTM Company acquired the right to manage to dispute the scope of the property to which that right applies. He suggests that if, on the appellant's case, the appurtenances acquired as part of the right to manage did not include appurtenances in common use with other blocks on an estate, then the entitlement to exercise the right might be undermined and, in some case, would disqualify a property from the right. Under section 90(4) of the 2002 Act, the date of acquisition of RTM is the date three months after a determination under section 84(5) becomes final. As there are no provisions in the 2002 Act allowing the question of entitlement to RTM after that date to be re-opened, the appellant is barred from raising the issues in this appeal.

21. I do not accept Mr Lazarev's submissions. In particular, it is not contended by the appellant that the RTM company was not entitled to exercise the right. In this case, Mr Lazarev seeks to stretch the appellant's submissions too far. At first instance, this case began as an

application by a number of lessees for a determination as to the payability of estate service charges. The points in issue here were raised as a defence to that claim. The appellant ultimately seeks a determination that the lessees are liable to pay the service charges and I see nothing wrong in making submissions in law about payability. Whether those submissions are correct is another matter and I deal with those substantive issues below.

The Appellant's submissions

22. Against this background Mr Allison submits that the present state of the law is wholly unsatisfactory, both on a practical level and as a matter of law. He referred me to *Fencott Ltd v Lyttleton Court RTM Co Ltd* [2014] UKUT 27, where the Deputy President of the Lands Chamber observed:

> "Where otherwise separate self-contained buildings receive services through inseparable communal installations, or where truly self-contained buildings share appurtenance (such as car parks, gardens or access roads), effective self-management is likely to require that control be vested in a single body. Not only is the prospect of dual management between an RTM company and the estate freeholder "not a happy one" but the potential for discord, duplication of effort and wasted expenditure where multiple single block RTM companies must collaborate is almost as daunting. Parliament must have intended the 2002 Act to transfer management control to tenants effectively…"

Per Incuriam

Mr Allison contends that *Gala Unity* was decided *per incuriam* and that in any event the issue may be so fundamental to the operation of the RTM scheme that it ought to be fully re-considered by the Court of Appeal or, given the number of decisions potentially affected, the Supreme Court. By contrast he accepts that allthough there are significant differences in the type of estate dealt with in *Gala Unity*, he accepts that this case cannot be distinguished on its facts.

23. The starting point, he says, is a consideration of whether the judgement in *Gala Unity* was given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on it, such that part of the decision or the reasoning on which it is based could be found to be demonstrably wrong: *Morelle v Wakeling* [1955] 2 QB 379.

24. That the decision is demonstrably wrong is supported, he says, by a different interpretation of the Act that would not lead to the difficulties created by *Gala Unity*. If, he says, the right to manage extends to appurtenant property in the widest sense, the definition of "premises" as used in the scheme must necessarily include all shared parts of the estate. He gave some examples of the absurd or nonsensical consequences that this produces:

(a) The RTM Company has the right to manage all of the estate common parts which, in many cases including Settlers Court, would be a huge undertaking and beyond the

means of the RTM company. In particular, although an RTM Company acquires management rights it does not also acquire the right to recover estate service charges from lessees other than those in the subject block. Furthermore, management of the wider estate and shared services would potentially be against the wishes of other stakeholders on an estate;

(b) If the appellants simply stopped providing estate services, then the RTM Company would be in breach of the terms of the leases at Settlers Court;

(c) By section 97(2), no other party is entitled to do anything with respect to the 'premises' which the RTM company is required or empowered to do under the lease by virtue of section 96 (unless there is an agreement to the contrary). Accordingly, the appellants are strictly speaking unable to carry out any management functions in respect of the wider estate, putting it in immediate breach of its obligations to other leaseholders and freeholders;

(d) If in fact the appellants do have the power to continue to manage the estate, then it still would not have the power to recover the appropriate share of its outlay from the leaseholders at Settlers Court or from the RTM Company;

(e) By section 73(4) a company is not an RTM Company in relation to premises if another company is already an RTM Company in relation to those premises. If therefore the right to manage is exercised in respect of one block of flats and the appurtenant property extends to shared areas of an estate, then the right to manage could not be exercised in respect of any other block;

(f) If an RTM Company acquires the right to manage shared estate services, what is to happen to any ringfenced reserve fund for the Estate?

25. He submitted that this cannot have been the intention of Parliament. In *Ninety Broomfield Road RTM Co Ltd v Triplerose* [2016] 1 WLR 275, the Court of Appeal decided that 'premises' in Chapter 1 of Part 2 of the Act means the same thing each time the term is used. In that context he said, it was recognised by the Court of Appeal that the terms of the Act are wholly inconsistent with the idea that 'premises' as defined can include different premises beyond the single 'self-contained building or part of the building' referred to in section 72(1)(a). He also drew my attention to the 'real practical problems' identified at paragraph 52 of the judgement and suggested that they would equally apply in this case.

26. In *Triplerose* it was accepted by the Court of Appeal that if the true interpretation of the provisions of the Act is ambiguous then the higher courts are entitled to have regard to the consultation paper and the debates in Parliament and reports in Hansard as an aid to construction. On that basis Mr Allison referred me to the following passages of the *Commonhold and Leasehold Reform, Draft Bill and Consultation Paper* (August 2000) (Cm 4843):

"9. The Government therefore considers that a new right is required to allow leaseholders to take over responsibility for the day-to-day management of the block in which they live…

10. The main objective is to grant residential long leaseholders of flats the right to take over the management of their building…

22. The right to manage as set out in the draft Bill has been prepared on the basis that the right will apply to leaseholders of flats on a block-by-block basis.

88. In certain cases a block of flats may be part of an estate of properties, with all blocks enjoying a number of common facilities. These may include, for example, a car park or gardens. Where that is the case, the RTM company would become responsible only for the management of the block for which the RTM had been exercised…Responsibility for the management of the common facilities would remain as allocated under the lease, as would the liability of the leaseholders to pay towards the costs incurred

102. Where the exercise of RTM caused leaseholders to have to pay separate charges to the landlord and to the company, the leaseholders would be able to exercise the same rights in respect of both charges."

27. Mr Allison explained that whilst there was only limited debate of the Bill in Parliament, there is no suggestion of any intention to depart from the Law Commission's proposals.

28. Against that background, Mr Allison submitted that the Act ought to be construed in such a way that an RTM Company only acquires the right to manage the building in respect of which the claim was made and not the right to manage wider parts of the estate that are shared with other properties. He proposed three possible solutions.

Appurtenant Property

29. Firstly, he submitted that if properly construed, 'appurtenant property' is limited to that which is in the curtilage of the building being claimed and thus to land which exclusively belongs to that building. He said that one of the reasons why the decision in *Gala Unity* is in doubt is that the Court's attention was not drawn to the decisions on the meaning of 'appurtenant' in *Methuen-Campell v Walters* [1979] QB 525 and *Cadogan Viscount Chelsea v McGirk* (1997) 29 HLR 294.

30. As set out above, section 112 defines 'appurtenant property' to mean 'any garage, outhouse, garden, yard or appurtenance belonging to, or usually enjoyed with, the building or part or flat.' In *Gala Unity*, as noted above, the President decided that appurtenant property could be of two sorts:

> "16. Firstly, there is the car port or car parking space that is included in the demise and there can be no doubt, in my judgement, that each flat's car port or parking space is appurtenant property for the purposes of the statutory provisions. The second sort

> of appurtenant property consists of incorporeal rights of way and other rights granted under schedule 2 of each flat's lease. These are rights that are not exclusive to the particular flat but are shared with all or some of the other flats, including flats within the Managed Estate that are not within either of the two blocks in respect of which the claim notices were served. There is, I think, no reason why the right to manage should not extend to the maintenance of land over which tenants have incorporeal rights."

31. In reaching this conclusion the President had regard to the position in respect of the appointment of a manager under Part II of the Landlord and Tenant Act 1987 and specifically *Cawsand Fort Management Ltd v Stafford* LRX/145/2005. It is clear from the judgement in *Gala* that the President had recognised the possibility that practical difficulties would be caused by his conclusion and had initially considered that the correct approach was a more limited interpretation of 'appurtenant' however he said "On further consideration I do not think that 'appurtenant property' is to be so narrowly construed. There is nothing in the wording itself that would suggest this, and, although the scope for conflict of the sort that I have mentioned exists, this is insufficient reason for imposing a restriction on the meaning of the provision."

32. Mr Allison said that these conclusions as to appurtenant property were not seriously challenged in the Court of Appeal but he said were reached in the Upper Tribunal without reference to authority which would have made a difference. *Methuen-Campell* was a decision where the court interpreted the meaning of 'appurtenances' under the Leasehold Reform Act 1967. A tenant seeking to acquire the freehold of his house sought to also include the neighbouring paddock in the demise. Section 2(3) of the 1967 provides that references to 'premises' in that Part of the Act "is to be taken as referring to any garage, outhouse, garden, yard and appurtenances which … are let to him with the house and are occupied and used for the purposes of the house or any part of it by him"

33. In relying on the case, Mr Allison acknowledged that this is a different form of wording, although there were some similarities to the 2002 Act. However, he said that the decision was in a similar context. The Court of Appeal considered the historic meaning of 'appurtenances' and concluded that one piece of land cannot be appurtenant to another. Lord Justice Goff referred to *Trim v Sturminster Rural District Council [1938] 2 KB 508* where Lord Justice Slesser stated that "…it is now beyond question that broadly speaking, nothing will pass, under a demise, by the word 'appurtenances' which would not equally pass under a conveyance of the principal subject matter without the addition of the word."

34. In *McGirk* , the Court of Appeal considered the term 'appurtenant property' in the context of the Leasehold Reform Housing and Urban Development Act 1993 where by section 1(7) it is defined 'in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat.' Millet LJ considered that the 'appurtenant property' did not need to be within the curtilage of the flat, but it did still need to be within the curtilage of the block in which the flat was situated. In *McGirk* the question was whether a

storeroom allocated to a particular flat should be included where the lessee had claimed and had the right to a new lease. He said that "the essential qualification…is that the appurtenant property should 'belong to, or(be) usually enjoyed with, the flat and (be) let with the flat' on the relevant date."

35. In either case, Mr Allison submitted, the definition of 'appurtenance' would only extend to exclusive rights. In particular the definition in the 2002 Act is in substantially the same form as in the 1967 Act and the 1993 Act and fell to be construed in a similar context. It should therefore be given the same meaning in each case: *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402.

36. In the context of the 2002 Act, he said, an RTM company does not acquire the right to manage the wider estate. For the purpose of the 2002 Act, he argued, appurtenant property is limited to that which is within the curtilage of the building being claimed and thus to land which exclusively belongs to that building. He submitted that the curtilage of a building can necessarily only belong to one building, it cannot be shared or overlap. It would be a nonsense to suggest, for example, that the expansive waterside walkway and river walls on the far side of the Estate are within the curtilage of Settlers Court. His proposed construction, he added, would be consistent with the conclusion in *Triplerose* that section 72(1) of the Act limits the operation of an RTM scheme to single premises; it cannot operate across multiple blocks on an estate.

Proper construction of section 72(1)(a) – 'self-contained'

37. In the alternative, Mr Allison argued that the definition of 'premises' in section 72(1)(a) should be read to give proper effect to the dominant description 'self-contained' so that the descriptor applies to all parts of the words that follow. In this way the subsection should be read so that the Chapter applies to premises if:

(a) They consist of a self-contained building with (self-contained) appurtenant property; or
(b) They consist of a self-contained building without (self-contained) appurtenant property; or
(c) They consist of a self-contained part of a building with (self-contained) appurtenant property; or
(d) They consist of a self-contained part of a building without (self-contained) appurtenant property.

In effect there, the comma following the word 'building' in section 72(1)(a) should be disregarded.

The irrelevance of 'appurtenant property'

38. As a third contention, Mr Allison submitted that section 72(1)(a) should be read so that the words 'with or without appurtenant property' simply make it clear that it is irrelevant to the operation of the RTM scheme whether or not the self-contained building or part of a building,

has property appurtenant to it. On this reading, he said, the 'premises' would simply be the building itself.

39. In making this submission, Mr Allison acknowledged that on this construction it would be unclear which party is to continue to manage property which is solely appurtenant to the building in question. He suggests that the answer to this question might be that the description of 'self-contained building' would have to be read to include the land irretrievably bound up with that building and no other, for instance if there were a car park that solely served that building. He said that as a matter of practicality, the distinction between what property is solely appurtenant to a block and which is shared property used by multiple blocks is usually tolerably clear in any lease where estate charges are due.

Respondents' submissions

40. On behalf of the respondents, Mr Lazarev's first submission was that there is no basis in law to depart from the decision of the Court of Appeal. Sections 72(1)(a) and section 112 are, he says sufficiently clear. He submitted that section 72 is a provision dealing with the entitlement to exercise the right to manage and not which part of the premises are to be managed. Section 72(1) gives a binary choice, either the premises qualify or they do not.

41. He said that the answer to management responsibilities lies in section 96 which provides in subsections (2) and (3) for management functions under a relevant lease (in relation to service, repairs, maintenance, improvements, insurance and management) to be functions of the RTM company. Section 96(6) then makes exclusions from the management functions which are to be transferred. These relate to any matter concerning only a part of the premises consisting of a flat or other unit *not* held under a lease by a qualifying tenant and to functions relating to re-entry or forfeiture. He therefore submitted that had it been intended that shared management functions were not to be acquired by an RTM Company then they would have been expressly excluded in section 96.

42. Mr Lazarev also submitted that the way in which the legislation is construed in *Gala Unity* does not give rise to the practical difficulties suggested on behalf of the appellants and that in any event the interpretation does not give rise to such an absurdity that would enable a departure from the clear words of the statute.

43. He said that in fact the practical difficulties are hypothetical and have not arisen in this case. Firstly, the estate continues to be managed by the appellant and he suggested there is no evidence that the appellant has been unable to recover materially all of the recoverable costs of providing the services.

44. In respect of the other matters said to cause practical difficulty, Mr Lazarev says that the issue of joint management of common assets is not unusual. By way of example he referred to

the position in a limited company with more than one shareholder where he says that issues are typically resolved by the application of provisions of the Companies Acts supplemented by a shareholders' agreement. Also in joint ventures, the issue of the management of common assets is resolved through an agreement on the respective rights and responsibilities of the joint venture partners. In the context of managing common parts of a residential estate, he said, there are unlikely to be complex issues that could not be solved by adopting a similar approach.

45. Mr Lazarev suggested that the perceived difficulties arise from a misunderstanding of the effects of *Gala Unity*. He said that the restriction in section 97(2) of the Act applies only to the lessees of the RTM building and the performance of management functions under their leases. It does not mean that the named manager or the landlord under non-RTM leases is precluded from carrying out management functions where those functions are shared. This, he said was recognised by Lord Justice Sullivan when he noted that his interpretation of the Act resulted in dual responsibility.

46. This he submitted is therefore not a case where a presumption against absurdity would apply in the construction of the RTM provisions of the 2002 Act. He referred me to *Craies on Legislation* [11th edition] at paragraph 19.1.12 as follows:

> "(…) The more clearly daft the result would be, the more one is prepared to tackle even small or crumbling walls in an effort to avoid it. In order to inspire this kind of a judicial determination not to allow an absurd result, it will be appreciated that something is required in excess of the kind of mild anomaly that is inherent to any moderately complicated legislative scheme.
>
> ……..
>
> The rule against absurdity remains an important aid for judges when deciding in which of two equally grammatical directions to jump in reading a provision; but the courts remain alert to avoid attempts to use the rule to lead them into substituting their judgement for that of the legislature, even where the legislature's judgment was demonstrably ignorant or deficient."

He also referred to *Stock v Fran Jones (Tipton) Ltd* [1978] 1 WLR 231 where Lord Simon of Glaisdale (at page 237) said:

> "(…) To apply it to the argument on behalf of the appellant based on anomaly, a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is a clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly"

47. Mr Lazarev then drew my attention to a number of cases where these general principles were considered or followed including *R (on the application of Noone) v The Governor of HMP*

Drake Hall [2010] UKSC 30 where a prisoner's release date and entitlement to home curfew detention were effectively dependent on the order in which sentences appeared in the court's sentencing order and where the effect of transitional provisions under the Criminal Justice Act 1991 and the Criminal Justice Act 2003 were described by the Supreme Court as 'hell.'

48. By contrast, he also referred to other cases where the courts refused to put a gloss on the words used in the relevant statutory provisions including *Secretary of State for Culture Media and Sport v BT Pension Scheme Trustee Ltd* [2014] EWCA Civ 958; *Greenwich v London Borough of Wandsworth* [2008] WECA Civ 910.

Per incuriam

49. Turning to the issue of *per incuriam*, Mr Lazarev suggested that the issue was not identified in the First-tier Tribunal nor in the application for permission to appeal and seemed to have been taken up following the grant of appeal by the Deputy President when he suggested that it would be necessary to distinguish *Gala Unity* or to demonstrate that it was decided *per incuriam* (see paragraph 4 above).

50. In any event Mr Lazarev contended that the decision was not *per incuriam*. Firstly, he referred me to the Upper Tribunal and Court of Appeal decisions in *Cawsand Fort Management Co Ltd v Stafford & Ors* [2006] EW Lands LRX/145/2005 and [2008] 1 WLR 371. At paragraph 15 of the Upper Tribunal decision in *Gala Unity*, George Bartlett referred to his own decision in *Cawsand Fort* where in respect of the meaning of premises and appurtenant property he referred to both *Trim v Sturminster RDC* and to *Methuan-Campbell v Walters*. Mr Bartlett was, therefore cited of those authorities, although not *Cadogan Viscount Chelsea v McGirk*.

51. Secondly, Mr Lazarev says that the Court of Appeal decision addresses the arguments that would have been advanced if the authorities had actually been citied to it and he referred in particular to paragraphs 15 and 16 of the Court of Appeal decision set out at paragraph 8 above.

52. Finally he contends that the cases relied upon by the appellant are of no assistance as they also decide that appurtenant incorporeal property, such as an easement, is not required to be within the curtilage of a house in any event.

Proper Construction of section 72(1)(a)

53. In the light of his submission that the language of section 72(1)(a) and 112 are plain and unambiguous and that the Court of Appeal's conclusion does not fall within the ambit of *Stock v Fran Jones (Tipton)*, Mr Lazarev submitted that there is no need or justification for considering alternative interpretations.

54. However, he said if he was wrong in that submission, he would argue that none of the alternative interpretations advanced by the appellant has merit. Before turning to this he said that the passages referred to in the consultation paper were not definitive of the question and in particular, there is no indication whether the passage or statements to that effect were repeated in subsequent materials accompanying the passage of the Bill. Nor, he argued, is it clear that paragraph 88 is entirely inconsistent with the decision in *Gala Unity*.

55. On the wording of section 72, Mr Lazarev submitted as follows:

(a) It is clear that the word 'self-contained' modifies the nouns 'building' or 'a part of a building.' The expression 'with or without appurtenant property' is separated by a coma. This signifies that it is a separate subordinate clause modifying the preceding main clause;

(b) It is grammatically wrong to suggest that a word within a main clause can modify a subordinate clause. Therefore, the word 'self-contained' grammatically cannot modify the subordinate clause 'with or without appurtenant property.'

(c) Subsections (2) and (3) of section 72 go on to define the meaning of 'self-contained' in relation to a 'building' and 'part of a building' and there is no reference in those subsections to appurtenant property.

(d) It makes no sense for the word 'self-contained' to apply to such appurtenances as easements, which are incorporeal hereditaments.

The relevance of appurtenant property

56. Mr Lazarev argued that there is no merit in the suggestion that the words 'with or without appurtenant property' mean that appurtenant property is irrelevant to the operation of the RTM scheme. He submitted that the natural meaning of sub-section (1)(a) is that if a self-contained building or part of a building has appurtenant property, it is included in the premises.

Consideration

57. As stated above, the appellants accept that there is no basis on which to distinguish the case and therefore to succeed the Applicant must show that the decision was made *per incuriam*. In his skeleton argument Mr Allison acknowledged that whether or not this Tribunal finds *Gala Unity* to have been decided *per incuriam* would turn on the relatively high hurdle that must be passed before it would consider disregarding a decision of the Court of Appeal, and on the basis upon which the Upper Tribunal might find that the appeal should succeed.

58. In *Morelle v Wakeling* [1955] 2 QB 379 the principle of *per incuriam* was described in the Court of Appeal as follows:

> "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence"

59. Having regard to that test I do not consider that *Gala Unity* was decided *per incuriam*.

60. Firstly, I do not consider that *Gala Unity* was decided in ignorance or forgetfulness of a binding authority. Both *Methuan-Campbell v Walters* and *Cadogan Viscount Chelsea v McGirk* were decided under different statutory regimes. *Methuan- Campbell* under the Leasehold Reform Act 1967 and *McGirk* under the Leasehold Reform Housing and Urban Development Act 1993. In neither case were the RTM provisions of the Commonhold and Leasehold Reform Act 2002 under consideration. The findings in *Methuan-Campbell* and *McGirk* are not determinative of the question in this case and arguably are not relevant.

61. Furthermore, both the 1967 Act and the 1993 Act are concerned with the acquisition of interests in land either freehold or, in the case of *McGirk*, a new lease. Neither were concerned with the acquisition of management rights. Although Mr Allison suggested that the definitions of 'appurtenance' were substantially the same and fell to be construed in a similar context, I do not think that is correct. There is a clear distinction between the regimes and the legislation is for a different purpose.

62. Even if that were not correct, reference is made in George Bartlett's decision in the Upper Tribunal's decision in *Gala Unity* to *Cawsand Fort* where the same Tribunal had considered *Methuan-Campbell v Walters* in the context of the appointment of a manager under Part II of the Landlord and Tenant Act 1985. The reasoning in paragraph 16 of the Upper Tribunal decision, shows a clear understanding and a rejection of the issues raised in this appeal. The Upper Tribunal's decision on the point was endorsed by the Court of Appeal. All of this falls far short of the test on *Morelle v Wakeling.*

63. Furthermore, I am not satisfied that the decision in *Gala Unity* or the reasoning leading to that decision can be said to be demonstrably wrong. In reaching that conclusion I am conscious that the implications of *Gala Unity* are far-reaching and can cause real difficulties in the management of estates and in the effective implementation of the Right to Manage itself. However, I take the view that this is an insufficient reason to say that the Court of Appeal was in error. In particular, although the specific challenges detailed by Mr Allison are not dealt with in

Gala Unity, it was clearly recognised by Lord Justice Sullivan that difficulties might arise. He dealt with this at paragraph 16 of the judgement where he said:

> "The prospect of dual responsibility for the management of some of the appurtenant property in this and other similar cases is not a happy one. As Mr McGurk submitted, there is the potential for duplication of management effort and for conflict between the 'old' management company and the new RTM company in respect of such appurtenant property, but I am not persuaded that these consequences are so grave, or that the end product is so manifestly absurd, that we would be justified in adding a gloss to words – appurtenant property – which are already defined in the Act."

64. It is also difficult to say that the statutory interpretation of section 72(1)(a) and sections 96 and 97 was manifestly wrong. Mr Allison suggested that section 72(1)(a) should be read to give proper effect to the dominant description "self-contained." I do not think this can be correct. Firstly, there are the syntactical criticisms made by Mr Lazarev. Secondly, given that the context of the Chapter 1 of Part 2 of the Act is the acquisition of 'management' I would suggest that it is possible that the inclusion of the words 'with or without appurtenant property' are included not to give effect to the meaning of 'self-contained' but to make it clear that 'appurtenances' are in fact to be included in the transferred management rights. It is interesting to note that Chapter 1 of Part I to the Leasehold Reform, Housing and Urban Development Act disaggregates the definition of 'premises' in section 3 and 'appurtenant property' in section 1(7), despite the same requirement for premises to be 'self-contained' in section 3(1)(a).

65. Finally, I do not accept that the words 'with or without appurtenant property' simply make it clear that it is irrelevant to the operation of the RTM scheme whether or not the self-contained building or part of a building, has property appurtenant to it. Mr Allison himself acknowledged that such an interpretation would create uncertainty about the management of property which was solely appurtenant to the building.

66. As noted at the beginning of this judgement, the point at issue here is of importance. However, the difficulties described result from the legislation itself. The challenges of creating a regime which gives lessees the right to manage the block of flats in which they live but which also seeks to give them rights of management in respect of the estate where the block of flats is located should not be underestimated. The Law Commission is currently considering the Right to Manage scheme generally and in January 2019 issued its consultation paper *Leasehold home ownership: exercising the right to manage.* It is likely that its recommendations will seek to address *Gala Unity* and the management of estates more generally.

67. However, for the reasons given, this appeal is dismissed.

Judge Siobham McGrath

Sitting for the Upper Tribunal, Lands Chamber

12 August 2019