

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – covenants to pay a service charge – proportions – construction of the lease - effect of the exercise of the right to manage upon the service charge provisions in the lease – section 100 of the Commonhold and Leasehold Reform Act 2002 and the meaning of “untransferred covenants”

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

BETWEEN:

G & A GORRARA LIMITED (1)
PAOLO GORRARA (2)
ROBERT GORRARA (3)

Appellants

-and-

KENILWORTH COURT BLOCK E
RTM COMPANY LIMITED

Respondent

Re: Flat E3 Kenilworth Court,
Hagley Road,
Birmingham,
B16 9NU

Judge Elizabeth Cooke

15 March 2022

Royal Courts of Justice

Miss Amanda Gourlay for the appellants

The following cases are referred to in this decision:

Arnold v Britten [2015] UKSC 36

Aviva Investors Ground Rent GP Limited v Williams [2021] EWCA Civ 27

Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38

FirstPort Property Services Limited v Settlers Court RTM Co Limited [2022] UKSC 1

Gala Unity v Ariadne Road RTM Co Limited [2012] EWCA Civ 137

Price v Matthey [2021] UKUT 7 (LC)

Triplerose Limited v Ninety Broomfield Road RTM Co Limited [2015] EWCA Civ 282

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (“the FTT”) about two preliminary issues in a dispute about service charges.
2. The appellants are the current and former lessees of a flat in one of five blocks, A to E, in Kenilworth Court, Hagley Road, Birmingham. They have challenged the reasonableness and payability of service charges demanded from them in respect of flat E3 for the years 2012/13 to 2019/20. The respondent is the lessee-owned company exercising the lessees’ statutory right to manage their block. The two issues in the appeal are about the construction of the lease, and about the construction of a number of provisions of the Commonhold and Leasehold Reform Act 2002, determined by the FTT as preliminary issues so that the challenge to the service charges could be decided once the parties’ disagreement about the extent of the lessees’ obligations had been resolved.
3. I heard the appeal at the Royal Courts of Justice on 15 March 2022. The appellants were represented by Miss Amanda Gourlay, to whom I am grateful. The respondent has chosen not to take part in the appeal but Ms Krishma Patel of counsel attended with a noting brief.

The factual and legal background

4. Kenilworth Court comprises five buildings arranged in a crescent, built in the 1950s; buildings A, B, D and E each contain 10 flats and there are 12 flats in block C, so there are 52 flats altogether, all held on long leases. The second and third appellants bought Flat 3 in Block E in 2004, and in 2016 assigned their lease to the first appellant, their family company; a long lease of the flat was first granted in 1953, but it is agreed that the relevant lease for the purposes of this appeal is the lease granted for a term of 125 years in 1997.
5. I shall have more to say about the terms of the lease in due course; for now, I observe that the lease imposes maintenance and other obligations upon the landlord and requires the lessee to pay a service charge, in the form of a proportion of the cost to the landlord of complying with its obligations under the Fifth Schedule of the lease, headed “The Maintenance Expenses”.
6. The lessees’ collective right to manage their building is set out in Part 2 of the Commonhold and Leasehold Reform Act 2002, Chapter 1. The right is exercised through a company, known as an RTM company, and by compliance with the statutory requirements for participation by qualifying lessees and for the giving of notices to the landlord and others; there is no need to prove fault on the part of the landlord. The effect of the acquisition by an RTM company of the right to manage is that it takes over the responsibilities of the freeholder (or management company, if the lease involves one) for the management of the building; and it was held in *Triplerose Limited v Ninety Broomfield Road RTM Co Limited* [2015] EWCA Civ 282 that an RTM company can manage only one self-contained building. Therefore the lessees of a group of blocks in a single estate such as Kenilworth Court cannot incorporate a single RTM company to manage the whole estate; one of the issues in this

appeal is whether the five RTM companies can nevertheless manage the estate as a single whole.

7. Whilst the 2002 Act enables an RTM company to manage “appurtenant property”, such as car parks and gardens, it can manage only appurtenant property that is used exclusively by the lessees of its building: *FirstPort Property Services Limited v Settlers Court RTM Co Limited* [2022] UKSC 1, overruling *Gala Unity v Ariadne Road RTM Co Limited* [2012] EWCA Civ 137.
8. The Supreme Court’s decision in *Settlers Court* obviously postdates the decision of the FTT now being appealed, made on 17 June 2021. It means that where there is an estate consisting of a number of blocks of flats, all the lessees of which have the right to use a shared garden and car park, an RTM company managing any of the blocks has no right to manage the car park or the garden and cannot enforce any obligation to pay a service charge in respect of the maintenance of either. The management of shared estate-wide facilities is unchanged by the acquisition of the right to manage any, or all, of the blocks.
9. Reverting now to the facts of the present appeal, by 2007 the lessees in Blocks A to D had all exercised their right to manage, creating four RTM companies, and in 2008 the lessees of Block E did the same through the respondent. I believe it is not in dispute that throughout the years in issue in the FTT proceedings the five RTM companies employed a single managing agent who managed the five blocks and the communal grounds; it appears that accounts and service charge demands were issued on the basis that the estate was managed as a single whole and that the lessees were each asked to pay a proportion of the whole cost.
10. The lease of flat E3 and, if I have understood correctly, all the other leases on the estate, prescribes the proportion of the landlord’s costs that the lessee is to pay as “0.75 per centum or such other percentage as the Lessor shall in the interests of good estate management deem to represent a fair proportion of the Maintenance Expenses...”
11. Even the most arithmetically challenged will appreciate that $0.75\% \times 52 = 39\%$, so that if everyone at Kenilworth Court paid that percentage of the landlord’s costs the landlord would have a serious shortfall. No-one knows why 0.75% was specified; fortunately the lease permits the landlord to change that proportion (and the reasonableness of the proportion charged can of course be challenged before the FTT: *Aviva Investors Ground Rent GP Limited v Williams* [2021] EWCA Civ 27). The landlord in the present case is not now performing any management functions; the RTM companies, together, have demanded service charges from the 52 lessees that add up to 100% on the basis of rateable value, with Flat E3 being charged 1.7026% of the costs of managing the whole estate.
12. The appellants do not agree that service charges should be demanded on that basis; in addition, they do not accept that the sums charged have been reasonable. They have become very concerned about the management of the estate which, they say, has deteriorated, and about the use of moneys paid and the plans for charges to be demanded. In June 2019 the appellants commenced proceedings in the FTT seeking a determination of the reasonableness and payability of service charges for the years 2012/13 to 2018/19, and in December 2020 the FTT granted an application to include the charges for the year 2019/20.

The decision in the FTT

13. A three-day hearing was listed in the FTT in May 2021. The FTT decided to determine some preliminary issues and to adjourn the rest of the application. The preliminary issues that it identified were:
 1. Whether the lessees were required by the lease (setting aside, for the moment, the effect of management by the RTM companies) to pay a proportion of all the costs incurred across the whole estate, or whether – as the appellants argued – they were required to pay some estate-wide costs and some costs that related only to their own block.
 2. What proportion of the costs should the lessees pay: 0.75%, or the rateable value proportion charged by the respondent?
 3. What was the impact upon the collection of service charges of the exercise of the right to manage under the 2002 Act by the lessees of each block?
14. The FTT did not decide the second of those issues, but expressed the provisional view – subject to any attempt to persuade it otherwise at the final hearing - that the proportion payable should be 1.7062%, on the basis of rateable value, as the respondent argued. The FTT’s conclusions on the other two issues are the subject of this appeal. The answer to the first question depends upon the construction of the lease, and the answer to the second depends upon the construction of the statute.

The first issue: to what costs does the lease require the appellants to contribute by way of service charge?

The lease and the parties’ arguments before the FTT

15. This is not a well-drafted lease. To my mind its meaning is clear, but the drafting has unfortunately left room for argument. The respondent in its Statement of Case in the FTT has argued – and for all the years in dispute has with its fellow RTM companies managed the estate on the basis - that the lease requires the lessee to pay a proportion of the estate-wide expenditure, for example for the maintenance of the roof of Block A as well as of Block E. The appellants disagree; they say that the lessee has to contribute to some costs across the estate and to others only for its own block.
16. The lease was granted for a premium and for a peppercorn rent, and it requires the lessee by way of further rent to pay the “Lessee’s Proportion of the Maintenance Expenses”. That proportion is set out in the Sixth Schedule and as already noted it is 0.75% or some other percentage decided by the landlord.
17. The “Maintenance Expenses” are defined at clause 1.7 as the moneys spent or reserved by the Landlord in carrying out his obligations set out in the Fifth Schedule; and the Fifth

Schedule, headed “The Maintenance Expenses”, sets out the landlord’s obligations in 23 paragraphs.

18. The Fifth Schedule uses three other defined terms:

1. “the Buildings” are defined in the recital on the first page of the lease as the Kenilworth Court estate, comprising the land and all five blocks (so the term means more than just the five blocks and includes the entire estate).
2. “the Common Parts” are defined in clause 1.2 of the lease as:

“any external steps leading to the entrance or entrances to the Building the entrance doors (with any entry phone) the entrance halls passages staircases service and passenger lifts and landings within the Building and all and any of the parts of the Building which are used in common by the owners and occupiers of any two or more of the Flats and do not form part of the premises demised by any of the said Leases together with the Lessor’s goods and chattels therein and the communal gardens roadways and pathways leading thereto...”

3. “the Maintained Property” is defined in clause 1.6 as:

“those parts of the Buildings and of the curtilage thereof which are more particularly described un the First Schedule hereto and the maintenance of which is the responsibility of the Lessor.”

The First Schedule then describes the Maintained Property as follows:

“FIRST the structural parts of the Building including the roofs gutters rainwater pipes foundations chimney stacks floors all walls bounding individual Flats therein and all external parts of the Buildings and all Service Installations not used solely for the purposes of any one flat (but not including the glass in the windows of individual Flats non-structural walls within the Flats the interior joinery plaster work tiling and other surfaces of floors ceilings and walls of the Flats and Service Installations or portions thereof which exclusively serve individual Flats or them) AND SECONDLY the entrance drive pathways driveways and communal gardens occupied and enjoyed with the Buildings.”

19. It will be seen that these definitions use both “the Buildings” in the plural and “the Building” in the singular; both terms are used in the definition of the Maintained Property and just “the Building” in the definition of the Common Parts. There is no definition of “the Building”. The appellants argue that the use of the singular is deliberate and that it means the block in which the demised premises is situated, in this case Block E.

20. The Fifth Schedule then sets out the landlord's obligations using the three defined terms and also the singular "Building". I need not set it out verbatim but here is a summary of the obligations, numbered as in the Schedule:
1. Maintaining, re-building etc the Maintained Property.
 2. Painting and decorating the Maintained Property.
 3. Providing maintenance staff and paying the rent etc of any accommodation in the Buildings occupied by the staff.
 4. "Insuring and keeping insured the Buildings against loss or damage by fire storm and tempest ... and keeping insured the lifts and boilers serving the Building..."
 5. "Insuring any risks for which the Lessor may be liable as an employer of persons working on or in the Buildings or any of them as the owner of the Building or any part thereof as it shall think fit."
 6. Cleaning the external faces of the windows of the Buildings and cleaning the internal Common Parts; it will be recalled that the definition of "Common Parts" uses the word "Building" not "Buildings".
 7. Maintaining "all apparatus from time to time of the Maintained Property."
 8. Servicing the lifts and boilers in the Building.
 9. Maintaining the communal gardens and roads.
 12. Paying rates and taxes for the Maintained Property.
 13. Complying with any notice served by the local authority in connection with the Buildings.
 17. Complying with the requirements of any competent authority and with statutory provisions etc relating to the Building.
 18. Purchasing and maintaining fire-fighting appliances for the Building.
 19. Providing services for the Buildings.
 21. Paying the fees of managing agents for the management of the Buildings.
21. The appellants say that the effect of the Fifth Schedule and of the defined terms taken together is that the lessee of Flat E3 is obliged to contribute towards some estate-wide

expenses and some expenses relating only to Block E. In particular they must pay for the maintenance of the structure of their own block but for the external decoration of all the blocks. To take another example, looking at paragraph 6, they must contribute to the cost of cleaning the windows of all five blocks, but only to the cost of cleaning the internal common parts of their own block because that is how Common Parts is defined.

22. The respondent's position as expressed in its Statement of Case before the FTT was that all the "Maintenance Expenses" in the Fifth Schedule related to all five blocks and the curtilage of the estate. By the time of the hearing before the FTT the respondent's position changed and it appears to have accepted that some services were to be paid for by the lessee only in respect of Block E itself (paragraphs 20 and 21 of the respondent's opening submissions); but counsel for the respondent at the hearing before the FTT accepted that that was not consistent with the provision of a single proportion in the Sixth Schedule.

The FTT's decision

23. The FTT took the view that the lessee of each flat was to contribute to all the landlord's costs on an estate-wide basis, as the respondent had initially argued. It relied in particular on the single proportion specified in the Sixth Schedule; on the absence of a definition of the word "Building"; on the grant of rights to each individual flat in the Third Schedule by reference to "such one of the Buildings as includes the Demised Premises", showing that when the draftsman intended to refer to one block that was spelt out clearly. The FTT took the view that Kenilworth Court was a common venture entered into by all 52 lessees who were going to share all the costs rather than splitting them between blocks.
24. At its paragraph 61 the FTT said:

"We think that by one of the following three options, namely:

- a. Accepting that whether the First Schedule splits the costs between Building (possibly meaning the individual block) and Buildings (meaning all blocks at Kenilworth Court), all of those costs fell within the scope of "Maintenance Expenses" anyway, to be aggregated with the costs from the other four blocks via the leases to the lessees of those blocks, or
- b. Working on the basis that the plural includes the singular, so that "Buildings" includes "Building", or
- c. Assuming an error has been made by the draftsman and the intention was to use the word "Buildings" rather than "Building"

The Lease then works perfectly satisfactorily. Our view is that the first of these options is to be preferred."

25. That first option was a summary of what the FTT said at paragraph 52:

“In our view it does not really matter whether the draftsman intended to refer only to one block when using the word “Building” in the First Schedule. Even if he did, that individual block is still within the definition of Maintained Property (see Schedule 1) and the cost of repair and maintenance to Maintained Property forms part of the Maintenance Expenses, which are to be shared between all 52 lessees at Kenilworth Court.”

The arguments on appeal

26. Miss Gourlay in her helpful skeleton argument referred to *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38, where Lord Hoffmann warned that: “It clearly requires a strong case to persuade the court that something must have gone wrong with the language”. At paragraph 21 he continued:

“When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did.”

27. Miss Gourlay referred also to *Arnold v Britton* [2015] UKSC 36, where Lord Neuberger reviewed the principles applicable to the interpretation of contracts and emphasised that commercial common sense is secondary to the meaning of the words of a contract, and should not be invoked retrospectively to give a meaning that the words plainly could not bear.

28. At the hearing she explained the appellants’ analysis of the First Schedule, on the basis that the use of “Building” and “Buildings” is deliberate. It can be broken down into four categories:

1. The structure of Block E (the words from “First” to “Flats therein”);
2. The next few words, “and all external parts of the Buildings” meaning the exterior of all the blocks;
3. The Service Installations serving more than one flat, but not the glass in the windows of individual flats; and
4. The communal drives and gardens (indicated by the words “AND SECONDLY” and follows)..

29. She explained that this makes sense because the lessee of each flat is concerned about the structure of their own building but not with the structure of the other blocks; however, each lessee is concerned with the exterior of the other blocks because they have an interest in how the estate looks to visitors and potential purchasers. She went on to say that the arrangement of obligations in the Fifth Schedule corresponds with that analysis. Four of the paragraphs

refer to the Maintained Property; of those four, paragraph 1 is about the maintenance of the structure, paragraph 2 about the painting and decorating of the exterior, paragraph 7 is about service installations and paragraph 12, about rates and taxes, relates to the land on which the estate stands. By contrast paragraph 8, for example, does not mention the Maintained Property but clearly obliges the lessee to contribute to the servicing of the lifts in the single building only, which makes sense because the lifts in the other buildings do not benefit this lessee.

30. Miss Gourlay argued that if “the Building” is to be read as “the Buildings” throughout then the definition is flawed by duplication. If the first element is read as the structure of the Buildings then most of the items in the list are also part of the second element, the exterior of the Buildings. And the fourth element, the gardens and driveways, is a subset of the second, given the way “the Buildings” is defined as the land around the blocks as well as the blocks themselves; alternatively, there are no drives or gardens “occupied and enjoyed” with the Buildings because those items are defined as part of the Buildings.
31. In the alternative, Miss Gourlay suggested that the wording of the First Schedule could be rationalised by deleting the “s” from the word “Buildings in the phrase “all external parts of the Buildings”. That way her clients would contribute only to their own block.
32. Turning to the FTT’s analysis Miss Gourlay argued that the use of a single percentage in Schedule 6 is highly likely to have been a mistake because $0.75\% \times 52 = 39\%$; in any event the single percentage is not inconsistent with an obligation to contribute to some costs on an estate-wide basis and to others only for the block. She suggested that the estate-wide costs could first be shared between the blocks (so that an expense of say £5,000) would cost each block (£1,000) so that the lessee paid a single percentage of the costs for the block alone and for the block’s share of the estate-wide expenses.
33. Miss Gourlay argued that the FTT’s reasoning at paragraphs 61a and 52 (set out at paragraphs 23 and 24 above) was flawed; it is not the case that it did not matter whether the draftsman used “Building” or “Buildings” because everyone had to contribute to everything.
34. I asked Miss Gourlay what she thought was the effect of clause 1.10 of the lease, which states:

“The masculine includes the feminine and the neuter and the singular includes the plural and vice versa”.

She responded that this was a boilerplate clause (meaning that it was standard wording) and was intended to ensure that where the lease referred once to, say, “boiler” and many times to “boilers” the word was always read as the plural; by contrast, the word “Building” in the singular is so frequent as to make it obviously deliberate. She also submitted that where the first letter of a word was capitalised it bore a specific meaning and was not subject to clause 1.10; where however an item such as a lift was typed in lower case, the draftsman was aware that there might be one or more of the item in the relevant area and therefore clause 1.10 ensured that a reference to “lift” would be read as “lifts” as necessary.

35. Although the respondent chose not to take part on the appeal, it provided written submissions to the Tribunal in response to the appellant's application for permission to appeal on this issue, in which it argued that the FTT was entitled to make the finding that it did even though neither party contended for that interpretation of the lease at the hearing; in particular it said that the FTT's interpretation is rational, and reconciles the difficulties presented by the parties' interpretation, in particular the problem of the single percentage in the Sixth Schedule.

The appeal on the first issue: discussion and conclusion

36. On one point only I agree with Miss Gourlay: the FTT's preferred reason for its decision that the lessee must contribute to estate-wide expenses throughout does not work. If the singular "Building" is read as referring to one building only, then only the lessees of that building only are required to contribute to, for example, the maintenance of the structure or the maintenance of their own lift, and the landlord will have a shortfall. It is simply not the case that because everything is part of the Maintained Property, to which all 52 lessees must contribute, then they will all contribute to everything.
37. However, Miss Gourlay's ingenious attempt to make sense of the Fifth Schedule on the basis that the use of the singular "Building" is deliberate does not work either.
38. The appellants' reading of the definition of the Maintained Property, and of the provisions of the Fifth Schedule, generates both inexplicable provisions and contradictions. On their reading of the First Schedule and the first paragraph of the Fifth Schedule, the lessee has to pay for the maintenance of the "external parts" of the other blocks, but not for the roofs of the other blocks because roofs are structural and the lessee pays only for the maintenance of its own roof. That is odd, and it leaves one wondering where the external walls fit in. The explanation that the lessee is concerned only with the appearance and not with the structure of the other blocks does not really work because a dilapidated roof on another block would look, to the visitor or purchaser, rather more unappealing than tired paintwork. It is not possible to understand why the lessee with no responsibility to contribute to the structure of the other blocks must nevertheless contribute to their insurance (paragraph 4 of the Fifth Schedule). The obligation to contribute to the cost of maintaining "apparatus" in the Maintained Property, in paragraph 7 of the Fifth Schedule; is hopelessly opaque because the way the words "Building" and Buildings" are used in the First Schedule does not tell the lessee whether that apparatus is in his own block or in all the blocks. It makes no sense for the lessee to have to contribute to the cost of complying with local authority notices (paragraph 13) relating to the Buildings but to the complying with legislation only in relation to the Building (paragraph 17).
39. The position is no better if one adopts Miss Gourlay's alternative suggestion of deleting an "s" in the First Schedule; it then becomes impossible to understand why the Fifth Schedule refers in places to "the Buildings", and there are inexplicable provisions such as the ones relating to insurance and to the cost of complying with notices and with legislation.
40. The difficulties that Miss Gourlay identifies if "Building" means "Buildings" are problems of redundancy in the language; they do not leave the landlord in doubt about what to do, nor

the lessee in doubt about what to pay for. The problems arising from the appellants' reading, by contrast, are contradictions which make the lease unworkable.

41. Accordingly in my judgment "what a reasonable person would have understood the parties to have meant by using the language which they did" (see *Chartbrook v Persimmon*, paragraph 25 above) is that the term "the Building" means "the Buildings"; in other words, that the singular means the plural which is exactly what clause 1.10 of the lease says it does.
42. That that is the correct construction of the lease is also the inescapable conclusion from the use of a single percentage contribution in the Sixth Schedule. A lease requiring contributions to some expenses on a block basis and some on an estate-wide basis would use two different percentages (as did the leases in *Price v Matthey* [2021] UKUT 7 (LC) and in *Settlers Court*). Miss Gourlay can make the single figure consistent with her case only by suggesting what I would regard as a laborious accounting process, which would have been specified in the lease had it been what the parties intended; but it is hard to see why they would have chosen that method in preference to the much easier option of specifying two percentages.
43. Finally, the draftsman of the lease, averse as he or she was to punctuation, was clearly fond of definitions, and would certainly have defined "the Building" had the use of the singular been deliberate and significant. Instead, in the one instance where there was a need to refer to a single block, in the Third Schedule in order to grant the lessee an easement over staircases etc, the block was specified clearly as "such one of the Buildings as includes the Demised Premises". The draftsman who wrote that would not then have used "the Building", without definition, in the way that the appellants argue.
44. Accordingly the appeal fails on the first ground because, although one of the FTT's reasons was incorrect, the term "the Building" in the lease means "the Buildings" as defined in the recitals. The lessee is obliged to contribute to the cost of all the landlord's obligations in the Fifth Schedule on an estate-wide basis. The use of the singular seems to have been an error, but one for which the draftsman made provision by stating in clause 1.10 that the singular includes the plural; so the construction that the FTT adopted is consistent with the plain words of the lease. As the FTT said, the correct construction of the Fifth Schedule is that all costs for all five blocks are to be included within the definition of Maintenance Expenses.
45. That is all very well so far as the two-party lease is concerned, but what is the impact of the acquisition of the right to manage by the lessees of Block E or indeed of any or all the other blocks?
46. Whether the FTT made the right decision on that question is the second issue in the appeal.

The second issue:

The FTT's decision

47. At the point when the second issue was argued before the FTT, even on the appellants' own case the lease obliged the lessee to pay for some estate-wide expenses; and indeed the FTT

found, and I have upheld its finding, that all the maintenance expenses related to the estate as a whole.

48. The FTT framed the second issue in general terms: “What was the impact upon the collection of service charges of the exercise of the right to manage under the 2002 Act by the lessees of each block?” But the dispute was more specific: the appellants said that the respondent was not entitled to enforce the lessee’s obligation to pay service charges for estate-wide services, whereas the respondent said that it was so entitled.
49. The FTT found in favour of the respondent on this second issue.
50. The FTT first set out sections 96 and 97 of the 2002 Act, by which management functions are transferred to the RTM company. So far as relevant they provide:

“(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 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—

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

97 (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—

- (a) landlord under a lease of the whole or any part of the premises,
- (b) party to such a lease otherwise than as landlord or tenant, or
- (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

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.

(3) But subsection (2) does not prevent any person from insuring the whole or any part of the premises at his own expense.

(4) So far as any function of a tenant under a lease of the whole or any part of the premises—

- (a) relates to the exercise of any function under the lease which is a function of the RTM company by virtue of section 96, and
- (b) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant,

it is instead exercisable in relation to the RTM company.

51. The FTT then reasoned as follows. First, it agreed with Miss Gourlay - and it seems not to have been in dispute - that the 2002 Act transfers the management functions relating to the individual block to the RTM company. It does not transfer to the respondent any right to manage any other block, nor does it give any other RTM company at Kenilworth Court the right to manage Block E.
52. Second, it observed that the difficulty with that is that all the lessees have covenanted to contribute together to all costs on all blocks. The 2002 Act does not do away with existing contractual obligations but, said the FTT, “neither do we see a clear way in which the RTM company can require the lessees of other blocks to contribute in accordance with their contractual obligations”.
53. The FTT reminded itself of the decision in *Gala Unity Limited v Ariadne Road RTM Company Limited* [2012] EWCA Civ 1372, where it was held that an RTM company acquires management functions in respect of appurtenant property that is shared with other blocks, such as a bin store or garden; the Court of Appeal recognised that that meant that management responsibilities would be duplicated but suggested that that could be managed by agreement between those responsible. The FTT reminded itself also of the decision in *Ninety Broomfield Road* (see paragraph [6] above) where it was held that an RTM company cannot acquire management functions in relation to more than one block.
54. It therefore expressed the view, at its paragraph 89, that the respondent was not able to demand contributions from the lessees of other blocks, nor to demand contributions from

the appellants in relation to services in any other blocks, “absent any other route by which demands might be legally justified.”

55. The FTT went on to say that it agreed with counsel for the respondent that “there is in effect a work-around to the problem identified.” It said that it saw no reason why the five RTM companies could not agree to manage the estate as one whole. It referred to paragraph 54 of *Ninety Broomfield Road* where Gloster LJ said:

“from a practical point of view there would be nothing to prevent two or more RTM companies, which were established in relation to separate blocks on the same estate, from entering into an agreement to delegate management to one of the RTM companies, or indeed a third party manager, to act on behalf of both or all: the articles [of association of the RTM companies] explicitly provide for such delegation; RTM companies can appoint agents.”

56. The FTT did not find as a fact that the five RTM companies had agreed to manage the estate as a whole, because it had not yet heard evidence and made findings of fact, but it held at its paragraph 92 that if such an agreement existed “it was legitimate for the Respondent to account to all lessees at Kenilworth Court on an estate wide basis, and to collect service charges on the basis of those accounts.”

57. The FTT then invoked section 100 of the 2002 Act which provides as follows:

“(1) This section applies in relation to the enforcement of untransferred tenant covenants of a lease of the whole or any part of the premises.

(2) Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person.

(3) But the RTM company may not exercise any function of re-entry or forfeiture.

(4) In this Chapter “*tenant covenant*” in relation to a lease, means a covenant falling to be complied with by a tenant under the lease; and a tenant covenant is untransferred if, apart from this section, it would not be enforceable by the RTM company.

58. The FTT reasoned that the lessees’ obligations to contribute to estate-wide Maintenance Expenses, which are not enforceable by the RTM company by virtue of sections 96 and 97, are nevertheless “untransferred tenant covenants” which the RTM company can enforce by virtue of section 100.

59. The FTT reasoned that lessee’s covenant to contribute to the cost of the Maintenance Expenses is both (1) an obligation to pay a proportion of the cost of maintaining the fabric of Block E and (2) an obligation to pay a proportion of the cost of maintaining the fabric of the four other blocks. The collection of funds to meet the first obligation is a management

function transferred to the RTM company by sections 96 and 97. The second element of the covenant, to pay for repairs to the other blocks, is an “untransferred covenant” which the RTM company can enforce by virtue of section 100.

60. That meant, the FTT concluded, that each RTM company at Kenilworth Court could enforce the covenants by the lessees of its own block to pay both for the maintenance of their own block and for the maintenance of the whole estate. The RTM company for Block A still cannot enforce any obligations of lessees outside its own block; but if all five RTM companies together agree to delegate all their powers – under the management functions and the untransferred covenants - to a single agent then the estate can be managed as a whole. Absent an agreement, the FTT concluded, there is “a lack of clarity and uncertainty about how to manage [the] estate... But if an agreement exists, there is a workable system.” The FTT concluded on the second issue:

“... as long as there was an agreement between all five RTM companies to continue to share service charge costs across the whole estate, comprising all five blocks, the 2002 Act does not change the proper basis for sharing costs”.

The appeal on the second issue

61. The appeal on the second issue is brought with the permission of the FTT. The Tribunal has had no submissions from the respondent.
62. Miss Gourlay for the appellants argues that the FTT misconstrued section 100 of the 2002 Act. “Untransferred covenants” are covenants such as the obligation not to cause a nuisance, or not to use the premises for anything except a private residence. The usefulness of the RTM company being able to enforce such covenants is obvious. The purpose of section 100 is not to provide a mechanism for the enforcement of inter-RTM company agreements to recover costs incurred across a multi-block development.
63. That is so obviously right that I can deal with the second issue in the appeal very shortly. The FTT’s construction of section 100 could not achieve the result sought by the FTT, and it is in any event incorrect and inconsistent with the policy of the legislation.
64. First, section 100 cannot enable the management of the estate as a whole by agreement. Untransferred covenants are owed to the landlord and not to another RTM company. Even if the lessees’ obligation to contribute to estate-wide costs were one that the respondent could enforce by virtue of section 100, none of the other four RTM companies is a person by whom that obligation is “enforceable apart from this section”, and so RTM company E could not make an agreement with RTM company A to enforce it – which is what the FTT’s reasoning requires.
65. But in any event the obligation to contribute to estate-wide covenants is not an untransferred covenant within the scope of section 100. Miss Gourlay’s explanation of the covenants to which the section applies is correct. It would be inconsistent with the scheme of the legislation for section 100 to bear the meaning the FTT attributed to it. It is now well-established that an RTM company takes on management functions in relation to one building

only (*Ninety Broomfield Road*) and in relation to property that is appurtenant to that one building only (*Settlers Court*). It would make no sense at all for the RTM company to have power in addition to enforce obligations in relation to a different block. All the reasons given in those two decisions why the RTM company must be confined to a single building and its own appurtenant property are equally reasons why the RTM company should not be able to enforce obligations in relation to other blocks. The RTM company for block A acquired the right to manage without notice to any of the lessees in the other blocks, and those other lessees have no control over it. There is no judicial discretion built into the scheme of the 2002 Act to which those other lessees could appeal. The RTM company's own members from its own block have control over it and they owe to that RTM company alone the obligations they would otherwise have to the landlord, or to a management company that was party to the lease, in relation to their own block alone. The RTM company's field of operations is confined to its own block. The powers that it can delegate relate only to its own block.

66. Accordingly the appeal succeeds on the second point.
67. I would add two things.
68. First, in my judgment the appeal on the second point would have succeeded, and for the same reasons, even before the decision in *Settlers Court*, which relates to appurtenant property and does not change the established principle that an RTM company operates in relation to one block alone. The FTT relied to some extent on the then unappealed decision in *Gala Unity*, as the source of the idea that what cannot be achieved through sections 96 and 97 alone can nevertheless be achieved by agreement between the RTM companies; nevertheless, the agreement that it postulated could not work, for the reasons I have explained.
69. Second, it remains the case that what the respondent and its fellow RTM companies wanted to achieve in relation to Kenilworth Court can be achieved by agreement, but only by the agreement not only of the five companies but also of all 52 lessees and the landlord (who, after *Settlers Court* remains responsible for any shared appurtenant areas, in particular the garden if that is shared by all the lessees). In view of the appellants' position that is not possible at present. A different solution could be achieved without the involvement of the freeholder if the lessees were to exercise their rights to collective enfranchisement, and then transfer the freeholds of all five blocks to a single company so that the estate could be managed as a whole.

Conclusion

70. The appeal fails on the first point and succeeds on the second. The application to the FTT can now proceed on that basis.
71. The appellants have also asked for an order under section 20C of the Landlord and Tenant Act 1985 in relation to the costs of the appeal. If they wish to pursue that application they are to file and serve written submissions within the next 14 days, and the respondent will then have 14 days to respond if so advised.

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.