**Managers: Unknown to the Building Safety Act?**

Decisions from the Tribunals have shown that when there are entities which manage buildings without owning any legal estate in them, some parties do not fit neatly into the relevant definitions in the Building Safety Act 2022.

***Mirchandani v Java***

Mirchandani v Java Properties International Ltd concerned a 1950s building called Thanet Lodge. It was an application by leaseholders against their landlord for a Remediation Order under Section 123 of the Building Safety Act 2022.

Java, the landlord, argued that it was not a relevant landlord for the purpose of Section 123. This was because management functions had been transferred to an RTM company (“RTMCo”).

The crucial definition of ‘relevant landlord’ is provided in Section 123(3) of the 2022 Act:

*“In this section “relevant landlord”, in relation to a relevant defect in a relevant building, means a landlord under a lease of the building who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.”*

Java asserted that Section 96 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) meant that it was no longer required to repair or maintain anything relating to the relevant defect. As that Section froze Java’s ability to carry out management functions, it argued that was not a ‘relevant landlord’. Essentially, Java argued that the RTMCo was responsible for fire safety in Thanet Lodge. Indeed, Java even submitted that the RTMCo should be considered the ‘relevant landlord’ for the purposes of making a remediation order.

The leaseholders’ rebuttal to this was (1) to attempt to convert the application into one for a remediation contribution order, which the Tribunal refused, and (2) to state that Tribunal can make a remediation order against the Respondent on the basis that the RTMCo requested the Respondent to make the remediation works. That second submission was partly based on Section 105(2) of the 2002 Act which state that the right to manage can cease by agreement between the RTMCo and the landlord. This argument also asserted that Java would plainly fulfil the definition of ‘relevant landlord’ if the RTMCo wound itself up, but that actually requiring it to do so before Java could become liable for a remediation order would be overly legalistic and cumbersome.

The leaseholders also submitted that the contrary would leave them without an effective solution to remedy the defects in the building. This was based on the public policy of the Act to “prevent leaseholders from having to pay the costs of remedying defects causing inadequate fire safety and instead place the onus on the building owners”, and that “[b]uilding owners are responsible for complying with their legal obligations to keep their buildings safe” (both cited from government Guidance on the use of remediation orders published by the MHCLG and DLUHC on 16 October 2023). Essentially, otherwise, any building with an RTM company could not benefit from Section 123 of the 2022 Act.

There was an effort, as part of this argument, to argue that Section 123(4) may stretch to include Java; Section 123(4) clarifies that a reference to a landlord under a lease includes a person who is party to a lease otherwise than as a landlord or tenant. The leaseholders submitted that Java was such an entity.

Finally, the leaseholders submitted that remediation goes beyond what can properly be described as repair and therefore as management, and that such works cannot therefore have been contemplated by Parliament when passing the 2002 Act.

These arguments were all rejected by the FTT:

1. The definition in Section 123(3) requires the landlord to have a repairing obligation.
2. Describing procedures for returning management functions to a landlord as overly legalistic and cumbersome cannot lead to undermining statute. Whilst the RTMCo continues to manage the building, Java is prohibited from doing so.
3. The FTT could only make an order if it has jurisdiction to do so. ‘Moral’ arguments simply are not enough.
4. Java could not be a party to the lease otherwise than as a landlord as it is a party to the lease as a landlord.
5. Remediation works are a management function.
6. Section 123’s purpose is to enforce maintenance obligations on those who are failing to exercise them. An entity which is prohibited from exercising such functions cannot all within that.

As part of its decision, the Tribunal noted that the RTMCo was also not a relevant landlord (see para 41). This is because it is not a party to the lease in any capacity; it has simply only taken over management functions as per the 2002 Act. However, the Tribunal noted that a management company which is a party to the lease could be a relevant landlord (para 49).

The Tribunal noted that it was only after judicial review that the Government added RTM companies to the list of entities capable of applying for remediation contribution orders. The Tribunal hypothesised that the position of RTM companies may not have been in Parliament’s mind when passing the 2022 Act. However, it had had the opportunity to review and amend the 2022 Act, and had indeed done so several times, including in respect of RTM companies.

The outcome would appear to leave the leaseholders in a building with an RTM company with a lacuna in terms of remedies compared to leaseholders in other buildings.

***Unsdirfer v Octagon***

Solomon Unsdorfer v Octagon Overseas Limited [2024] UKUT 59 (LC) concerned premises comprising the Canary Riverside Estate in East London. It includes 5 buildings which, due to their size, are classified as ‘higher risk buildings’ for the purposes of Part 4 of the 2022 Act. Since 2016, the residential parts had been under the management of a manager appointed pursuant to Part 2 of the Landlord and Tenant Act 1987.

Part 4 of the 2022 Act places a number of obligations on ‘accountable persons’. The definition on an ‘accountable person’ is found in Section 72(1) of the 2022 Act:

*(1) In this Part an "accountable person" for a higher-risk building is—*

*(a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or*

*(b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.*

Section 72(6) contains the following explanation of "relevant repairing obligation":

*a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing.*

The Upper Tribunal explained that subsection 6 would engage an RTM company so as to make them an accountable person. However, the question for the Upper Tribunal was whether a manager appointed under Section 24 of the 1987 Act would also fall within Section 72 of the 2022 Act.

The Upper Tribunal noted the interrelationship between Section 24 managers and special measures managers appointed under the 2022 Act; for example, a special measures manager may seek the appointment of a Section 24 manager, and the tribunal may also amend an existing Section 24 order to ensure no overlap between the functions of both types of manager. However, the Tribunal decided that this interrelationship did not provide a means by which a Section 24 manager could be called an accountable person: This was primarily because Section 24(2E) of the 1987 Act makes clear that a newly appointed Section 24 manager cannot be given any of the functions of an accountable person:

*An order under this section may not provide for a manager to carry out a function in relation to a higher-risk building where Part 4 of the Building Safety Act 2022 or regulations made under that Part provide for that function to be carried out by an accountable person for that building.*

The argument in favour of a Section 24 manager being an accountable person rested on the idea that the Section 24 orders and the managers obligations were ‘under a lease’ and ‘by virtue of an enactment’ and therefore were relevant repairing obligations. It was argued that the contrary would produce an absurd result, with landlords whose past conduct had warranted them being stripped of management responsibilities suddenly being responsible for management of serious building safety risks.

However, the Upper Tribunal held that such managers are not accountable persons. It noted that Section 72(2) of the 2022 Act specifically makes (most) RTM companies the accountable person, but no express mention is made of Section 24 managers. The main issue was whether the manager’s maintenance obligations arose ‘under a lease’ or ‘by virtue of an enactment’. The Upper Tribunal did not accept that the manager is inserted into the lease: it is an FTT order which imposes obligations on a manager, not a lease. Neither could the Upper Tribunal accept that the obligations were by virtue of an enactment given Section 23(2) of the Interpretation act 1978 by which enactment means primary of secondary legislation: it was held that it was meant to capture obligations from provisions such as section 11 of the Landlord and Tenant Act 1985, and not an order from the FTT.

The Upper Tribunal also drew a distinction in this regard between RTM companies and Section 24 managers. The former do not require any judicial decision or order in order to acquire the right to manage. The right to manage is conferred by the legislation upon the completion of qualifying steps. This was said to be fundamentally different to a Section 24 manager.

It was recognised that the overlap in functions and responsibilities between Section 24 managers and the actual accountable person (landlord) could have uncomfortable and impractical consequences. The Upper Tribunal stated that transitional provisions could have avoided this. However, this overlap only continues until Section 24 orders expire.

**What next**

No doubt we will see more cases clarifying how situations like the above fit within the definitions of the Building Safety Act 2022 as it becomes a more established part of the legal landscape. Once special measures managers begin to be appointed, the exact overlaps between them and Section 24 managers will likely come under much greater discussion in the Tribunals. For now, parties may need to put up with ‘uncomfortable and impractical’ overlaps and lacunas.

RTM companies are not profit-making entities with large assets: they are lessee run and derive their income from lessees. In making amendments to the 2022 Act, Parliament appears to have remembered this. For example, between 28 June 2022 and 23 July 2024, paragraph 9 of Schedule 8 stated that no service charge was payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect: not ideal for RTM companies. However, thanks to amendments, that provision now allows resident management companies (which include RTM companies) to levy such charges in connection with an application or possible application by the company for or relating to a remediation contribution order. Indeed, the Minister at the report stage of the Bill bringing in this amendment appeared to recognise this, stating that the pre-amendment position meant that “management companies are unable to fund litigation against non-compliant landlords, as they are unable to recover the costs for doing so from leaseholders in their buildings”. Given this policy landscape, ultimately, it may not be that surprising that the Tribunals in the above decision were slow to extend liabilities to managers of any kind.