Neutral Citation Number: [2024] EWCA Civ 297

Case No: CA-2022-002444

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
[2022] UKUT 273 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 27 March 2024

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE SNOWDEN

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Between :

HOWE PROPERTIES (NE) LIMITED	**Respondent**
- and -	
ACCENT HOUSING LIMITED	**Appellant**

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Justin Bates (instructed by **Trowers & Hamlins LLP**) for the **Appellant**
Anthony Verduyn (instructed by **DWF Law LLP**) for the **Respondent**

Hearing date: 17 January 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Wednesday 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal concerns service charges in relation to properties on an estate that includes The Meadowings and Sheepfoote Hill in Yarm, near Stockton-on-Tees (the "Estate"). Howe is the long leaseholder of four properties on the Estate (the "Properties"), and the appeal relates to the terms of three of its leases (the "Leases").

2. The issue is whether the terms of the Leases entitle the appellant landlord ("Accent"), which manages the Estate, to levy an annual service charge which includes a fee for management services which is set by it on a standardised basis in respect of all its properties nationwide.

3. The appeal is from the decision of UT Judge Elizabeth Cooke (the "UT") who allowed an appeal from the decision of the First Tier Tribunal (Property Chamber) (the "FTT").

4. The issue is one of pure interpretation of the leases in question. In addition to the implications for the tenants on the Estate, whose leases are all in the same or very similar terms, we are told that the result has significant implications for Accent and the administration of its business, because similar terms are in use in respect of over 1,000 properties in its nationwide stock of housing of over 20,000 properties.

The Estate

5. The Estate was built in the 1970s and comprises 138 residential properties, one of which was originally a caretaker's flat. There are 10 freehold houses and 128 flats located in a number of blocks. Of the flats, 31 are the subject of long leases granted under the "right to buy" provisions of the Housing Acts 1980 and 1985. The remaining 97 are let to social tenants on assured tenancies. There are also some communal grounds and facilities.

Accent's approach to management charges

6. Accent manages the Estate as a whole using its own staff, who also manage the remainder of its national stock of housing. In order to determine what charges to levy upon its homeowners in respect of these management services, Accent has adopted a tiered system which applies to all of its properties nationwide. Under that system, properties are placed in one of five categories according to their characteristics, and their tenants or owners are then charged a flat management fee as part of an annual service charge.

7. The categories used by Accent to determine its management fees are described on its website. The different tiers are defined by reference to the type of property and the level of services provided. They range from the lowest "tier 1" which attracts a charge of £100 per annum, to the highest "tier 5" which attracts a charge of £420 per annum. Howe's Properties all fall within "tier 3" and are charged £300 per annum. This category comprises,

> "Shared owners flats and maisonettes
>
> Leasehold flats and maisonettes

> DOMUS bungalows, flats and houses - small estate and no house manager
>
> Bungalows for the elderly – small estate/no warden call
>
> Flats for the elderly – small estate/no warden call."

Howe's four leases

8. The leases of the four Properties owned by Howe were granted at different times. The earliest lease was of 134 The Meadowings which was granted in 1987. It was the subject of the Upper Tribunal's decision, but is not the subject of this appeal. The subsequent three Leases, of 84 The Meadowings, 67 Sheepfoote Hill and 23 Sheepfoote Hill were granted in 1989, 1993 and 1994 respectively, and are the subject of this appeal.

9. Each of the four leases defines "the Buildings" to mean,

> "… the flats and (where the context so admits) the forecourts paths driveways parking spaces and grounds …"

on the Estate.

10. Each of the leases also includes a recital (6) which explains,

> "It is the intention of the Lessor to demise the flats comprised in the Buildings [other than the property hereby demised] upon similar terms to those herein contained…"

11. The four leases are all in a fairly standard form. They each contain (in clause 3) a series of covenants by the lessee with the lessor, for example, to pay the ground rent, to keep the interior of the premises in good decorative repair and not to make structural alterations without prior written consent of the lessor. They also each contain (in clause 4) a series of covenants by the lessor with the lessee that include, for example, a covenant to repair, maintain and decorate the structure and exterior of the Buildings, so far as practicable to keep clean, reasonably lighted and in a tidy condition the common parts of the Buildings and the gardens and grounds on the Estate, and to engage or employ and pay the staff needed to carry out such maintenance works.

12. The first critical provision of the leases is clause 5(1). This contains a covenant by the lessee to pay a part of the "Annual Service Charge", as defined, to the lessor. The four leases contain slightly different wording in this respect which is underlined in the extracts below.

13. In the earliest lease of 134 The Meadowings, clause 5(1) provides that,

> "The Lessee shall pay to the Lessor annually <u>a 1/137th part</u> of the Annual Service Charge as hereinafter defined…"

That lease was plainly entered into at a time at which it was anticipated that the Estate would comprise 137 separate properties, together with a caretaker's flat.

14. In the next lease of 84 The Meadowings, clause 5(1) provides that,

> "The Lessee shall pay to the Lessor annually a proportionate part of the Annual Service Charge as hereinafter defined…"

Clause 5(1) in the two later leases of 67 and 23 Sheepfoote Hill provides that,

> "The Lessee shall pay to the Lessor annually a fair proportion of the Annual Service Charge as hereinafter defined…"

15. Although clause 5(1) was different, each of the leases includes the same definition of "Annual Service Charge" in clause 5(2) as follows,

> "The Annual Service Charge shall be the total of all sums actually expended or provided either directly or as in the case of service by the Lessors own staff indirectly by the Lessor during the period to which the relevant Service Account relates in connection with the management and maintenance of the Buildings …"

16. Clauses 5(2)(a)-(e) then provides

> "and in particular but without limiting the generality of the foregoing shall include …"

and sets out a number of examples of sums that would fall within clause 5(2). The examples are as follows,

(a) the costs of and incidental to the performance and observance of a number of the lessor's repairing and maintenance covenants in clause 4;

(b) the expenditure involved in connection with the maintenance of any communal television and radio aerial system;

(c) the costs of and incidental to compliance by the lessor with notices from any relevant authorities in respect of the Buildings;

(d) "all fees charges expenses and commissions ... payable to any agent or agents whom the Lessor may from time to time employ for managing and maintaining the Buildings and all salaries and other payments made to staff and employees of the Lessor where works are undertaken by the Lessor without employment of an agent including an element of profit to the Lessor"; and

(e) all fees charges and expenses payable to solicitors, accountants, surveyors and other professionals employed in connection with the management and/or maintenance of the Buildings.

17. Clause 5(3) of the leases contains a further provision for the inclusion in the Annual Service Charge of such sums as the lessor or its surveyor shall reasonably consider desirable to be retained as a reserve fund to provide for such of the costs expenses and outgoings referred to in clause 5(2) as are of a short term cyclical nature but not of a

regularly recurrent nature. Any such sums not actually expended or appropriated from the reserve fund are to be deducted from the Annual Service Charge every three years.

The FTT decision

18. On 4 November 2019, Howe issued an application to the FTT under sections 20C and 27A of the Landlord and Tenant Act 1985, challenging the service charges levied by Accent for the financial years ending 31 March 2017, 2018 and 2019 on a wide variety of grounds, most of which are not relevant to this appeal. The relevant challenge for the purposes of this appeal was to the imposition of the flat £300 fee for management services that formed part of the annual service charge.

19. In its evidence, in addition to contending that the management services that it received from Accent were not actually worth £300 per annum, Howe contended that it was unfair that long leaseholders on the Estate were charged twice the £150 per annum paid by freeholders (who were in Accent's "tier 2"), and six times the £50 per annum charged to the assured tenants on the Estate, when all of them had received the same management services. In support of its contentions, Howe calculated that in respect of the financial year ended 31 March 2017, some 60% of the management fee income charged by Accent in respect of the Estate was borne by the long leaseholders who represent only 22% of the properties on the Estate.

20. The basis for charging assured tenants was unexplained and unclear, since the amount of £50 per annum did not appear in Accent's "tier" system. The FTT noted, however, that "the statutory framework governing social tenants is not the same as that for leaseholders". It was suggested to us in argument that the charges to such tenants was the result of a reduction being made by Accent in order to comply with certain statutory limitations under the Landlord and Tenant Act 1985 on the amount of service charges that can be levied on assured tenants.

21. In its evidence, Accent contended that the management fee levied on Howe was a reasonable sum for it to be charged given the level of management carried out on the Estate. In its evidence, it provided a list, in general terms, of the types of work which it claimed to have carried out on the Estate.

22. On 15 February 2022, the FTT issued a decision in favour of Accent and made no order under section 20C. The FTT held that Howe had not demonstrated that a lower fee would be charged by any alternative manager of the Estate, and that an annual management fee of £300 per long leaseholder on the Estate was "within the spectrum of reasonable charges for the work undertaken". The FTT also found that Accent had managed the Estate generally to a high standard and that many of Howe's queries and complaints had been dealt with properly within a reasonable timescale.

The Appeal to the UT

23. Howe sought and obtained permission to appeal to the UT. One of its grounds of appeal was that Accent's tiered system of management charges was not in accordance with the terms of its leases. Howe argued that it was obliged to pay the specified fraction (1/137th), or the same proportion as all other occupants of the Estate (i.e. 1/138th), of the overall amount actually expended or provided for in relation to the management and maintenance of the Buildings. Howe also contended that there was no basis in the

wording of any of the leases for applying a different proportion in respect of the items relating to management and maintenance in clause 5(2)(d) from any of the other items identified in clause 5(2)(a)(b)(c) and (e), since they were all simply examples of items that would go to make up the total amount which had to be divided in the same way.

24. Accent argued that clause 5(2) contained a number of different "streams" of expenditure and that it was permissible (at least under the three Leases where the wording was "a proportionate part" or "a fair proportion") for a different proportion of an item falling under each "stream" to be charged to different types of tenants. Accent contended that this was particularly so in relation to clause 5(2)(d), because the work involved in management and maintenance of different types of properties on the Estate might differ.

25. Accent conceded that this approach did not work in relation to 134 The Meadowings, where clause 5(1) simply specified that the tenant had to be charged 1/137th of the whole. However, it contended that the UT could not be sure that 1/137th of the total Annual Service Charge (as defined) was not £300.

26. In her judgment, [2022] UKUT 273 (LC), UT Judge Cooke accepted Howe's submissions. She stated, at [19]-[21],

> "19. … the lease of 134 The Meadowings … requires the calculation of a global sum made up of items (a) to (e) and its division by 137. There is no scope at all for the application of different proportions to different items, let alone to the charging of a flat fee that does not appear to be a proportion since [Accent's] own publicity material indicates that the rate of £300, and other flat fees for management depending on tenure of property and size of estate, is imposed on a number of [Accent's] estates.
>
> 20. Moreover, [Accent's] construction of the other three leases is unarguable. None gives any scope for the lessor to charge a different fraction of its total expenditure (etc) on item (d) from the fraction it charges in respect of the aggregate of items (a), (b), (c) and (e); had the parties to the leases intended that the wording would have been quite different. Clause 5(2) would have had to read something like "a fair proportion of each of the following…"; but in fact each of the clauses 5(2) requires the Annual Service Charge to be calculated as a single proportion (or fraction, or percentage, or any other synonym) of a global sum. There is certainly no basis on which the lessor can charge a flat rate for item (d) that is determined by the tenure of the property.
>
> 21. I am unimpressed by the idea that for all the Tribunal knows the £300 is 1/137th or 1/138th of the whole of the lessor's expenditure (etc) on item (d). If it were, [Accent] would have said so. It is manifestly not calculated by reference to expenditure since it is advertised as a flat rate on several estates."

27. Given this decision on the construction point, UT Judge Cooke did not go on to consider a further argument by Howe to the effect that the FTT had erred in finding that the £300 charge for management services was in any event a reasonable charge.

28. UT Judge Cooke then went on to explain the consequences of her decision on the construction point. After indicating that it would be open to the parties to agree a figure for the management charges, she continued, at [27],

> "27. If agreement cannot be reached then [Accent] will have to calculate the Annual Service Charge for each of the leases by adding its direct and indirect management costs to the figures it already has for items (a), (b), (c) and (e) and then dividing the whole amount by one figure, namely the figure already determined for the rest of the Annual Service Charge which appears to be agreed at 1/138 for all four properties; I take it that that is agreed by the parties to be a "proportionate part" in respect of 84 The Meadowings and a "fair proportion" in respect of the two Sheepfoote Hill properties, and it is in any event not open to [Accent] to change that denominator now nor to [Howe] to challenge it in the FTT. Once [Accent] has done so, if [Howe] wish to pursue their challenge to payability and/or reasonableness the FTT will be able to determine that challenge."

29. At [29] of her decision, in default of any agreement of an appropriate figure for the management charge element to be charged to Howe, UT Judge Cooke ordered Accent to provide information that made it clear how the £300 charge for management services had been calculated.

The Statement of Cost of Management

30. No agreement having been reached, the information ordered by the UT was subsequently provided in the form of a "Statement of Cost of Management". This document revealed that the £300 charged to Howe was the result of the dividing part of Accent's general corporate payroll costs and other overheads (such as office costs, rent/rates, telephone and IT costs) amounting to £997,536 among the 3,058 properties in Accent's national portfolio that it categorised as "tier 3" properties, giving an average figure of £326.20. Accent asserted that,

> "Realistically this is how the management fee must be calculated as the people involved with the management deal with a number of leasehold schemes, not just [the Estate]."

The Appeal

31. Permission to appeal was given by Stuart-Smith LJ. The arguments on appeal focussed on the interpretation of the Leases and essentially tracked those made to the UT.

32. Howe also filed a Respondent's Notice seeking to argue that Accent should in any event not have been entitled to levy a management charge of £300 per annum because such an amount was unreasonable (and that the FTT was wrong in finding otherwise).

However, the parties were agreed that if we were to allow the appeal on the interpretation of the Leases, that matter would have to be reconsidered (either by the UT or FTT) in light of our decision.

Analysis

33. In Arnold v Britton [2015] AC 1619 ("Arnold") – a case involving the meaning of a service charge clause in a lease – Lord Neuberger summarised the general approach to interpretation of contractual provisions. He said, at [15],

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Preliminary observations

34. When considering the purpose of clause 5 in each of the Leases, it is clear, to state the obvious, that its general purpose is to require the tenant to pay a sum of money to the landlord by way of partial reimbursement in respect of the landlord's costs and expenditure incurred in managing and/or maintaining the Buildings of which the demised flat forms part. That is consistent with the statutory definition of a service charge, which is defined for the purposes of the Landlord and Tenant Act 1985 (as amended) by section 18(1) thereof, as follows,

> "…. 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs."

35. I accept that when construing clause 5(1), part of the admissible background, which is apparent from recital (6) of each of the Leases, is that the Lease was anticipated to be one of a number of leases in similar terms of the flats in the Buildings on the Estate. However, there are two caveats to this.

36. The first is that although the definition of "Buildings" in the Leases included all the flats on the Estate, and the definition of Annual Service Charge refers to the amounts

spent in relation to the management and maintenance of the Buildings, the Leases do not expressly address the issue of whether, and if so, how, the owners of freehold houses on the Estate should be obliged to pay a proportion of the Annual Service Charge. That being so, I do not immediately see how, when construing clause 5(1) of the Leases, it can necessarily be assumed that the same (or any) proportion of the Annual Service Charge would be payable by the freehold owner of a property on the Estate as might be payable by a tenant under a lease.

37. Secondly, although clause 5(1) of the earlier lease in respect of 134 The Meadowings provided that the tenant was to pay a specified fraction (1/137th) of the Annual Service Charge, that fact was not referred to in the subsequent Leases. Whilst the landlord which granted the Leases must be taken to have been aware of the terms of any earlier leases that it had also granted, there was no evidence to suggest that the original tenants under the Leases were also aware of the terms of any earlier lease when they entered into their Leases. If anything, they would simply have assumed that any earlier leases would have been granted in similar terms to their own Leases. Accordingly, the actual terms of the earlier lease of 134 The Meadowings cannot be "facts and circumstances known or assumed by *the parties* at the time that the document was executed" (per Lord Neuberger in Arnold) so as to form part of the admissible factual matrix against which the terms of the later Leases fall to be construed.

The meaning of clause 5(1)

38. I do not consider that the ordinary and natural meaning of the expressions "a proportionate part" or "a fair proportion" in clause 5(1) is necessarily limited to an "equal part" or an "equal proportion". Proportionality or fairness is often synonymous with equality, but that is not necessarily so.

39. Indeed, whilst recognising that this is not a complete answer to the arguments on interpretation, I would observe that if it had been intended to mandate a division of the total Annual Service Charge into a number of equal parts corresponding to the number of properties on the Estate, clause 5(1) of the Leases could easily have said so in terms. Alternatively it could simply have specified the appropriate fraction in arithmetical form. That, of course, was what had been done in the lease of 134 The Meadowings. But that was not what was done in the later Leases.

40. UT Judge Cooke found, however, that the potentially wider language used in clause 5(1) of the later Leases had the same more limited meaning as in the earlier lease of 134 The Meadowings. The primary basis for her reasoning appears to have been that clause 5(1) required the calculation of a "single proportion" of a "global sum" calculated under clause 5(2), and that this meant that the same proportion had to be applied to all the costs going to make up the total, whichever sub-clause of clause 5(2) those costs might fall under.

41. UT Judge Cooke did not indicate how, as a matter of interpretation of the Leases, that "single proportion" was to be determined. Rather, she appears to have assumed that costs of the types identified in clauses 5(2)(a), (b), (c) or (e) should be divided on an equal basis, and so the same had to be true of the costs identified in clause 5(2)(d).

42. With respect, I do not agree. Clause 5(1) does not refer to a "single proportion" but to a "proportionate part" or a "fair proportion". It is self-evident that a tenant is to be

charged annually a single *amount* which is part of the total Annual Service Charge. But I do not think that in every situation it would necessarily be "proportionate" or "fair" to divide all costs falling within clause 5(2) equally across all the properties on the Estate. Put another way, I do not see why it must be the case that in determining a "proportionate" or "fair" component of the total that a particular tenant should pay, the nature of the individual services or the identity of the individual properties benefitting from the provision of such services going to make up the whole, have necessarily to be disregarded.

43. I well understand that in cases involving blocks of flats and estates with multiple tenants, it might be thought simpler and easier to divide the costs of providing services equally among all the properties. That might also be the default position unless there were good reasons for allocating particular costs differently. There could also be scope for an approach under which, if there was a rolling programme of maintenance applying equally to all of the properties over several years, but where it was a matter of pure practicality which properties were dealt with in any particular year, the costs for that programme could be spread equally over all of the properties in each of the years.

44. However, to take an obvious example, it might well be that the costs of compliance by the landlord with its repairing and maintenance covenants under clause 4 – which would fall within clause 5(2)(a) – might relate to defects or works in some only of the flats or blocks of flats. Indeed, depending on the facts, it could be that the costs of remedying a major defect in one of the blocks of flats might form a substantial proportion of the costs making up the Annual Service Charge (as defined) in any particular year.

45. Whilst there might be an instinctive tendency towards collective burden sharing by all tenants in such a situation, I do not see why such a result is mandated by the wording of clause 5(1). It seems to me that the broader wording of clause 5(1) in the Leases permits a result under which the tenants of the flats affected by the defect are required to bear a higher proportion, and the unaffected tenants a lesser proportion, of the total costs for that year, to reflect the way in which those total costs are made up.

46. The second answer given by UT Judge Cooke for her conclusion was that if it had been intended that a different proportion could be charged for individual items falling under different sub-clauses of clause 5(2), then clause 5(2) would need to have been phrased differently by the addition of words such as "a fair proportion of each of the following…" . Again, I do not agree. That reasoning confuses and conflates the different roles played by clauses 5(1) and 5(2).

47. The purpose of the definition of Annual Service Charge in clause 5(2) is to define and limit the total costs which the landlord is entitled to seek to recover from all tenants of properties on the Estate. It is clause 5(1) in each of the leases of the flats on the Estate that in effect provides for the division of that total and the recovery of a part of it from each of the individual tenants. As such, the place to deal with the question of how the total costs are to be divided up for the purposes of reimbursement is clause 5(1) and not clause 5(2). Indeed, the wording suggested by UT Judge Cooke does not in fact fit into either clause 5(2) or clause 5(1). Rather, as I see it, the job which she envisaged is in fact done by the use of the flexible expressions "a proportionate part" or " a fair proportion" in clause 5(1).

48. In reaching that view, I should make clear that I agree with the point made by Peter Jackson LJ during the hearing, that although clause 5(1) is more flexible than UT Judge Cooke thought, it does not give Accent the freedom to determine a "proportionate part" or a "fair proportion" of the Annual Service Charge on an entirely subjective basis. Clause 5(1) does not say, for example, "such part of the Annual Service Charge as the landlord, in its absolute discretion, considers proportionate" or "such proportion of the Annual Service Charge as the landlord, in its absolute discretion, considers fair". The division must be objectively justified.

49. Nor does clause 5(1) permit Accent to decide the proportion of the Annual Service Charge that it should recover from a particular tenant by reference to factors that are irrelevant to the provision of services to that tenant. So, for example, I do not consider that it would be permissible for Accent to decide to charge long leaseholders a greater proportion of the Annual Service Charge than would otherwise be justified by the services provided to them, so as to make up for any limits on the amounts which Accent can lawfully charge to assured tenants by reason of statutory limitations under the Landlord and Tenant Act 1985. If and to the extent that this is what UT Judge Cooke was alluding to in the last sentence of [20], I would agree with her.

50. However, if UT Judge Cooke was indicating that there could never be any basis under clause 5(1) upon which Accent could charge a different proportion of the Annual Service Charge to tenants with different tenures, then I would not agree. If it were the case that the nature of the tenure of a lease required a greater level of work to be done by Accent in managing the tenancy, then Accent would be able, if it could justify the differential, in charging a different rate to the different tenants. But that would all depend on the facts.

The meaning of clause 5(2)

51. In support of her conclusion that the flat rate charge for management services of £300 per annum was not permitted by the terms of the Leases, UT Judge Cooke also expressed the view, in [21], that such charge levied by Accent was impermissible because it was "manifestly not calculated by reference to expenditure since it is advertised as a flat rate on several estates". That reflected a similar point made in relation to the lease of 134 The Meadowings in [19].

52. In my view, this raises a different point from the meaning of "a proportionate part" or "a fair proportion" in clause 5(1) of the Leases. This is a point that goes to the meaning of Annual Service Charge in clause 5(2).

53. It is perfectly clear from the reference in the definition of Annual Service Charge in clause 5(2) of the Leases to,

> "the total of all sums actually expended or provided … in connection with the management and maintenance <u>of the Buildings</u> …"
>
> (my emphasis)

that clause 5 is only intended to cover sums actually expended or provided for by the landlord in connection with the management and maintenance of the properties on the Estate.

54. I therefore agree with UT Judge Cooke that there is simply no basis for including in the Annual Service Charge any amounts expended or provided for by Accent in connection with the management or maintenance of any other properties that are not on the Estate.

55. That conclusion is not in any way undermined by the particular wording of clause 5(2)(d), which gives as an example of the costs which can be included in the Annual Service Charge,

> "all fees charges expenses and commissions ... payable to any agent or agents whom the Lessor may from time to time employ for managing and maintaining the Buildings and all salaries and other payments made to staff and employees of the Lessor where works are undertaken by the Lessor without employment of an agent including an element of profit to the Lessor."

56. Consistent with the overriding words at the start of clause 5(2), the express limitation in the first part of clause 5(2)(d) is that the landlord can only include in the Annual Service Charge fees etc of agents which it employs in managing and maintaining the Buildings. The second part of the clause deals with "in-house" costs where works are undertaken by staff and employees of the landlord, "without employment of an agent". But it must be implicit, given that this is simply an example of what it permitted under clause 5(2), and follows directly from the first part of clause 5(2)(d), that such "works" must also relate to managing and maintaining <u>the Buildings</u> and not any other properties owned by the landlord.

57. As such, if it is Accent's case (as it appears to be from its "Statement of the Cost of Management" to which I have referred above), that its flat rate annual management charge of £300 has been determined by dividing a global sum attributable to the management of part of its national portfolio of properties among the properties in that portfolio that it has unilaterally categorised as "tier 3" properties because,

> "… realistically this is how the management fee must be calculated as the people involved with the management deal with a number of leasehold schemes, not just [the Estate]",

then in my judgment that would be entirely outside what is contractually permitted by clause 5. That is because the aggregate sum has been defined by reference to work done on properties that are not on the Estate at all, and it has been divided by a number that includes some types of properties that are also not to be found on the Estate (e.g. DOMUS bungalows). Whatever Accent might consider to be "realistically" necessary, or simply more convenient for it in the conduct of its national business, is irrelevant to what it is contractually entitled to charge under clause 5 of the Leases.

<u>Disposal</u>

58. For these reasons I would allow Accent's appeal against UT Judge Cooke's limited interpretation of the wording of clause 5(1) of the Leases. I would, however, uphold

her decision that to the extent that the flat rate management charge was set by Accent by reference to its costs of dealing with properties not on the Estate, this was not permitted by clause 5(2) of the Leases.

59. Following circulation of our judgments in draft, the parties agreed that the outstanding challenge by Howe to the payability and reasonableness of the management charge for the three years in question (*i.e.* ending 31 March 2017, 2018 and 2019), as identified in paragraph 28 of the UT decision, should be remitted for further consideration by the FTT.

Lord Justice Dingemans

60. I agree.

Lord Justice Peter Jackson

61. I also agree.