IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos.: CH/28/2019
CH/31/2019
CH/34/2019
CH/36/2019

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr David Farrar, local government officer

For the Respondents: Mr Paul Stagg, counsel, instructed by MR Associates (direct access)

Decision: The appeals are allowed to the following extent. The decision of the First-tier Tribunal sitting at Workington on 19 September 2018 under references SC164/18/00325, SC164/18/00329, SC164/18/00327 and SC164/18/00326 involved the making of an error of law and is set aside. Acting under s.12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision in the following terms:

The eligible rent for housing benefit purposes is to be reduced by a proportion of the Enhanced Housing Management Charge, together with a further deduction of an amount equal to 12% of that reduction in respect of Management Overhead on Rent and an amount equal to 7% of that reduction in respect of Voids on Rent. The proportion is:

- as to 85% of the EHMC (in respect of which the parties' representatives reached agreement at the hearing before me, 43% of that 85%
- as to the remaining 15% of the EHMC (representing the three elements, on which the representatives were not agreed, 6/15 (i.e.40%)of that 15%

Expressed arithmetically (and "showing my working" rather than simplifying the sum to a bare figure), the factor by which the reduction is to be calculated is

$$\left[(0.85 \times 0.43)+\left(0.15 \times \frac{2+0+4}{15}\right)\right] \times \frac{119}{100}$$

The parties have liberty to apply to the Upper Tribunal to resolve any dispute relating to the application of this decision.

I do not rule on whether or not the accommodation is "exempt accommodation". Correctly understood, it is not a matter raised by the appeal against the authority's original decision and I decline to exercise my discretion to rule upon it.

REASONS FOR DECISION

1. Inclusion Housing CIC Ltd ("Inclusion") are a not for profit organisation who are the long leaseholders of a development in Cumbria which provides tenancies for individuals with learning disabilities. There is a nomination agreement between the freeholder, Inclusion and a third party provider of support but neither party sought to rely before me on any provision in it nor in the individual tenancy agreements. By a series of decisions, the local authority sought to restrict the eligible rent on which it was obliged to pay housing benefit so as to exclude an element of the rent actually charged by Inclusion, which the local authority considered was an ineligible service charge for housing benefit purposes. Each of the tenants whose cases are before me have appointees to deal with their housing benefit and those appointees have in turn agreed that it is Inclusion that should deal with representation in the present proceedings. In practical terms the cases are a dispute between Inclusion, whose income stream stands to be affected, and the local authority. There is no difference between the four cases for the purposes for which I am concerned.

2. The appeals do raise a structural issue in relation to the intended operation of the housing benefit scheme and for that reason the Secretary of State was by Directions dated 21 February 2019 given the opportunity to apply to be joined as a party which, however, she declined.

3. The decision notice (to take that in CD's case) informed her that housing benefit had been awarded. It went on to indicate that:

> "The following details have been used in calculating your benefit:
> …
> Total Rent payable per week £293.90
> Weekly ineligible rent £ 13.40
> Weekly rent eligible for benefit £280.50

The subject of the dispute was what is termed the Enhanced Housing Management Charge ("EHMC"). The service charge and rent breakdown of the scheme is in evidence and includes a line under the overall heading of "Rent" for what is described there as the "Intensive Housing Management Service" but which it has not been suggested is not the same thing as the Enhanced Housing Management Service. I use the latter term in this decision. There is not a further line for, as it were, an "ordinary" housing management service. The EHMC thus does not solely extend to the particular features of housing management required in order to meet the needs of the cohort of residents but also encompasses the housing management which would be needed in any social housing project or, indeed, any project providing rented housing.

4. The sum of £11.26 a week was attributable to the EHMC. To that the local authority added £1.35 in respect of a proportion of the Management Overhead on Rent (charged at 12%) and £0.79 in respect of a proportion of Voids on Rent (charged at 7%). These percentages were those used for lines in the

service charge and rent breakdown: Management Overhead on Rent and Voids on Rent were lines under the overall heading of Rent; Management Overhead on Eligible Service Charges and voids on Eligible Service Charges appeared as lines under "Eligible Service Charges". There was no such entry under "Ineligible Service Charges". In relation to the last-mentioned category, the breakdown showed a positive figure only for water rates under the Ineligible Service Charge heading. However, the document appears to be based on a standard template, as there are £0.00 entries for a number of lines under that heading. Taken together, the figures mentioned above in this paragraph made up the figure of £13.40, which in the authority's view constituted an ineligible service charge.

5. The status of the accommodation forming the subject of each of the tenancies as "exempt accommodation" under sch 3 of the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006/217 ("the Consequential Provisions Regulations") had not been raised by the original decisions under appeal. However, at the hearing before the FtT, it was the authority's case (CD, pp221-222) that if the charge was not an ineligible service charge, that would call into question the status of the accommodation as "exempt accommodation." Inclusion's representative meanwhile (p227) was at pains to stress the status as "exempt accommodation".[1]

6. Even though the decision under appeal had not involved deciding the point, the FtT concluded that the accommodation was, indeed, "exempt accommodation". Under para 6(9)(a) of sch 7 to the Child Support, Pensions and Social Security Act 2000, through the FtT "need not consider any issue that is not raised by the appeal", by necessary implication it has the discretion to do so.

7. A key question in this appeal is whether the authority was correct in its submission that if the services represented by a service charge were not excluded, that went to the status of "exempt accommodation." The judge who heard the case gave permission to appeal, observing that

> "It requires the consideration and judgement of the Upper Tribunal to analyse whether accommodation can be defined as exempt accommodation under Schedule 3(3) of the Consequential Provisions Regulations where in this case the landlord is providing support to the tenant, but the cost of that support seems to be precluded by Paragraph 1(f) of Schedule 1 to the Housing Benefit Regulations 2006. How do the two provisions fit together, if at all?"

Exempt accommodation

8. "Exempt accommodation" was a concept first created by the Housing Benefit (General) (Amendment) Regulations 1995/1644. It is now found in

[1] See FtT's Reasons para 13 (there must be a "not" omitted from the second sentence.)

para 4(10) of schedule 3 to the Consequential Provisions Regulations in the following terms:

> *""exempt accommodation"* means accommodation which is—
> (a) [not material] or
> (b) provided by a non-metropolitan county council in England within the meaning of section 1 of the Local Government Act 1972, a housing association, a registered charity or voluntary organisation where that body or a person acting on its behalf also provides the claimant with care, support or supervision."

9. The purpose of creating the concept was to provide a legal framework for certain types of accommodation, provided for people with unusually high levels of need, to be outside the more generally applicable mechanisms for controlling rent levels, on account of the higher cost involved in providing such accommodation.

10. Thus, sch 3, para 5 of the Consequential Provisions Regulations stipulates a particular form of reg 12 of the HB Regulations to be used to calculate the eligible rent for housing benefit purposes, peculiar to "exempt accommodation" (and to certain other categories of tenancy not relevant for present purposes). Para 3(b) of (the specific form of) Reg 12 stipulates that it is necessary to deduct:

> "where payments include service charges which are wholly or partly ineligible, an amount of the ineligible charges determined in accordance with Schedule 1."

11. There are relevant definitions in para (7) of the regulation:

> "In this regulation and Schedule 1—
>
> "service charges" means periodical payments for services, whether or not under the same agreement as that under which the dwelling is occupied, or whether or not such a charge is specified as separate from or separately identified within other payments made by the occupier in respect of the dwelling; and
>
> "services" means services performed or facilities (including the use of furniture) provided for, or rights made available to, the occupier of a dwelling."

12. I deal below with the detail of what is an ineligible service charge. What though is clear from para 3(b) quoted at [10] above and relevant to the issue raised by the judge of the FtT is that it is conceptually possible for something to constitute "exempt accommodation" whether or not payments include service charges and, if they do, whether the service charges are eligible, partly eligible, or ineligible.

13. Guidance as to how "support" is to be understood in the context of housing management is provided by Mr Commissioner Turnbull's decision in R(H)4/09 (the Golden Lane Housing case) where he observed:

> "25. It is implicit in the approaches adopted by all parties that the word "support" involves the landlord doing something more than or different from the exercise of its ordinary property management functions. That must in my judgment be right. A landlord does not in my judgment "provide … support" to a tenant, in the context of the definition of "exempt accommodation", by doing what any prudent landlord would do in the management of its property. To take an obvious example, a landlord does not provide support by complying with its repairing obligations, however beneficial to the tenant that may be. However, it becomes apparent when one examines some of the activities of GLH which are said on its behalf to amount to support that there is in some cases room for debate whether they go beyond what the ordinary landlord would do in managing the property. In such cases it is in my judgment relevant, in determining whether support is provided to a more than minimal extent, to have regard to the extent to which the alleged support is allied to ordinary property management. "

14. While that is by no means all that Golden Lane and other authorities have to say about "support" in this context, it does serve to highlight that the test of "exempt accommodation" is concerned with the presence of an additional element, the distinguishing feature which takes the case out of the general run that is subject to the generally applicable rent control measures.

Ineligible service charges

15. As regards the matter which had been the subject of the decisions under appeal to it, the FtT's decision notice found that the EHMC was eligible for housing benefit, continuing:

> "It is not a service charge within the meaning of paragraph 1(f) of Schedule 1 of the [HB Regulations]. The service provided by the landlord is management of accommodation that requires extra housing management services because of the disabilities and vulnerabilities of the tenant."

16. Although the Reasons contain findings as to what services the EHMC covers, the FtT's reasoned decision is expressed exclusively by reference to the tests for whether something is "exempt accommodation". There is virtually no discussion of the issues raised by para 1(f) of Schedule 1 to the HB Regulations, the actual subject of the decisions under appeal. It is common ground that to that extent the FtT erred in law.

17. The authority's case before me was that it was required by schedule 1 to deduct sums payable in respect of ineligible service charges and by paragraph (3) to make any necessary apportionment to allow it to do so. The

authority's case relied heavily on the historic changes reflected in Schedule 1. I turn, accordingly, to the legislation.

18. The Housing Benefit Regulations 2006/213 ("the HB Regulations") were a consolidation measure, the previous regulations being the Housing Benefit (General) Regulations 1987/1971 ("the 1987 Regulations"). From the outset of the 1987 Regulations, provision was made (in their schedule 1) to define certain service charges as ineligible for housing benefit purposes. Among the exclusions was that effected by sub-paragraph (f), which subsequently underwent a number of amendments. By May 1997 it provided:

> "(f) charges in respect of general counselling or of any other support services, whoever provides those services, except where those services—
> (i) relate to the provision of adequate accommodation; or
> (ii) are provided to tenants by either—
> (aa) their landlord in person; or
> (bb) someone employed by their landlord ("the employee"),
> and the landlord or, as the case may be, the employee spends the majority of the time, during which he provides any services, in providing services the charges for which are eligible under these Regulations (other than any that are eligible only under the terms of this head) or head (iii) below
> or
> (iii) are provided to a claimant in supported accommodation by his landlord in person or someone on his behalf, and payment of the charges in respect of those services is a condition on which the claimant's right to occupy the accommodation depends."

Limb (iii) had been added in 1997; the remainder of the provision as set out above broadly reflected, albeit expressed differently, the position since the making of the 1987 Regulations.

19. With effect from (broadly) 3 April 2000, the Housing Benefit (General) (Amendment) (No.3) Regulations 1999/2734 substituted a new form of para 1(f) and created a new Schedule 1B. This was a transitional scheme as part of a move towards funding via the "Supporting People" programme then being proposed. Para 1(f) then excluded:

> "(f) charges in respect of general counselling or of any other support services, whoever provides those services, except where those services—
> (i) are provided to a claimant in supported accommodation by his landlord in person or someone on his behalf; and
> (ii) fall under paragraph 2 of Schedule 1B (service charges for claimants in supported accommodation)."

20. Paragraph 2 of Schedule 1B provided:

> "The service charges in respect of general counselling or other support which fall under this paragraph are—
>
> (a) charges in respect of time spent in the provision of general counselling or other support which assists the claimant with maintaining the security of the dwelling he occupies as his home;
>
> (b) charges in respect of time spent in the provision of general counselling or other support which assists the claimant with maintaining the safety of the dwelling he occupies as his home (including making arrangements for the checking of the claimant's own appliances where these could pose a safety hazard);
>
> (c) charges in respect of time spent in the provision of general counselling or other support which is directed at assisting the claimant with compliance with those terms in his tenancy agreement concerned with—
> (i) nuisance;
> (ii) rental liability;
> (iii) maintenance of the interior of the dwelling in an appropriate condition; and
> (iv) the period for which the tenancy is granted,
>
> such charges to include those in respect of time spent in the provision of general counselling or other support which assists the claimant with contacts with individuals or professional or other bodies with an interest in ensuring his welfare; and
>
> (d) provided that they are not charges specified in any of sub-paragraphs (a)–(c), charges in respect of time spent in the provision of general counselling or other support which is provided to the claimant—
> (i) by either a resident warden or a non-resident warden with a system for calling him;
> (ii) in accommodation which it is the practice of the landlord to let for occupation by persons in need of general counselling or other support services where the dwelling is one of a group of dwellings which it is the practice of the landlord to let for occupation by such persons."

21. With effect from (broadly) 7 April 2003, the Housing Benefit (General) (Amendment) Regulations 2003/363 amended para 1(f) so as to leave para 1(f) excluding

> "charges in respect of general counselling or of any other support services, whoever provides those services".

As foreshadowed by the amendments 3 years earlier, the intention was that thereafter the excluded services should be funded through Supporting People: see HB/CTB Circular A6/2003.

22. Following the 2006 consolidation exercise this remains the current formulation, now found as para 1(f) of the Schedule to the HB Regulations. Meanwhile, Schedule 1B was repealed[2].

23. Para 1 of Schedule1 in full reads:

> "1. Ineligible service charges
> The following service charges shall not be eligible to be met by housing benefit—
>
> (a) charges in respect of day-to-day living expenses including, in particular, all provision of—
> (i) subject to paragraph 2 meals (including the preparation of meals or provision of unprepared food);
> (ii) laundry (other than the provision of premises or equipment to enable a person to do his own laundry);
> (iii) leisure items such as either sports facilities (except a children's play area), or television rental, licence and subscription fees (except radio relay charges and charges made in respect of the conveyance and installation and maintenance of equipment for the conveyance of a television broadcasting service);
> (iv) cleaning of rooms and windows except cleaning of—
> (aa) communal areas; or
> (bb) the exterior of any windows where neither the claimant nor any member of his household is able to clean them himself, where a payment is not made in respect of such cleaning by a local authority (including, in relation to England, a county council) or the Welsh Ministers to the claimant or his partner, or to another person on their behalf; and
> (v) transport;
>
> (b) charges in respect of—
> (i) the acquisition of furniture or household equipment; and
> (ii) the use of such furniture or equipment where that furniture or equipment will become the property of the claimant by virtue of an agreement with the landlord;
>
> (c) charges in respect of the provision of an emergency alarm system;
>
> (d) charges in respect of medical expenses (including the cost of treatment or counselling related to mental disorder, mental handicap, physical disablement or past or present alcohol or drug dependence);
>
> (e) charges in respect of the provision of nursing care or personal care (including assistance at meal-times or with personal appearance or hygiene);

[2] By SI 1999/2734

> (f) charges in respect of general counselling or of any other support services, whoever provides those services;
>
> (g) charges in respect of any services not specified in sub-paragraphs (a) to (f) which are not connected with the provision of adequate accommodation."

24. If one were coming to the above provision "cold" one might think that it was concerned essentially to identify services which were not concerned with the provision of adequate accommodation (hence the sweeping-up clause at sub-paragraph (g)). However, given the history of the provision, one can see that it is less concerned with that issue in itself but serves wider purposes of identifying services, whether or not linked to accommodation, the cost of which should properly be defrayed either by the individual tenant or, to the extent that it was publicly funded, through public funds other than housing benefit.

25. It is accepted by both parties that what is involved in housing management will differ according to the attributes and needs of those being housed: see e.g. CIS/1460/95. Absent the legislative history of schedule para 1(f), one might conclude that such matters did not constitute "general counselling or other support services" at all, but simply housing management tailored to meet the needs of this cohort of residents. However, the legislative history points in a different direction. Thus, in the version in force at May 1997 (see [18]), it was envisaged that things which were "general counselling or other support services" might "relate to the provision of adequate accommodation": it was not that they were simply part of housing management, but rather fell within the quoted words and so were potentially vulnerable to being treated as excluded services. However, because of their connection with the provision of adequate accommodation they were nonetheless considered the proper subject of housing benefit at that time.

26. Similarly, the version in force from 3 April 2000 explicitly makes clear, via the then Schedule 1B, that assisting with maintaining the security or safety of the dwelling and complying with the terms of the tenancy in relation to key matters such as rental payments, maintenance and the avoidance of nuisance all form a sub-set of "general counselling or other support services" and so, despite the exclusion, remained eligible. However, the ability to receive housing benefit in respect of such services was removed, clearly advisedly, by SI 2003/363 (see [21] above).

27. What I have described as the view if one were coming "cold" to the current schedule 1(f) is in consequence not the interpretation to be adopted once interpretation is adequately informed.

28. This is, in essence the approach for which the local authority contends, albeit it does so with greater emphasis on policy circulars, whereas I have to be guided by the legislation. Mr Stagg objects that the authority's historically - based approach is not a reliable guide. He may have been objecting to its reliance on Circulars but, if he was making the point more generally, I

disagree. In particular, he made the point that Supporting People as a funding stream (which, it will be recalled, was what led to the making and subsequent repeal of the version in force from 3 April 2000) had now been incorporated into other funding streams. This was not disputed before me. I have not been provided with evidence about current funding streams for the cohort of residents in this case, save that Inclusion do not receive funding from anyone else in respect of the services covered by the EHMC. However, the lack (at any rate in its previously existing form) of the funding stream which had triggered those legislative amendments cannot justify a different reading of schedule 1(f). The understanding of what constitutes "general counselling or other support services" in the light of the legislative history remains what it is, even if the funding arrangements have changed.

29. It follows that the local authority is correct in saying that a deduction needed to be made. By para 3(1) of Schedule 1 of the HB Regulations:

> "Subject to paragraph 2 where an ineligible service charge is not separated from or separately identified within other payments made by the occupier in respect of the dwelling, the appropriate authority shall apportion such charge as is fairly attributable to the provision of that service, having regard to the cost of comparable services and such portion of those payments shall be ineligible to be met by housing benefit."

(Paragraph 2 is not material in this case).

30. Returning to the question posed by the judge giving permission to appeal, is there a correlation between excluded services and exempt accommodation? As I have sought to show at [9] and [24] the two mechanisms have fundamentally different purposes. Para 1 of Schedule 1 additionally serves wider purposes: it is, for instance, not only the cohort of potential residents of exempt accommodation who are affected by the exclusion of day-to-day living expenses by para 1(a) of schedule 1. While "general counselling or other support services" may have acquired what I regard as an extended meaning in the light of its legislative history, the phrase relating to "exempt accommodation" is a different one – "care, support or supervision". The two phrases have a word in common – "support" - but the context of the two is different. The legislator has not sought to define the word and in my view it takes its colour from the phrases of which it forms part and the differing contexts in which those phrases are used. That the two provisions are capable of operating independently is further shown by para 3(b) of the (specific) reg.12, quoted at [10] above. I therefore do not consider it is appropriate to make the link between there being services which escape being excluded services on the one hand and loss of "exempt accommodation" status on the other. In my view, each needs to be examined on the evidence before the tribunal in cases where the respective points arise. The present appeals, as noted above, did not concern loss of "exempt accommodation" status (unlike, for instance, the appeal in *Chorley BC v IT (HB)* [2009] UKUT 107 (AAC)), which was precipitated by the decision of the local authority to restrict the eligible rent to the local reference rent (something

it could not do if the accommodation constituted "exempt accommodation"). In my view the present tribunal was led astray by the local authority's submission; it did not need to rule on "exempt accommodation" and, while it had a discretion to consider matters beyond those raised by the appeal, it appears that the exercise of that discretion was legally flawed, being based on the basis, erroneous as I have held it to be, that there was a structural link between the two concepts. It follows that in remaking the FtT's decision having set it aside, I do not address whether or not the scheme as it now stands represents "exempt accommodation", as to which I remain neutral.

Consideration of services within the EHMC

31. I adjourned the hearing to allow the parties to examine (without prejudice to their primary contentions) what element of common ground there was as to what within the substantial range of services comprised within the EHMC were excluded services. They were able to agree as to services which represented 85% of the EHMC. 43% of the 85% were agreed to amount to excluded services. A small number of services remained for adjudication. The table in evidence shows that 5% of the EHMC is attributable to each of these three activities. I address each in turn. In doing so, while I was taken to authorities on the meaning of "support" in the context of the definition of "exempt accommodation", because of the view I take that there is not a direct linkage between "exempt accommodation" and "excluded service charges" I prefer to base my reasoning on the legislative history of para 1(f) of Schedule 1 .

(a) *"Advising and assisting tenants to deal with benefit claims and other correspondence relevant to sustaining occupancy of the dwelling*
●To enable the service users to gain expert advice from the Welfare Benefits Unit to make valid claims for appropriate benefits, to expedite their claims and to help them to appeal where necessary"

It is argued that most residents have appointees (not provided by Inclusion) who carry out these activities on the residents' behalf. While I do not have detailed evidence, it is not disputed. The argument that Inclusion do not need to do it because the appointees do in reality goes to whether the service needs to be provided at all, never mind its nature. However, I do not think the argument goes anywhere in this case. It is sufficient if a service is made available to a resident, as long as there is a reasonable possibility that the resident may use it. A tenant's appointee arrangements may fail; the tenant may require more specialist input in relation to benefits (in particular, housing benefit) than a family member acting as appointee can provide. Inclusion's obligation under the tenancy agreement is to provide "advice and assistance in relation to any claim you may be entitled to make against any public body in respect of housing benefit or other property related benefits." Such assistance, it seems to me, is a normal part of housing management. Anything further than that would (under the 2000-2003 regime) have constituted support, fallen within para 2(c) of Schedule 1B and been eligible for housing benefit during that period but following the amendments made in 2003, not thereafter. In my view the 5% of the EHMC apportioned to this

activity needs itself to be apportioned between what would be routine housing management in relation to, in particular, housing benefit claims and broader work (e.g. in relation to the "other correspondence") which is aiming to meet the particular needs of the resident group. Evidence is slight. I am encouraged by the parties to adopt a broad- brush approach. The proposition that what constitutes housing management has to be looked at in the context of the particular cohort of residents tends to increase the eligible proportion so I rule that 3% is to be treated as eligible and 2% ineligible.

(b) *"Where required, to collect rents from tenants and pay the money into the nominated bank account"*

The local authority's position is that as housing benefit is paid direct, there is no room for this function. Inclusion say that if the local authority wins the case, there will be a need for them to recover the shortfall direct from tenants. I accept that, and further that looking at the circumstances down to the date of decision under appeal, there was a latent need to do so under the arrangements as they stood, the effect of which has now been declared by the present decision. Chasing up smaller amounts of money is not necessarily any easier than chasing up larger amounts. Obtaining payment may require liaising with appointees as well as residents. I would accept it as a proper part of housing management and not as a "counselling or other support service." Consequently the 5% is eligible.

(c) *"To link into appropriate/relevant local mental health and other disability networks, supporting people teams and forums and keep the National Operations Manager fully briefed."*

This appears to me to be primarily a support service. Whilst one might expect a provider of specialist social housing to have an eye to the health and welfare of residents and, for example, to make an appropriate referral if they became aware that a resident had become significantly mentally unwell, the activity as described appears to be principally referring to participation in a broader range of networks and forums. Ensuring that residents' needs and experiences flow into the work of those networks and forums is important and will contribute, if perhaps at times intangibly, to the well-being of the residents and so may properly be regarded largely as a "support" service for this purpose. 1% is eligible, 4% ineligible.

Management Overheads and Provision for Voids

31. The rent and service charge breakdown for the scheme included, in respect of eligible service charges, uplifts of 12% of the amount of those charges in respect of the management overhead on them and 7% to allow for the impact of voids on eligible service charges. As noted in [4], having concluded that part of the EHMC represented an ineligible service charge, the authority applied the same percentages to the figure it had arrived at representing those service charges, thereby increasing the amount considered ineligible. Mr Stagg for Inclusion disputes their right to do this. This aspect was developed by written submissions following the hearing.

32. The authority in its submission reiterates that in effect the gross charge for the provision of all elements of the rent and service charge comprises a net amount plus a 19% surcharge. As to why the management and voids percentage figure on the ineligible amount should likewise be considered ineligible, the authority relies on the decision of Upper Tribunal Judge May QC in *Carlisle City Council v SC (HB)* [2011] UKUT 480 (AAC). In paragraph 11, where the judge gives further direction to the tribunal to whom he is remitting the case, he refers to a spreadsheet, recording a number of concessions made as to certain entries which were, or were not, eligible, leaving a number of matters for the new tribunal to consider. In that context he indicates that:

> "The calculation of the 15% service management and 10% voids bad debt figures are dependent on the extent to which the other charges have been allowed."

33. Mr Stagg accepts that, read in isolation, the above sentence supports the authority's submission. However, he suggests that it is possible, given the content of the previous sentence in which the various concessions had been recorded, that the pro rata approach had been common ground. He suggests that Judge May's pronouncement is, at best, *obiter dicta* and that that is no indication that the point had been the subject of argument.

34. I agree that there is no indication that there had been any argument on the point. I do not accept that that makes it *obiter*: the judge was clearly telling the parties what approach they were required to take when the case was remitted to them. I do accept that the weight to be given to the point is somewhat reduced as it had not been the subject of argument.

35. Mr Stagg relies on the definitions of "service charges" and "services" set out at [11]. He submits that the management overheads and voids elements are not charged for "services" as defined. Rather, he continues, they are an element of the overall rent to allow the landlord, which is a not-for-profit organisation, to pay for its central administration costs and to be compensated for its loss of income from the proportion of its accommodation portfolio which is expected to be empty at a given time, for whatever reason.

36. On that basis, he argues, they cannot be separated out from the overall rent relying on sch 1 paras 3 and 4 (para 4 deals with excessive service costs). Rather, such charges contribute to the overall rent, which is then subject to the relevant rent control provisions according to whether "exempt accommodation" is involved, or not.

37. Whilst I accept that the purpose of the management overhead and voids lines is to finance the matters suggested by Mr Stagg, they are not themselves in respect of those costs. The percentage increases are applied indiscriminately to all lines within rent and within eligible service charges, irrespective of the demands the activities covered by those lines make on Inclusion's central administration. Effectively the percentage is there so as to spread those costs against each and every part of the charges for the scheme

in respect of which Inclusion has any chance of recovering them (I note that the percentages are not applied to Ineligible Service Charges.) Although depicted as a separate line under the main headings of "Rent" and "Eligible Service Charges", the effect of the percentage increases is to inflate the prices of the items to which they are applied. If the services identified in consequence of the agreement at the hearing and by this decision as ineligible had been identified as Ineligible Service Charges at the outset, the percentage mark-up would not have been applied to them, as the breakdown which is in evidence demonstrates. More ineligible services may lead to an increase in the percentage mark-up so as to realise the same amount to go towards the cost of central management overall, but one can only go on the evidence of how the financing of the scheme is presently structured. Under that, services covered by the EHMC are charged out at a base cost plus (in total) 19%, as the authority correctly suggests. When some of those services fall to be taken out of the scope of housing benefit, the consequent reduction is of the base cost attributable to them plus the 19%.

38. This conclusion is consistent with that reached by Judge May in the *Carlisle* case. Whether or not the passage in his direction concerning the need for prorating was given after argument, that was his ruling and I respectfully agree with it.

39. As regards the necessary deduction under para 1(3) of schedule 1, my ruling is therefore as set out at the head of these Reasons.

CG Ward
Judge of the Upper Tribunal
8 October 2019