OPINION

by

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OPINION

Re: Common Repairs and Rateable Values

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1. **BACKGROUND**

1.1 I, Professor Stewart Brymer, OBE, LLB (Hons), W.S., NP, Solicitor, 8B Rutland Square, Edinburgh, EH1 2AS have been requested by the Chair of the Edinburgh Conveyancers' Forum ("ECF") ("the Memorialists") to give an Opinion on what I consider to be best professional practice in the context of common repairs and allocation of costs based on rateable values or assessed rentals of individual properties within a block or tenement.

1.2 A copy of the letter of instruction from the Chair of ECF is annexed hereto and referred to herein for its terms ("the Letter of Instruction").

1.3 The background to the request for my opinion is contained within the Letter of Instruction and need not be repeated here.

2. **POINT AT ISSUE**

2.1 I am asked to comment on what might constitute best professional practice in the context noted in the Letter of Instruction for the benefit of both solicitor members of ECF and their clients.

3. **OPINION**

3.1 As the Memorialists themselves accept, the point is, indeed, a narrow one. In essence, the issue is one of title provisions often being out of step with the position on the ground in practice when it comes to ascertaining the allocation of the cost of works of repair or renewal among proprietors in a tenement or other multi-occupancy building. This is exacerbated by virtue of the additional cost to

be met by clients in seeking to establish what the rateable value of a particular property was.

In the Letter of Instruction the Memorialists refer to me seeking to identify what might constitute "best" professional practice. That can, of course, be attempted but the issue, in law, is really what might constitute good professional practice when judged by the three part test laid down by Lord President Clyde in *Hunter -v- Hanley* 1955 SC 200. In that case, the Court outlined what has come to be known as the classic statement of the standard of care in cases of alleged professional negligence in Scots law. Lord President Clyde was of the view that the test was whether or not the professional person had been proved to be guilty of such a failure as no other member of that profession of ordinary skill would be guilty of if acting with ordinary care. That to me establishes a lower standard than "best" practice.

The Lord President commented as follows:-

> "To establish liability where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail. If this is the test, then it matters nothing how far or how little he deviates from the ordinary practice. For the extent of deviation is not the test. The deviation must be of a kind which satisfied the third of the requirements just stated."

3.2 Considered from the perspective of a client who owns property in a tenement or other multi-occupancy type building, the issue is about having repair and renewal work done expeditiously and that all interested co-proprietors pay their share of the cost thereof – them all living in an atmosphere of shared common interest.

Looked at in that way, it is hard to disagree with the proposition that the method of sharing the cost of such work should be anything other than in an equal basis in all bar the most extreme of cases. Sadly, however, the position in practice as regulated by the terms of the various properties' title deeds can be somewhat less than clear and, on occasion, less than fair.

3.3 There is a statutory provision in relation to common charges which applies where the title provisions do not cater for all of the liability.[1] Unfortunately, the provision is not to the effect that when complicated, difficult or insoluble problems arise in relation to common maintenance Rule 4 will apply. In this case, the provisions of the Tenements (Scotland) Act 2004 and the Tenement Management Scheme ("TMS") are of no assistance unless all the proprietors in a tenement were to agree to proceed on the basis of the TMS. That may be a possibility but the risk is that at least one proprietor may claim to be disadvantaged by such an approach to allocate common costs with the result that the TMS is of no assistance.

3.4 The current provision relating to common charges based on gross annual value or rateable value is contained in the *Local Government Finance Act 1992.*[2] It is provided in that statute that: (1) where in any deed executed before 1 April 1989 there is a provision which apportions liability according to assessed rental or gross annual common and rateable value of the properties; (2) all of the properties involved in the apportionment appear in the Valuation Roll enforced before 1 April 1989; and (3) one or more of the properties constitutes dwellings, then the reference is to be construed as being a reference to whatever value appears in the Valuation Roll in force immediately before 1 April 1989. That is fine in so far as it goes but, as ever, the devil is in the detail.

If there are properties which have been altered or improved in whole or in part or, indeed, where a ground floor commercial property has been converted into residential use problems can arise. In such latter circumstances as the

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[1] *Tenements (Scotland) Act 2004 S4(6) and Rule 4 of the Tenement Management Scheme set out in Schedule 1*
[2] *Local Government Finance Act 1992 s.111*

Memorialists correctly state, there is no way of recognising either the various changes which may have taken place since 1989 which might have impacted on rateable values, had such method of collecting local taxation still been possible, or in seeking to identify what the amended rateable value of the now residential property would have been. In such circumstances, it is understandable why proprietors and their solicitors, surveyors or property factors often seek to identify a fairer mode of allocation of costs. If all relevant proprietors agree to proceed in a new manner then all is well – although I would recommend that an appropriate Minute of Agreement or Deed of Conditions be entered into by all the proprietors in order to document their consent to such an alteration to the terms of their title deeds and that that document then be registered in the Land Register and be applied to the titles of all relevant properties in terms of the Title Conditions (Scotland) Act 2003. Unfortunately, as the Memorialists state, it is often impossible to achieve unanimity as to the need for works of repair and/or renewal to be carried out, let alone them agreeing to an amended method of calculating the responsibility of individual proprietors and their successors in title.

3.5 As mentioned above, over the years, there have been attempts to vary the proportions of common charges where, post-1989, there have been sub-divisions or amalgamations or changes from residential to commercial use and vice versa in circumstances where the method of calculating common charges was originally based on gross annual value or rateable value. In some cases, this has led to applications being made to the Lands Tribunal for Scotland. Apparently however, the Lands Tribunal have had doubts as to whether they have competence to vary.[3]

3.6 The salient issue here is that the position stated in title deeds as regards an assessment on a rateable value or assessed rental basis can, and often does, produce results that are unfair. This can arise when a property is sub-divided or the use thereof changes over time as mentioned above. This unfairness is further highlighted by reason of the additional cost incurred in seeking to establish what

[3] *See Kennedy v Abbey Lane Properties 29th March 2010 Lands Tribunal; Patterson v Drouet 20th January 2011 Lands Tribunal referred to in the Letter of Instruction and additional reference below; Reid and Gretton, Conveyancing 2010 100-102*

the position was as at 1 April 1989 as mentioned in the Letter of Instruction. Such information used to be provided without any cost being incurred. Times have changed however and it is now common for local authorities to seek to recover a charge for producing the relevant information. It is questionable however as to how much use such information is if, as is often the case, the nature of all the properties has changed in whole or in part in the intervening period since 1989. It can, by necessity, only ever give a note of the position as it was immediately prior to that date. I understand that certain local authorities may also offer a service whereby they determine what the rateable value of an altered property or properties would have been. There is, as far as I am aware however, no statutory warrant for this and the resultant values would not have the status of rateable values in the legal sense.

3.7 As the Memorialists themselves indicate and as noted above, this matter has come before the Lands Tribunal relatively recently.

In *Kennedy v Abbey Lane Properties*[4] the proprietor of commercial properties on the ground floor of a residential building comprising 32 units sought to alter the share of common charges (4.5%). This application however was made not on the basis of a gross annual value argument but on the basis of a benefit v burden argument.[5] The commercial subjects had to contribute to maintenance of a common entrance only for the flats and stair. The Tribunal refused the application.

In *Patterson v Drouet* [6] the title provided for an allocation of common charges based on rateable value. Accordingly the proportions were fixed as at 1 April 1989 when domestic rates were abolished. In the *Patterson* case, the flat in question had been in *commercial* use in 1989 and so it was stuck with a high rateable value despite the fact that it had since then been converted into a residential property. Obviously if domestic rates had continued to be the method of local taxation the rateable value would have been altered to reflect domestic use. The owners of the two ground flats applied to have their liability reduced.

[4] *29th March 2010 Lands Tribunal*
[5] *In terms of Title Conditions (Scotland) Act 2003 s.100*
[6] *20th January 2011, Lands Tribunal and www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2012.01.html*

The owners of the upper flats opposed the application. The argument for variation was based on change in circumstances.[7] The Tribunal decided that the application should be granted on the merits. The applicants sought to reduce their liability from 75% to 30%. As Reid and Gretton point out however,[8] the Tribunal does not have any power to vary burdens in relation to properties *other* than the property which is the subject of the application. What then would happen to the 45% which was formerly allocated on the ground floor premises? It might be assumed that that would then be redistributed among the other flats but Reid and Gretton wondered about this. Their view was that if the application were ultimately granted, although it might result in a new obligation being imposed on the other flats, there was no new real burden as such. If there was an unallocated 45% then the TMS would apply and that would not be a new burden imposed by the Tribunal. In another case, [9] the Tribunal again had concerns about the competency of the application.

It has been suggested that as an alternative to a Tribunal application, an attempt should be made under Section 91 of the 2003 Act to vary the community burden by an application by the owners of a quarter of the units. The problem of course here would be getting the other owners to agree. As matters stand therefore, it would appear that the Lands Tribunal might well grant such an application on the merits having concluded in the *Patterson* case that the application was competent. By necessity however, this would involve an application having to be made to the Lands Tribunal with the associated cost and delay involved. One also has to have regard to the fact that each case is fact-specific and a different decision could be arrived at in another application. Accordingly, what conclusion can be drawn from the decision in the *Patterson* case?

3.8 That, in essence, is the nub of the matter. In cases where the titles provide for an allocation on a rateable value basis then that is what must be applied in the absence of agreement to the contrary. It would be tempting to conclude that if a title to an individual flat provides for a burden of repairs *ex facie* based on rateable value then a solicitor need go no further to identify what all the rateable

[7] *Factor (a) in terms of Section 100 of the 2003 Act*
[8] *Reid and Gretton, Conveyancing 2010 100-102*
[9] *A Murray & Sons Limited v Munro and Others 18th April 2011 Lands Tribunal LTS/TC/2008/27*

values in the block actually are. The argument being that if this formula is deemed equitable in principle then one need not identify the shares in detail as they will simply be what they are and have to be taken as "fair". I cannot agree that that is a valid answer to the question posed of me however for the reasons noted above. It is therefore recommended that solicitors seek to determine the situation both as per the title deeds and also on the ground in respect of altered use patterns or the nature of alterations to individual properties (in so far as same can be ascertained of course) and communicate the result of these findings to their clients and other interested parties as the case may be. This is an inherent part of the examination of title process when a client is purchasing a flat in a tenement property. It might, for example, be the case that the title of a ground floor property in residential use which is burdened in the title deeds by a higher proportion of the cost of repairs/renewals to common parts by virtue of the property having previously been in commercial use in 1989 could be deemed not to be valid or marketable by reason of that burden. Such a conclusion could only be arrived at after a consideration of all the facts and circumstances however. That, in my opinion, represents good professional practice.

It is, I suggest, going too far to assume that in such circumstances, an application to the Lands Tribunal would be successful in every case. In *Patterson* for example, certain of the parties were not legally represented and the Tribunal endeavoured to make allowances for that fact. In addition, it is, in my opinion, unsafe to assume that the various proprietors or the relevant local authority would always agree among themselves to share such costs on an equal basis.

In essence, the whole issue of common repairs in practice comes down to communication among the proprietors themselves. I would suggest that it is in the interests of all proprietors for there to be certainty as to the method of allocating repair/renewal costs and, if at all possible, that that allocation should be fair and representative of the situation on the ground. As the Memorialists will no doubt agree however, fairness is sometimes illusory. For a commentary on this general issue see the undernoted article by Professor Robert Rennie.[10]

[10] *See Rennie, Counting the Cost in Tenements 2009 SLT (News) 137*

3.9 Accordingly, each case must be addressed on its own facts and circumstances and if a manifestly unfair position results because of allocation being on a rateable value or assessed rental basis according to the titles, then the various proprietors should discuss the matter and consider adopting the TMS. It is not, I suggest, for solicitors to second guess what the outcome of such a discussion might be.

3.10 I have nothing further to add.

Date: 13 August 2015

Signed:

Insert Letter of Instruction