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Dear Professor Brymer

Common Repairs and Rateable Values

I am writing in my capacity as the present Chair of the Edinburgh Conveyancer's Forum. Our members have asked me to seek a Professorial Opinion in relation to best practice in the context of common repairs and allocation of costs based on rateable values.

The point is probably fairly narrow but it is an issue causing a degree of debate amongst members where appropriate guidance may be beneficial.

Firstly, purely by way of background, I would make the following comments:-

1. It is accepted as a matter of law that it remains a valid basis for apportionment of common repair costs to have this based on a formula according to those rateable values allocated to each individual property within a larger building (or indeed assessed rental being the older formula in that regard). It would be agreed that provided an allocation based on this formula covers 100% of repair costs, that such a title arrangement would take priority over the default provisions of the Tenements (Scotland) Act 2004.

2. In practice, however, in order to identify what are now historic rateable values, information for Edinburgh properties is obtained on application to the Lothian Assessor's Office where, at present, a charge of £30 is made for the provision of a letter giving this information. Such information is not available online and application can only be made in writing on payment of the said sum. Although such a sum is not significant by itself, multiple applications across the whole profession over a year we believe will amount to a sizeable figure. In addition, this takes no account of the additional work and inconvenience caused to members in seeking and obtaining this information.

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3. Notwithstanding the availability of this information at a cost or otherwise, it is believed that reliance on the rateable values as a basis for apportionment of costs in practice is now virtually non-existent. It should be noted that the City of Edinburgh Council in the context of statutory repair schemes did utilise rateable values for apportionment of costs but ceased this practice many years ago in order to replace it with a simple equal share basis. The current consensus amongst Forum members would be that virtually all repair schemes within the context of the tenement are now dealt with on an equal share basis without reference to rateable values (or indeed historic feuduties or other similar method).

4. It is noted that the last re-valuation of residential properties for the purposes of rates was in 1985 ie. some 30 years ago. There is therefore a growing feeling that reliance on such historic figures is no longer appropriate certainly in practice if not in theory. This view is reinforced by the recent decision of the Lands Tribunal in the case of Patterson and Others v. Drouet and Others decided in 2012 . Although the case, as always, was specific on its facts, in essence the Tribunal recognised that a change of circumstances (particularly change of use) of certain properties within a larger building were grounds for variation of the titles to the extent that allocation of costs based on rateable values was no longer appropriate. It would be accepted that the change of circumstances there was significant in that it related to the change of authorised use of commercial premises to residential whereby the original use had resulted in a substantially higher level of rateable value being levied on the property.

5. It would be submitted, however, that although change of use like this would be relatively rare, there would in many cases have been substantial alterations to tenemental properties over the last 30 year period which would in normal cases have resulted in a considerable revaluation for the purposes of rates. Although it is not an area of our expertise it is understood that rateable values were assessed based on their facilities and amenities eg. central heating, kitchen provision etc. Stating the obvious, many properties in the last 30 years have been upgraded, extended, altered, sub-divided or such like. As a result of the passage of time, it is believed that there are relatively few tenements which are in the same condition today as they were in 1985 when the last valuation was carried out.

The concern expressed by members, therefore, is that reliance on rateable values as the correct formula for common repair liabilities is increasingly hard to justify in principle as well as practice (and is becoming increasingly akin to reliance on historic feuduties). Linked to that is the ongoing direct costs and inconvenience of ascertaining exactly what historic rateable values may be.

Accordingly, therefore, the Forum would appreciate your views as to what would be appropriate good practice in this regard for the benefit of both solicitor members and, of course, our clients.

Your thoughts on this matter will be gratefully appreciated.

Yours sincerely

Ross MacKay
Chair
Edinburgh Conveyancers Forum