

# Housing and Property Chamber

## First-tier Tribunal for Scotland



### Decision on homeowner's application:

**Property Factors (Scotland) Act 2011 Section 19(1)(a)**

**Chamber Ref:** FTS/HPC/PF/19/4014

**Property at 15 Rosebank Tower, Cambuslang, South Lanarkshire G72 7HE ("the Property")**

**The Parties:-**

**Gerald Boyd, 19 Tanzieknowe Road, Cambuslang, South Lanarkshire G72 8RD ("the Applicant")**

**South Lanarkshire Council, Property Services, Pollock Avenue, Hamilton, South Lanarkshire ML3 9SZ ("the Respondents")**

**Tribunal Members:-**

David Bartos	- Chairperson, Legal member
Elizabeth Dickson	- Ordinary member

### DECISION

1. The Respondents have failed to issue to the Applicant quarterly statements of common charges for Rosebank Tower of which the Property forms part with a notification that the management fee element of said charges is divided by seventy-two, as set out in the Deed of Conditions covering the Property which is a failure to carry out a property factor's duty as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

### Introduction

2. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; and the rules in schedule 1 to the First-tier Tribunal for

Scotland Housing and Property Chamber (Procedure) Regulations 2017 are referred to as "the Rules".

3. By application received on 18 December 2019, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") for a decision that the Respondents had failed to comply with certain property factor's duties owed to him. In particular he alleged that the Respondents had breached their duties in not issuing him with a statement of common charges which includes a 1/72 share of the Respondent's management fees for the tower of which the Property forms part and that on a quarterly basis;
4. The application included a separate continuation sheet which provided more detail.

### **Findings of Fact**

5. Having considered all the evidence, the Tribunal found the following facts to be established:-
  - (a) Rosebank Tower is a residential tower block in Cambuslang, South Lanarkshire. It has 72 flats within it including the Property. The Property is a flat number 15. The Property includes a share of the common parts of the block. Nineteen of the flats, like the Property, are owned by private owners ("the Private flats"). The other 53 flats are owned by the Respondents and let out by them ("the Council flats")
  - (b) The Applicant and his wife are co-owners of the Property. He does not reside there. The Property was first registered in the Land Register on 1 September 2008.
  - (c) The Respondents have acted as factors for the Private flats within Rosebank Tower since they succeeded Glasgow District Council as owners of the Council flats following local government reorganisation in 1996.
  - (d) The Respondents are a registered property factor in terms of the Property Factors (Scotland) Act 2011. They have issued a number of Statements of Services to the Applicant in connection with the Property.



These have included Issue 6 issued in or about January 2018 (production A23) and Issue 10 issued in or about September 2019 (production A2).

(e) The Tower, including the Property is burdened by a Deed of Conditions ("the Deed") registered in the Land Register of Scotland on 15 January 1993. Its terms are set out in the Burdens Section of the Applicant's title LAN202039 on pages D1 to D16.

(f) In the Deed, the Respondents are referred to as the "Factor" and Rosebank Tower is referred to as the "Property". The Deed also states in clause 1 (5) :

" 'Main Building' means the block comprising the dwellinghouses' "

Clause 11(b)(iv) of the Deed indicates that a "dwellinghouse" as referred to in the Deed can be a Council flat.

(g) In the Deed clause 6(c) states:

"The proprietor or proprietors of each dwellinghouse in the Property shall be liable, jointly with the proprietors of all other dwellinghouses in the Property, for payment as herein provided of charges in respect of the heating provided by the common central heating system . . . and of all other Common Charges in the proportion of one equal share in respect of each dwellinghouse."

(h) In the Deed clause 6(e) states:

"As soon as reasonably practicable after the end of each Quarter, the Factor shall prepare a Statement of the Common Charges incurred in respect of that Quarter and shall furnish a copy thereof to each of the proprietors of dwellinghouses in the Property. The proprietor of each dwellinghouse in the Property shall make payment to the Factor of the proportion of the Common Charges payable in respect of that Quarter . . . (i) within ten days after the commencement of each Quarter, a sum notified by the Factor to each proprietor from time to time approximately equivalent to the proportion of Common Charges estimated by the Factor as payable by such proprietor. . . ."

(i) In the Deed clause 1(6) defines "Common Charges". The definition is dealt with later in this decision.

(j) Up to the time of this decision in their quarterly statements to proprietors of the Private Flats the Respondents divided "common repair" charges and "general block" charges for the Tower between all 72 dwellinghouses. Proprietors of Private flats such as the Applicant required to pay a one seventy-second share of such charges.

- (k) In contrast the Respondents charged only the 19 owners of Private flats with the "management fee" or "factoring charge". The overall cost of the management and administration of the Tower was not apportioned to all of the dwellinghouses in it.
- (l) The management fee was charged to homeowners such as the Applicant to cover costs for services as set out in the evidence of David Keane noted below.
- (m) In February 2019 the Applicant sent an e-mail to the Respondents querying which individual elements made up the factoring management fee that he was being charged in respect of the Property. He also asked about how many of the dwellinghouses in the Tower were contributing to the management fee. In March 2019 the Respondents provided the Applicant with a statement (production A20) indicating that the fee including staffing and general administration and costs of instructing repairs.
- (n) At a meeting of the Tower's Property Committee on 29 May 2019 the Respondents provided the Applicant with a further statement (production A21) which indicated that the Respondents did not bear any management fee in respect of the Council flats.
- (o) In his e-mail to the Respondents dated 6 June 2019 at 7.53 hrs the Applicant took issue with the distinction in shares charged for common repairs and block repairs on the one hand and the management fee on the other hand. He relied on the title deeds which appeared to require these elements to be charged with all flats bearing an equal share.
- (p) By e-mail dated 1 July 2019 to the Respondents the Applicant made a formal complaint that the Respondents were in breach of their property factor's duty to charge homeowners a one seventy-second share in respect of management fees as well as common or block repairs.
- (q) By e-mails dated 30 October and 7 December both 2019 to the Applicant, the Respondents rejected his complaint. The last of these indicated that it concluded stage 2 of the complaints process and advised the Applicant that if he remained dissatisfied his remedy was to apply to the Tribunal.

### **Procedure**

- 6. The President of the Housing and Property Chamber of the First-tier Tribunal for Scotland referred the application to the present Tribunal for its



determination. This was notified to the parties by letters from the Tribunal's casework officer dated 10 January 2020 which also invited the parties to make written representations to the Tribunal and to lodge supporting documents known as productions. Given a delay in the notification to the Respondents they were given additional time for written representations. They made two sets of written representations, the second being in response to the Tribunal's direction dated 10 February 2020. There were no written representations from the Applicant. Both parties lodged productions in support of their cases, those of the Applicant being prefixed by "A" and those of the Respondent being prefixed by "R". The Tribunal notified the application, representations and productions to the party not lodging them.

7. A hearing was fixed to take place at Room 108, Glasgow Tribunals Centre, 20 York Street, Glasgow G2 8GT on 28 February 2020 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by the said letters dated 10 January 2020. The hearing took place at the venue and on the date and time fixed. The Applicant attended the hearing. Elaine Paton, solicitor, of the Respondents' Administration and Legal Services Department attended also along with David Keane the Respondents' Factoring Manager who was a witness.

### **Evidence**

8. The evidence before the Tribunal consisted of:-
  - The application form and its continuation sheet
  - The Applicant's 26 productions with an inventory
  - The Respondents' 8 productions (covering 60 pages in all) with an inventory
  - The oral evidence of the Applicant
  - The oral evidence of David Keane, Factoring Manager, South Lanarkshire Council.

### **The Hearing**

9. The Tribunal found that the Applicant gave oral evidence honestly. It as not controversial and was accepted. The Tribunal found Mr Keane gave oral evidence honestly. The Tribunal accepted his evidence which it found to be helpful in clarifying the Respondent's procedures. In so far as there might be any conflict between the Applicant and Mr Keane as to the Respondent's charging practices and the background to them, the Tribunal preferred Mr Keane, he being better placed to comment on them.

### **Duty to issue bills with properly apportioned management fee**

#### *Applicant's Submission*

10. At the outset of the hearing the Applicant provided the Tribunal and Mrs Paton with a written submission. There was no objection from Mrs Paton to this being used. The Applicant submitted that the Respondents breached their duty under clause 6(e) of the Deed of Conditions to issue him with a quarterly statement of common charges incurred by the Respondents in respect of the quarter which required to be borne by the owners of all 72 flats in the Tower. He submitted that the difficulty lay with the management fees which the Respondents set out in their statements as being part of the common charges. He submitted that the Respondents' quarterly statement under the Deed required to set out the "Common Charges" as defined in clause 1(6) of the Deed. That provided:

"In this Deed . . . (6) "Common Charges" means and includes :-

- (a) The whole expense incurred from time to time in respect of the repair, maintenance and renewal and any authorised improvement of the Common Parts;
- (b) Any charges in respect of heating provided by the common central heating system;
- (c) The remuneration of the Factor and the reimbursement to him of any expenses properly incurred by him in performing his duties in relation to the Property;
- (d) The remuneration of the Caretaker . . .
- (e) Any expense incurred by the District Council in the exercise of their rights under clauses 5 or 11 hereof; and



- (f) Any other expenses, however arising, in relation to the Property which in the opinion of the Factor should properly be borne by all the proprietors of dwellinghouses in the Property”.

11. The Applicant submitted that the only head under which the Respondents could claim management fees as part of the common charges was that of head (c) of clause 1(6). That head referred to the “remuneration” to which the Factor was entitled under clause 9(b) of the Deed. Clause 9(b) gave a Factor entitlement to remuneration to be determined by those entitled to appoint him. The Applicant submitted that as the appointment contemplated by the Deed related only to the Tower, the remuneration in turn must relate to the general management and administration of the Tower only. Alternatively, if a management fee was not “remuneration” it fell under the second, “reimbursement of expenses properly incurred” part, of clause 1(6)(c). On either view it was a “Common Charge” and as such fell to be borne by each of the 72 flats pursuant to clause 6(c).
12. The Applicant told the Tribunal that his investigations with the Respondents had revealed a practice whereby block charges and repairs including caretaker fees were ascertained for Rosebank Tower and were divided between the 72 flats. However the Respondents’ e-mail to him of 5 June 2019 revealed an inconsistency in that the management fee was ascertained for all 8,518 properties apparently factored by the Respondents across their local authority area and then divided by all 8,518 private owners. This was inconsistent. He accepted that he received quarterly statements but disputed the legality of him as a private owner being asked to bear only a one nineteenth share of the management fee.
13. The Applicant submitted that clause 1(6)(d) of the definition of “Common Charges” included the caretaker’s remuneration. That was the remuneration for the caretaker for the Tower. The Respondents’ own management fee should be equally restricted to their management of the Tower. Both elements would then fall to be divided by the number of flats, namely 72

pursuant to clause 6(c) of the Deed, to give the amount payable by a Private flat such as the Property.

14. Another inconsistency was with Tower repair charges which fell under clause 1(6)(a) of the "Common Charges" definition. Again these were split equally between 72 flats. Why he asked, should the management fee be treated differently ? Finally the Applicant submitted that he was seeking nothing more than he was entitled to under the various written statements of services ("WSS") issued by the Respondents. Thus in the WSS issued in January 2018 (production A23) informed him on page 3 in section 3 that,

"These charges [factoring charges] are reviewed annually and reflect the cost of providing this service"

being that mentioned in section 2 of management and administration of parts, areas and services commonly owned within the block and,

"the Title Deeds for a property will provide conditions relating the management and maintenance of common parts, how decisions are to be taken how costs are to be apportioned between owners and how arrangements are to be made for paying for maintenance."

The WSS issued in September 2019 (production A2) informed him in section 3 on page 3 that the deeds for the block would confirm owners' responsibilities for payment of service charges and management fees and on page 4 that,

"Our [management] fee represents the cost of administration and carrying out of the property management duties highlighted in this guide. The management fee is reviewed annually to make sure that it covers the cost of providing this service and a flat rate management fee is calculated and applied to our customers factoring accounts."

Thus submitted the Applicant, the WSS both made it clear that the fee should reflect the cost of providing the service to the commonly owned parts of his block and not other blocks and that owners' responsibility to pay would be in accordance with the title deeds including the Deed of Conditions.



*Respondents' Submission*

15. For the Respondents Mrs Paton explained that the Private Flats and the Council Flats were administered by the Respondents separately. The Respondents did not require to communicate with the proprietors of the Council Flats since the Respondents themselves were the proprietors. The Applicant was charged the same management fee as the other proprietors of the Private Flats. The Respondents met expenditure relating to the Council flats in the Tower from its general income derived from its estate management services. As registered social landlords, the Respondents were not entitled to use income from their tenants to assist in the provision of factoring services to private homeowners.
16. Mr Keane testified that the Respondents' customers are homeowners. He spoke to how the annual factoring (or management) fee was calculated and referred to the documents in production R8 (pages 59 & 60) which he had prepared. The Respondents calculated their costs covering all 8,518 properties which they factored. These costs were divided into (a) direct costs; and (b) shared costs. The "direct costs" covered factoring staff, central support (e.g. office information technology), direct administration (e.g. postage, stationery, printing ink), service management, debt recovery staff. The "shared costs" covered inspections and instructions of work, housing and investment team costs, housing support costs, health and safety inspections in relation to common works, homeowners' enquiries (e.g. as to anti-social behaviour), disputes with homeowners, and property council and property committee meetings where these are required (as in Rosebank Tower).
17. The direct costs and shared costs respectively were then divided equally between all 8,518 factored properties to give annual figures of £67.81 per property for direct costs and £49.51 per property for shared costs. The sum of these then gave a factoring (or management) fee of £117.32 per private factored property for the year 2019/2020. That figure would then be divided by four for the quarterly statements issued to homeowners such as the Applicant.

18. Mr Keane explained that it would be a costly exercise to have to re-allocate the direct and shared costs to Rosebank Tower. There would have to be a consequential re-allocation for other blocks of properties factored by the Respondents.
19. Turning to the common repair works instructed for the Tower, Mr Keane referred to production R7 (pages 57 & 58) where he clarified that the column "Value of bills issued" referred to the value of bills issued per Private Flat and the column "Total repair charges billed" referred to the total repair charges billed to Private Flats. The column "No of jobs billed" referred to the number of individual repairs billed to Private Flats. On the other hand the column "Cost per flat" referred to all flats in the Tower. This indicated that the Private Flats such as the Property received a subsidy in respect of the repairs carried out to the Tower as a whole as it was the Respondents' policy not to issue bills to their owners where the sum due was less than £5.
20. Against the background of Mr Keane's evidence as to the "direct" and "shared" costs making up the "management fee", Mrs Paton took issue with the management fee being part of the "remuneration of the Factor" in terms of clause 1(6)(c). She submitted that the Respondents could not be entitled to "remuneration" for their factoring services as this was prohibited by local authority law. She did not refer to any statutory provision in support of this. When asked by the Tribunal about whether the costs spoken to by Mr Keane could fall under the last part of clause 1(6)(c), namely "the reimbursement to [the Factor] of any expenses properly incurred by him in performing his duties in relation to the Property", Mrs Paton had nothing to add. Mrs Paton had no submission in relation to the point about the WSS. She accepted that they had been issued as stated by the Applicant.
21. Mrs Paton explained that the reason for the distinction between the management fee and the other charges was that which the Council flats gained benefit from the other charges they did not gain benefit from the management fee. Services to the Council tenants within the Tower were provided by other sections of the Council. The services described by Mr



Keane were purely for the benefit of the Private flats and the Council flats gained no benefit from them. She submitted that the Respondent's approach to the factoring fee gave owners of the Private flats in the Tower the advantage of the Respondents' economies of scale. There was also a cross-subsidy of Private flats in tower blocks who generally received more services than factoring customers in more traditional buildings.

*Applicant's Submission in Response*

22. In response the Applicant emphasized that if the management fee was not part of Common Charges as 'remuneration' under clause 1(6)(c) the services mentioned by Mr Keane could be comprised under the second part of clause 1(6)(c) i.e. as an expense properly incurred. He adhered to his position that cost of these factoring services should be calculated on a Tower basis and then divided by 72. He did so accepting that the outcome could be that the management fee payable by himself, and other owners of Private flats in Rosebank Tower could be higher than under the Respondents' current charging process. However if that was the effect of the Deed which governed the common charges that the Respondents could charge as factors, the Respondents had a duty to give effect to it.

*Decision*

23. The Tribunal gave careful consideration to the submissions. It could see the force of the Respondents' submissions. It acknowledged the evidence from Mr Keane in relation to the exercise of re-allocating the factoring costs spoken to by Mr Keane to individual blocks of commonly factored communities such as Rosebank Tower. However the task of the Tribunal was to decide whether there had been a breach of the Respondents' legal duty as property factors.
24. The only duty founded on was that in clause 6(e) of the Deed which obliged the factor to issue quarterly to "each of the proprietors of dwellinghouses in the Property" of a copy of a "Statement of Common Charges" incurred in

respect of the previous quarter together with a notification of the proportion of those charges payable by the proprietor in question.

25. There was no dispute that the Respondents carried out various factoring services for the proprietors of the Private Flats in Rosebank Tower as described by Mr Keane. Equally it was undisputed that these involved a cost to the Respondents as factors.
26. The Applicant's position was that the "Common Charges" referred to in the duty to provide the statement included all of the items within the definition of "Common Charges" in clause 1(6)(c) of the Deed. That definition read,
 

"The remuneration of the Factor and any reimbursement to him of any expenses properly incurred by him in performing his duties in relation to the Property [i.e. Rosebank Tower]"
27. Whilst the Tribunal had not been given any local authority law in relation to local authorities being prevented from obtaining remuneration for factoring services, the Tribunal was prepared to accept that the management fee was not "remuneration" in terms of clause 1(6)(c). However the cost of the services spoken to by Mr Keane as falling within the management fee fell within clause 1(6)(c) as "expense properly incurred by the factor" provided that the services related to the Respondent's duties in relation to Rosebank Tower and not other factored communities. The Tribunal accepted the Applicant's submission that cost of those services was thus a "Common Charge" in terms of the Deed.
28. It followed from this that the Respondents had a duty under clause 6(e) (as read with clause 6(c)) to issue a Statement of Common Charges which included the "direct" and "shared" costs mentioned by Mr Keane apportioned to Rosebank Tower together with a notification that the proprietor in question pay a one seventy-second share of all Common Charges including those costs but excluding common central heating costs.
29. The Tribunal could see that this might require the Respondents as proprietors of the Council flats to bear the cost of some services for which



the Respondents or their tenants in those flats gained no benefit. However the provision of clause 6(c) of the Deed was clear, namely that all dwellinghouses had to bear the "Common Charges" equally with the exception of common central heating. That formed part of the legal basis of the Respondent's appointment as factors and it required to be followed.

30. The Tribunal concluded that by issuing statements and notifications to Private Flat proprietors requiring payment of other than a one seventy-second share of the management (or factoring) fee for services to Rosebank Tower, the Respondents had breached their property factor's duty under clause 6(e) of the Deed.

#### **Proposed Property Factor Enforcement Order**

31. Having decided that the Respondents has failed to carry out their "property factor's duty" as set out above, the Tribunal proposes to make a property factor enforcement order in terms of the document accompanying this decision.
32. The Applicant did not seek any remedy relating to past statements of common charges and notifications that he had received. He was not looking for any monetary remedy. His request was that future bills from the Respondents divided all charges by seventy-two, including the management fee. He indicated that there was no urgency over this and would be satisfied if matters were put into order from the first quarter of 2020.
33. Mr Keane told the Tribunal that if the Respondents were to change their practice in billing the management fee for Rosebank Tower it would require them to look at all of the deeds of conditions affecting blocks that they factored in order to allocate the costs to each block and then to divide in accordance with the fractions in the deeds. He indicated that the financial year of the Respondents ran from 1 April to 31 March. Annual notification letters had been sent to all homeowners to whom they provided factoring services.

34. The Tribunal's proposal seeks to remedy the breach in erroneous billing while giving a reasonable time for the Respondents to alter their practice to avoid the breach that has been found.

### **Court proceedings**

35. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

### **Opportunity for Review, Representations and Rights of Appeal**

36. The Applicant and Respondents may seek a review of and make representations to the First-tier Tribunal on this decision and the proposal. Any request for a review or the making of such representations must be made in writing to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.
37. The Tribunal is conscious that since the hearing the COVID-19 crisis has broken out in Scotland. That could affect both (a) the time within which it may be reasonable for the Respondents to change their billing practice for management fees; and (b) the parties ability to make representations on that matter. For these reasons the Respondents are at liberty to make representations on any effect of the COVID-19 crisis on their ability to comply with the proposed time limit. The Applicant will be given an opportunity to respond to any such representations. If there is a difficulty with either party meeting the 14 day limit for representations due to the crisis, they are at liberty to apply to the Tribunal for an extension of that time limit, giving specific reasons.
38. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence on the clause 6(e) issue, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request for a review and written representations a request



for such a hearing giving specific reasons as to why written representations would be inadequate.

39. If the First-tier tribunal remains satisfied after taking account of any representations that the Respondents have failed to comply with their duties, it must make a property factor enforcement order.
40. **In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.**
41. **All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.**

Signed .... Legal Member and Chairperson

.....5 April 2020..... Date