Upper Tribunal for Scotland

[2021] UT 24
UTS/AP/20/0014

DECISION NOTICE OF SHERIFF IAIN FLEMING

ON AN APPLICATION TO APPEAL

in the case of

SOUTH LANARKSHIRE COUNCIL, Legal and Administration Services, Council Offices, Almada Street, Hamilton, ML3 0AA
per South Lanarkshire Council, South Lanarkshire Council Advcoate, Legal and Administration Services, Council Offices, Almada Street, Hamilton, ML3 0AA; unknown, Hamilton, ML3 0AA

Appellant

and

MR GERALD BOYD, 19 Tanzieknowe Road, Cambuslang, G72 8RD

Respondent

FTT Case Reference FTS/HPC/PF/19/4014

11 May 2021

Decision

[1] The appellant is South Lanarkshire Council (hereafter "the appellant"). The respondent is Mr Gerald Boyd (hereafter the "respondent") who resides at 19 Tanzieburn Road, Cambuslang Lanarkshire G72 8RD and who is the heritable proprietor of the subjects known as and forming 15 Rosebank Tower, Cambuslang Glasgow G72 7HE being the subjects registered in the Land Register for Scotland under Title Number LAN 202039. As such the respondent is the homeowner of the subjects. This is an appeal by the appellant

following a hearing on 28 February 2020 and a subsequent written decision dated 5 April 2020 by the First-tier Tribunal (Housing and Property chamber) (hereafter "the tribunal") whereby it found that the appellant had breached its duties as a factor in terms of section 17(5) of the Property Factors (Scotland) Act 2011 (hereafter "the 2011 Act"). The tribunal held that the appellant ought to have provided quarterly statements to the respondent which divided the property management fee element of common charges by 72, as is required by the title deeds to the property. Thereafter a Property Factors' Enforcement Order was granted (hereafter "the PFEO") which is also the subject of appeal. The tribunal issued a written decision setting out Findings in Fact and the reasons for its decision.

[2] The tribunal hearing took place on 28 February 2020. The appellant was represented by Ms Elaine Paton, solicitor, of its Administration & Legal Services Department. The respondent represented his own interests. The tribunal heard evidence from the respondent and from Mr David Keane, factoring manager of the appellant. The tribunal also had regard to the application form and its continuation sheet, and to the Inventories of Productions which were lodged by both appellant and respondent. Following the evidence and submissions by the appellant and the respondent the tribunal made Findings in Fact, which fully amplify the factual background.

[3] By email dated 12 May 2020 the appellant submitted an application for permission to appeal against the original decision of the tribunal dated 5 April 2020. The appellant moved the Upper Tribunal (hereafter "the UT") to quash the tribunal decision of 5 April 2020 and the consequent PFEO. On 13 May 2020 permission to appeal was granted by a differently constituted First-tier tribunal (hereafter "the FtT").

[4] The grounds of appeal in respect of which permission was granted can be divided into five general headings, adopting the sequence presented by the FtT:

- An incorrect interpretation by the tribunal of the relevant title conditions.
- An unfair and unreasonable result arising from that incorrect interpretation by the tribunal.
- The existence of a conflict between the tribunal's interpretation of the title conditions and the obligations of the appellant under the Housing (Scotland) Act 1987.
- The title and interest of the respondent to raise the initial application.
- The overriding practical considerations in the public interest as to why the appeal should be allowed.

[5] The Findings in Fact as found to be established by the tribunal are detailed in full for practical context. Although permission to appeal was restricted to the listed issues Mr Upton, who presented the appeal for the appellant, developed his submission to include argument in relation to the adequacy of the tribunal's fact finding and reasoning and more tentatively in relation to acquiescence. To avoid confusion and mindful of the fact that there is potential confusion between the nomenclature adopted in the Findings in Fact and the Deed of Conditions. I have referred to the appellant and respondent in their current context. In order to avoid further confusion I have referred to the respondent's flat as the property and reference to the tower block within which the property is situated as Rosebank Tower.

Findings in fact

(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 a private owners ("the

Private flats"). The other 53 flats are owned by the respondent and let out by them ("the Council flats").

(b) The respondent 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 appellant 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 re-organisation in 1996.

(d) The appellants 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 respondent in connection with the property.

(e) The Tower, including the property, is burdened by a Deed of Conditions ("the Deed") registered in the Land Register for Scotland on 15 January 1993. Its terms were set out in the burden's section of the respondent's Title LAN202039 on pages D1-D16.

(f) In the Deed, the appellant is referred to as the "factor" and Rosebank Tower as "the property". The Deed also states in clause 1(5): "The main building" means the block comprising the dwellinghouses. Clause 11(b)(iv) of the Deed indicates that "dwellinghouse" as referred to in the Deeds can be a Council flat.

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

> "The proprietor or proprietors of each dwelling house in Rosebank Tower shall be liable, jointly with the proprietors of all other dwellinghouses in Rosebank Tower, for payment as herein provided with charges in respect of the heading 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 Rosebank Tower. The proprietor of each dwellinghouse in Rosebank Tower shall make payment to the factor of the proportion of the common charges payable in respect of that quarter..(i) within 10 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 appellants divided "common repair" charges and "general block" charges for the Tower between all 72 dwellinghouses. Proprietors of private flats such as the respondent require to pay a 1-72nd share of such charges.

(k) In contrast the appellants charged only the 19 owners of private flats the "management fee" or "factoring charge". The overall cost of the management to the 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 respondent to cover costs of services set out in the evidence David Keane noted below.

(m) In February 2019 the respondent sent an email to the appellants querying which individual elements made up the factoring management fee that the respondent 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 appellants provided the respondent with a statement

(production A20) indicating that the *(sic)* fee including staffing and general administration, the cost of instructing repairs.

(n) At a meeting of the Tower's Property Committee on 29 May 2019 the appellants provided the respondent with a further statement (production A21) which indicated that the appellants did not bear any management fee in respect of the Council flats.

(o) In his e-mail to the appellants dated 6 June 2019 at 7.53 hours the respondent 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 appellants the respondent made a formal complaint that the appellants 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 respondent, the appellants rejected his complaint. The last of these indicated that it had concluded stage 2 of the complaints process and advised the respondent that if he remained dissatisfied his remedy was to apply to the tribunal.

[6] The Findings in Fact refer to a definition of the common charges within the Deed of Conditions. This is addressed within paragraph 10 of the written decision of the tribunal. The definition of common charges within clause 1(6) of the Deed is as follows:

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 unauthorised 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 Rosebank Tower;

(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 Rosebank Tower which the opinion of the factor should properly be borne by all the proprietors of the dwellinghouses in Rosebank Tower.

[7] The tribunal made it clear that it accepted the evidence of Mr Keane (tribunal decision Paragraph (9).) The evidence of Mr Keane is narrated in paragraphs 16, 17 and 19 of the decision. These are as follows:

> "[16] The appellants' customers are homeowners. Mr Keane spoke to how the annual factoring (or management) fee was calculated and referred to the documents and production R8 (pages 59 and 60) which he had prepared. The appellant calculated their costs covering all 8,518 properties which they factored. These costs were provided into (a) direct costs; and (b) shared costs. The 'direct costs' covered factoring staff, central support (eg. office information technology), direct administration (eg. postage, stationary, and 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 (eg 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 cost 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 statement issued to homeowners such as the respondent.
>
> [19] Turning to the common repair works instructed for Rosebank Tower, Mr Keane referred to production R7 (pages 57 and 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 of 'number 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 Rosebank Tower. This indicated that the private flats such as the property received a subsidiary in respect of the repairs carried out to Rosebank Tower as a whole as it was the respondent's policy not to issue bills to their owners where the sum due was less than £5.00."

[8] [Although perhaps slightly unusually set out I regarded the evidence of Mr Keane as having been incorporated into the Findings in Fact and accordingly treated these paragraphs as such. I did not understand Mr Upton on behalf of the appellants or the respondent to argue against that approach.

The appeal hearing

[9] The purpose of the UT is to hear and decide appeals from decisions of the FtT. An appeal may only be on a point of law. Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as "the 2014 Act") provides:

> "46 Appeal from the Tribunal
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> (1) A decision of the FtT in any matter in a case before the Tribunal may be appealed to the Upper Tribunal.
>
> (2) An appeal under this section is to be made—
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> (a) by a party in the case,

(b) on a point of law only.

(3) An appeal under this section requires the permission of—

(a) the FtT, or
(b) if the FtT refuses its permission, the Upper Tribunal.

(4) Such permission may be given in relation to an appeal under this section only if the FtT or (as the case may be) the Upper Tribunal is satisfied that there are arguable grounds for the appeal.

[10] The Inner House of the Court of Session in the case of *Advocate General for Scotland* v *Murray Group Holdings Limited* (2015) CSIH 77 2016 SC 201 identified four different categories of case covered by the concept of an appeal upon a point of law: these are (i) an error of general law, the content of its rules and the interpretation of statutory and other provisions; (ii) an error in the application of the law to the facts; (iii) making findings in fact without a basis in the evidence; and (iv) taking a wrong approach to the case by, for example, asking the wrong questions or taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal can properly reach. (see paragraphs 42 and 43)

[11] The statutory function of the UT is a limited one to correct errors of law. It is not part of its function to provide a party with an opportunity to re-try the proceedings or to have a second opportunity to put a case in the best light.

[12] The tribunal is an expert tribunal and its decision requires to be respected save where it had clearly misdirected itself in law: *AH (Sudan)* v *Secretary of State for the Home Department* 2008 1 AC 678 wherein at paragraph 30 Lady Hale said the following:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke* v *Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone

> are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

[13] After sundry procedure the appeal hearing took place by Cisco Webex on 3 February 2021. The appellant was represented by Mr Upton, Advocate, and the respondent represented his own interests. At the outset of the hearing the UT re-iterated to the respondent that it was noted that he was representing his own interest and it may be to his benefit to consider whether to obtain legal representation or other form of assistance. He was advised that legal aid may be available. The respondent had been similarly advised at an earlier procedural hearing. The respondent indicated that he had considered the position. He stated that he was not entitled to legal aid and he wished to proceed with the hearing. Having heard the appeal I have considered parties' written and oral submissions, together with the documentation which was before the tribunal and the written decisions of the tribunal and the FtT. Simply because a particular issue is not specifically referred to does not mean that it has not been considered. I also had regard to the list of legal authorities provided by Mr Upton. The terms of the authorities are uncontroversial and I have not found it necessary to refer to them within this decision.

[14] There is a PFEO which was made by the tribunal which is also the subject of appeal. I advised parties that I would hear the appeal in relation to the decision of the tribunal referable to the failure by the appellant to comply with its property factor's duties. Thereafter, having decided thereon I would, if necessary, consider the PFEO at a later hearing, and only once I had issued to parties my decision in respect of the appeal against

the finding of the failure of the appellant to carry out its duties in terms of section 17(5) of the 2011 Act.

Fresh evidence

[15] The UT considered firstly the application by the appellant to have fresh evidence admitted. That evidence was in the form of two affidavits from two separate witnesses together with productions. One of the proposed additional witnesses was Mr David Keane who had testified before the tribunal and on the basis of his evidence the tribunal made Findings in Fact. The other proposed witness was Ms Goodwin. The relevant rules which apply to the hearing of additional evidence are contained within the Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016, Rule 18 and provide as follows;

> "(3) The Upper Tribunal may consent to a witness giving, or require any witness to give, evidence on oath or affirmation, and may administer an oath or affirmation for that purpose.
>
> (4) Fresh evidence may only be led in an appeal if the Upper Tribunal is satisfied—
>
> > (a) that the evidence—
> >
> > > (i) could not have been obtained with reasonable diligence at the FtT stage;
> > >
> > > (ii) is relevant and will probably have an important influence on the hearing; and
> > >
> > > (iii) is apparently credible; or
> >
> > (b) that the interests of justice justify the evidence being led."

[16] In addressing the test stated within sub-paragraph (4)(a)(i) Mr Upton submitted that the evidence could not have been obtained with reasonable diligence at the FtT stage. In his submission it was not apparent that the tribunal as a fact finder would not make adequate

findings about the evidence of the witness Mr Keane and therefore it could not be said that reasonable diligence had not been applied. Mr Upton accepted that Mr Keane had testified and it was not suggested by him that Ms Goodwin could not have been called to give evidence before the tribunal. The starting point of the submission was that the treatment by the tribunal of the fact finding was unsatisfactory as all that was done was to accept the evidence of Mr Keane. The facts found by the tribunal were insufficiently specific and for one reason or another they contained what Mr Upton described as "a mistake". The fact finding by the tribunal was described as "slapdash and vague." The appellants were entitled to assume that the fact finding would be satisfactory and could not have been expected with reasonable diligence to prepare for a written decision which was below the standard of what the appellants had expected and which they were entitled to expect. Mr Upton also founded on sub-paragraph 4(b) of the rules which provides a separate leg of the fresh evidence test namely that the interests of justice justify the evidence being led. Mr Upton submitted that it was critical that information contained both in the affidavits and in the productions was before the UT. The evidence was required to allow the UT to understand the true position. Without the evidence the full position was not before the UT. It was argued that the new evidence was uncontroversial. Mr Keane's affidavit corrects a statement made to the tribunal and is in fact in the interests of the respondent. The proposed documents were said to provide a "slightly more detailed breakdown" of the costs.

[17] The respondent also moved the UT to allow fresh evidence in the form of a production, namely a document which he had found on the appellant's website after the tribunal hearing had taken place. The respondent explained that he had tried his best to obtain all of the information prior to the tribunal hearing but had been unable to locate this

particular document on the appellant's extensive website in time for the tribunal hearing. He did not know when it was made available for public inspection. The respondent advanced an argument based on the interests of justice test. He submitted the document is relevant and "will probably have an important influence on the hearing." In response to the application by the respondent the appellant averred that the documentation referred to by the respondent had been readily available on the website of the appellant as at the date of the tribunal hearing.

[18] I refused both applications to lead fresh evidence. I did not consider that either leg of rule 18 had been met. I considered that all of the proposed fresh evidence which the appellant sought to introduce could have been obtained with reasonable diligence at the tribunal stage. The submission made by the appellant in terms of rule 18,4(a)(i) is predicated on the fact finding of the tribunal being inadequate. At one point during the submission put forward by Mr Upton he characterises the fact finding as "slapdash and vague." That characterisation is not accepted for reasons that will be amplified later in this decision. If, as Mr Upton maintains, a critical finding in fact is missing, that is an error in law and an issue that the UT will require to deal with having identified that the crucial finding is missing. It may impact significantly on further procedure. However, before the final procedure can be determined the absence of a critical finding in fact requires to be established. I made clear to parties in refusing the motions for fresh evidence that I considered that the original findings in fact must be afforded significant respect. While it may be that the new evidence is uncontroversial that does not equate with competence. It needs to be remembered that the tribunal is an expert tribunal. The FtT for Scotland Housing and Property Chamber (Procedure) Regulations 2017 rule 2(2)(d) refers to the FtT dealing with proceedings "justly" and further the said rule 2(2)(d) indicates that dealing with proceedings "justly" includes

using the "special expertise" of the FtT effectively. As far as the respondent's motion is concerned the information he wished to place before the UT is available on the appellant's website and it is not suggested it was not there at the time of the hearing before the tribunal. I conclude that it could have been obtained with reasonable diligence.

[19] I did not consider that the interests of justice "justify" the additional evidence being led. The function of the UT is not to rehear the case. As Lewison LJ observed in *Fage UK Ltd* v *Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26; [2014] FSR 29 at [114]:

> "the trial is not a dress rehearsal: it is the first and last night of the show. This emphasizes the need to adduce all relevant evidence at the first hearing, rather than to attempt to adduce further evidence on appeal. Once the last night of the show has finished, the audience are unlikely to be interested in additions to the script."

It was suggested that the UT required to hear the new evidence to allow the "true position" to be understood. If the true position cannot be understood from the written statement of facts and reasons provided by the tribunal that may constitute an error of law. Again, it would be for the UT to recognise that there had been an error in law and to determine further procedure. Again, for reasons that will be amplified later I do not consider that there is evidence from the findings of the tribunal that it misunderstood the position.

[20] I agree with the tribunal that an appeal process is not an opportunity for a disappointed litigant to produce additional evidence or documents which they consider may have impacted on the decision which was originally made by the tribunal (tribunal decision paragraph 38). The tribunal perhaps anticipated that an attempt may be made to lead further evidence and quite clearly mentioned that such evidence would not be permitted. The parties have had an oral hearing. They had the opportunity to lead such evidence as they wished the tribunal to hear and to lodge such productions as they thought were necessary. That was clear given that Mr Keane had testified and it was not suggested

that Ms Goodwin could not have been called as a witness. Both witnesses and all productions could have reasonably been made available. The interests of justice can be interpreted as including the purpose of achieving finality and certainty. To allow parties a further opportunity to introduce evidence in the circumstances of this case, particularly further evidence from a witness who has already given testimony before the tribunal is not in the interests of justice. As far as the respondent is concerned he was unable to advise as to when the document he wished to lodge became available or to positively assert that it was not available before the hearing date. Since the document he sought to introduce only "probably" would have an important influence I took the view it was not in the interests of justice for the additional evidence to be allowed.

The tribunal's reasoning

[21] In order to put this appeal in context I set out at the outset the reasoning of the tribunal. The respondent and his wife are co-owners of the property which was registered in the Land Register for Scotland on 1 September 2008. The whole of the residential tower block, including the property, is burdened by the Deed which was registered in the Land Register for Scotland on 15 January 1993. The terms of this were set out in the burdens section of the respondent's title LAN202039 on pages D1 to D16.

[22] Within the Deed the appellant is referred to as the factor. The residential tower block forming Rosebank Tower is referred to within the Deed as " the property." To avoid confusion I have referred to "the main building" or "the tower" as Rosebank Tower in this decision when referring to the terms of the Deed. Throughout, the Deed refers to the factor only in the masculine. Again, to avoid confusion I have repeated that reference throughout this opinion.

[23] clause 1(6) of the Deed defines common charges as follows:

"In this deed '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 Rosebank Tower;

(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 of the deed; and

(f) any other expenses, however arising, in relation to Rosebank Tower which in the opinion of the factors should properly be borne by all the proprietors of dwellinghouses in Rosebank Tower".

[24] clause 11(b)(iv) of the Deed indicates that a dwellinghouse as referred to in the Deed can be a council flat.

[25] In the Deed clause 6(c) states:

"The proprietor or proprietors of each dwellinghouse in Rosebank Tower shall be liable, jointly with the proprietors of all other dwellinghouses in Rosebank Tower, 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."

[26] 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 (Rosebank Tower). The proprietor of each dwellinghouse in Rosebank Tower shall make payment to the factor of the proportion of the common charges payable in respect of that quarter … (i) within 10 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".

[27] At issue before the tribunal was the submission of the respondent that the appellant had breached its duty under clause 6(e) of the Deed in as much as it required to issue proprietors with a quarterly statement of common charges incurred by the appellant in respect of the quarter, which charges require to be borne by the owners of all 72 flats in Rosebank Tower. It was the position of the respondent that the only basis upon which the appellant could claim management fees as part of the common charges was in terms of sub-paragraph (c) of clause 1(6) of the Deed. That clause referred to the "remuneration of the factor" and "to the reimbursement to him of any expenses properly incurred by him (the factor) in performing his duties in relation to the property (Rosebank Tower)" to which the factor was entitled under clause 9(c) of the Deed. Clause 9(c) provided the factor with an entitlement to remuneration to be determined by those by those entitled to appoint him. The respondent submitted that as the appointment contemplated by the Deed related only to the Rosebank Tower block, the remuneration in turn must relate to the general management and administration of the Rosebank Tower block only. Alternatively, if the management fee was not "remuneration" in terms of the Deed it fell under the heading of "reimbursement of expenses properly incurred" part of clause 1(6)(c). On either view it was a common charge and fell to be borne by each of the 72 flats in terms of clause 1(6((c).

[28] It was claimed by the respondent before the tribunal that he had carried out various investigations with the appellants which 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 appellants' e-mail to him of 5 June 2019 revealed an inconsistency in that the management fee was ascertained for all 8518 properties apparently factored by the appellants across their local authority area and then divided amongst all

8518 private owners. That which was provided for within the Deed was not being followed. The respondent submitted that the appellant's management fee should be restricted to the management of Rosebank Tower.

[29] In the respondent's submission clause 1(6)(d) of the definition of common charges included the caretaker's remuneration. That was the remuneration for the caretaker of Rosebank Tower. The appellant's management fee should be restricted to their management of Rosebank Tower. Both elements would then fall to be divided by the number of flats, namely 72, pursuant to clause 1(6)(c) of the Deed.

[30] In so far as the common charges were concerned (clause 1(6)(a)), these were apparently split between the 72 flats. The respondent queried why the management fee should be treated differently from the other common charges. The respondent then referred to various Written Statements of Services (hereafter "the WSS") which had been issued by the appellant. In particular, he referred to a statement issued in January 2018 by the appellant wherein it is stated:

> "The title deeds for the property will provide conditions relating to 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".

[31] The respondent referred to a further WSS issued in September 2019 which informed him that the title deeds for the block would confirm owners' responsibilities for payment of service charges and management fees. "Management fee" was defined as representing the cost of administration and carrying out of the property management duties. In short, the submission of the respondent before the tribunal was that both the Deed and the WSS provided by the appellant made it clear that the fees charged should provide the cost of providing the service only to the commonly owned parts of the tower block of which his

property formed part (Rosebank Tower) it was not apportioned in accordance with the title deeds.

[32] The argument presented by the appellants before the tribunal was that the private flats and the council owned flats were administered by the appellants separately. The appellants did not require to communicate with the proprietors of the council flats since the appellants themselves were the proprietor. The respondent was charged the same management fee as the other proprietors of the private flats. Administratively, the appellants met expenditure relating to the council flats in Rosebank Tower from a general income derived from its estate management services. Further, as registered social landlords the appellants were not statutorily entitled to use income from their tenants to assist in the provision of factoring services to private homeowners. The appellant's submissions, put shortly, before the tribunal were that local authority law prevented the division of the costs amongst all of the owners .

[33] The tribunal accepted that the management (or factoring) fee was not "remuneration" in terms of clause 1(6)(c) of the Deed. However, the conclusion which the tribunal reached was that the cost of the services spoken to by Mr Keane, the appellant's factoring manager, as falling within the management fee fell within clause 1(6)(c) as an "expense properly incurred by the factor". This was provided that the services related to the appellants duties in relation to Rosebank Tower and not other factored communities. The tribunal accepted the respondent's submission that the cost of these services were thus "a common charge" in terms of the Deed.

[34] The tribunal concluded that the appellants have a duty under clause 6(e) (as read in conjunction with clause 6(c)) to issue a statement of common charges which included both the "direct" and "shared" costs as mentioned by Mr Keane. Further, these costs required to

be apportioned to Rosebank Tower together with a notification to the proprietor that they will require to pay a 1-72th share of all common charges including those costs but excluding common central heating costs.

[35] The tribunal recognised that the appellants as proprietors of the council flats "might require" to bear the cost of some of the services for which the appellants or their tenants in these flats gain no benefit. However, the tribunal considered that against the terms of clause 1(6)(c) and concluded that in their view the terms of the Deed were clear, namely that all dwellinghouses had to bear "common charges" equally with the exception of the common central heating. This formed part of the legal basis of the appointment of the appellants as factors and it required to be followed.

[36] The tribunal accepted Mr Keane's evidence, and concluded on the basis of that evidence that the costs which he has described fell within the terms of clause 1(6)(c) of the Deed. Mr Keane explained in evidence "how the annual management (or factoring) fee is calculated" and amplified this by reference to various documents and productions. He both categorised and listed various costs.

[37] It is also important to draw attention to the WSS (tribunal paragraph 14) which was issued by the appellants in January 2018. Therein it is stated:

> "The Title Deeds for the property will provide conditions relating to 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 the maintenance. …
>
> … our management fee represents the cost of administration and carrying out of the property management duties highlighted in this guide".

[38] The WSS before the tribunal which was issued by the appellants makes reference to the title deeds as regulating the services which are provided. It was recognised that before the tribunal the appellant took issue with the submission that the management fee is part of

"the remuneration of the factor" in terms of clause 1(6)(c). The appellant's position was sustained in that regard by the tribunal. The finding was that the services spoken to by Mr Keane were an expense properly incurred by the factor in performing his duties in relation to Rosebank Tower. In so deciding it is clear that the tribunal carefully considered the submissions before it and discretely categorised the services as those covered by clause 1(6)(c). It needs to be remembered that this is an expert tribunal whose membership is not limited to legal members but includes a member with experience in housing and property matters.

Title and interest of the respondent to raise the initial action

[39] One ground of appeal brought by the appellant is that the tribunal erred in law in holding that the respondent had title and interest to bring the application. Such an argument was not raised before the tribunal. Coming in the way that it did and at the stage in proceedings that it did there is a strong argument that the submission should be refused for those reasons alone. However, the ground sought to raise an issue of competency which is always a matter that is *pars judicis* (the part of the judge) I deal with this issue first as the outcome is fundamental to the progress or otherwise of the appeal. It is argued that it is a general principle of civil litigation that a party who seeks a judicial remedy must set forth title and interest to demand it. Litigation which pursues no practical interest is an incompetent waste of the public resources of the tribunal. The basis of the argument appears to be that the respondent conceded before the tribunal that were he to be successful in his argument that the practical result may be that he had been paying less than he should have done. While it is now conceded that the respondent has title to sue it is contended that he does not have an interest to sue. It is submitted by the appellant that it was conceded by

the respondent that his argument was advanced as a "matter of pure academic principle". Further it was argued that the respondent is not a public defender and is not acting for any others. Mr Upton described the litigation variously as "sterile", "trivial "and "time wasting." He so categorised the action upon the basis that by his calculation the most that could be achieved by the respondent was an annual saving of £28.51 which he categorised as "Only part of the direct costs which the respondent is objecting to". Indeed, it was submitted by Mr Upton that the respondent cannot aver that the whole of the sum of £28.15 is objectionable as it may be that some part is justifiable. In short, the argument advanced by Mr Upton was that the respondent is not saying that he was overcharged, just that he might be being overcharged. That is based on the premise that the respondent sought no pecuniary remedy before the tribunal and because the respondent conceded (tribunal decision, paragraph 22) that the outcome of his application could entail financial disadvantage to him and other homeowners.

[40] In response the respondent has indicated that the tribunal held that the application made by the respondent met the requirements of the 2011 Act. It was argued therefore that the tribunal having heard his application and adjudicated thereon that there is now no requirement to disclose an interest to sue. The respondent maintained that he does have an interest to sue. He is of the view that he was being over charged. He advised that the calculation of the precise amount by which he is being overcharged is very difficult to determine. The situation has been ongoing since 2011 and if not judicially resolved it may continue for another 30 years or until Rosebank Tower is demolished. The practical interest was for a determination to be made regarding a statutory obligation.

Decision on title and interest to sue

[41] It is clear from the decision of the tribunal that the respondent was not seeking any remedy relating to past statements of common charges and notifications that he had previously received. He was not looking for a monetary remedy in terms of compensation. His application was upon the basis that future bills from the respondents require to divide all charges by 72, in accordance with the Deed to which the property was subject. He further indicated that there was no urgency.

[42] The respondent is a homeowner. He is the infeft proprietor of the subjects at 15 Rosebank Tower. Within the note of argument presented by the appellant it is argued that it is a general principle of civil litigation that a party who seeks a judicial remedy must set out title and interest to demand it. While it is now conceded that the respondent has title to sue it is contended that he does not have an interest to sue.

[43] I do not accept that the definition of "pure academic principle" can be applied to the application. Rather, it appears clear that what the respondent was seeking was a proper application of the terms of the Deed of Conditions. On any view as an infeft proprietor he is fully entitled to require that the granter of the Deed of Conditions carry out its obligations in accord with the Deed of Conditions. To categorise the application as being purely academic is inaccurate. For the reasons given by the respondent I consider he has an interest to litigate. He is making monetary payments to the appellant. The interest to sue "may be small." (MacPhail, Sheriff Court Practice, 3rd Edition Paragraph 4.33). A concession by the respondent that he may require to pay more to the appellants in terms of the management fee does not deprive him of the interest to sue. It is specifically averred by the appellant within the written submissions presented that a consequence of the respondent's

success may be to deprive him of the benefits of economies of scale currently existing and thus the costs of provision of factoring services would increase. That is entirely distinct from the respondent having an interest to sue. It is an economic risk which the respondent has elected to take.

[44] The Deed in this instance was registered in the Land Register of Scotland on 15 January 1993 (Finding in Fact 5, (e) of the decision of the tribunal). Section 17 of the Land Registration (Scotland) Act 1979 provides that a land obligation specified in such a deed becomes a real obligation affecting the land to which applies on the recording (registration) of the Deed of Conditions in the Land Register. Equally, it is clear that if a Deed of Conditions is executed at the commencement of any development without any express statement of disapplication any future purchaser of a property has the assurance that the conditions will apply throughout the whole development. To categorise or describe this litigation as being one with no practical interest is a misdescription. In my view there is no doubt that as a homeowner who is the subject of a Deed of Conditions the respondent clearly has title and interest to bring the application.

[45] It also needs to be remembered that the respondent raised this issue with the appellants at the outset. In terms of the Findings in Fact of the tribunal the respondent made a formal complaint to the appellant which took issue with the basis of charging the management fee by the appellants in terms of the deed of conditions. The appellants rejected same and drew to the attention of the appellant his entitlement to raise an action before the FtT (tribunal decision paragraph 5(q)). The respondent duly raised proceedings. Having directed the respondent to the tribunal and having raised no issue about title and interest before the tribunal it is perhaps surprising that this issue was raised for the first time at appellate stage.

The fact finding of the tribunal

[46] Having dealt with the issue of the respondent's title and interest I now require to deal with the issue of the fact finding of the tribunal. Although no specific permission to appeal was given in relation to this issue it was argued by the appellant that a specific and critical finding in fact was missing from the tribunal decision. Indeed the submission that additional evidence should be allowed to be led relied to some extent on this submission. It is argued that there is no finding that the factoring fee is charged for services provided to council tenants and that the appellant or its tenants received benefit. As I understood the submission it was argued that the tribunal found that the factoring or management fee was for the private properties only, and because it did not make the necessary finding that the appellant or its tenants did not receive any benefit that omission was critical. The factual situation was acknowledged by the tribunal (tribunal decision paragraphs 25 and 29.) The tribunal acknowledged that it could see that the current factoring arrangement **might (**my emphasis**)** require the appellants as proprietors of the council flats to bear the cost of some services for which the appellants or their tenants in those flats gained no benefit. The use of the word "might" is of importance as its inclusion precludes the making of a finding in fact in the terms argued by the appellant. The use of the word "might" accommodates the possibility that it may not the case that the appellants would need to bear costs for which they or their tenants gained no benefit. The respondent did not accept the position referable to benefit and advised the UT that in his view the appellant and its tenant did benefit from the factored amenities.

[47] The tribunal acknowledged that the solicitor for the appellant before the tribunal explained that the reason for the distinction between the management fee and other charges

was that while the council flats gained benefits from the other charges they did not gain benefit from the management fee. The witness Mr Keane does not appear to have been asked about the recipients of the benefits of the factoring. It is not clear that the tribunal necessarily accepted that the council tenants gained no benefit from the factoring service. Absent a specific question to a witness it would be difficult for the tribunal to make such a finding in fact.

[48] The question for the UT is whether the absence of a finding in fact to that effect is an error in law. I do not regard it as critical. The situation is not as finite as was argued by Mr Upton. The submission of the appellant does not distinguish between the issues of cost and benefit. Simply because one party is not charged does not mean it does not benefit. The appellant has a number of reasons referable to its other capacities why it may allocate charges in certain ways. Given the dispute between parties as to whether the appellant and its tenants benefit from the factoring service it is perhaps not surprising that there is no finding in fact. It was also argued before the tribunal that the reason the factoring cost was not apportioned equally between all of the occupants (both tenants and owner) was due to local authority law which prohibited the appellant from obtaining "remuneration" for its factoring services. That does not necessarily mean that there was no benefit to the appellant and its tenants from the factoring service. In my view the suggested finding in fact is not crucial and its absence can be explained by the way in which the case was presented before the tribunal. The issue of whether the council flats gained benefit was acknowledged by the tribunal in its decision.

[49] It is not disputed that the tribunal is under a duty to provide adequate and proper reasoning (*Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 45 at 348). The decision of the tribunal was based on an interpretation of the Deed. The fact that one of the

potential consequences of the current arrangement is not specifically incorporated into a finding in fact is not crucial firstly because it is not clear that the tribunal could have made the requested finding on the basis of the evidence and secondly because its inclusion as a finding would have made no difference to the outcome.

[50] In *AH (Sudan)* Lord Hope, at paragraph 19, said the following:

> "I agree also with what Baroness Hale of Richmond says about the caution with which the ordinary courts should approach the decision of an expert tribunal. A decision that is clearly based on a mistake of law must, of course, be corrected. Its reasoning must be explained, but it ought not to be subjected to an unduly critical analysis. As your Lordships have indicated, there are passages in the decision that is before us which might, when read in isolation, suggest that the tribunal misdirected itself. But I am quite satisfied that the decision as a whole was soundly based, and that a more accurate wording of the passages that have attracted criticism would have made no difference to the tribunal's conclusion on the facts that the Secretary of State's refusal of asylum in these cases should be upheld."

[51] Significant general criticism was made of the fact finding process of the tribunal. In considering the tribunal's approach as to "what costs are charged by way of management or factoring fee?" one looks to the evidence of Mr Keane. The factoring fee is calculated by reference to a number of different outlays and costs which relate to; firstly, direct costs such as ,factoring staff, central support (eg office IT), direct administration (postage, stationery, printing ink)service management and debt recovery. Secondly, shared costs, which relate to inspections, instructions of work, housing and investment team costs, housing support costs, health and safety inspections in relation to common works, homeowner's enquiries (eg anti-social behaviour), disputes with homeowners, property council and property committee meetings where required.

[52] It is clear that the tribunal had a number of different functions and costs illustrated to it. These are described by Mr Keane as the annual factoring or management fee. The tribunal clearly had regard to clause 1(6)(c) of the Deed of Conditions. It discounted the

categorisation of the management fee as being "part of the remuneration of the factor" and one can well understand why it did. That was a finding open to the tribunal on the basis of the evidence before it. The various costs which are listed are not and could not constitute the remuneration of the factor

[53] However, the tribunal then invited submissions from the appellants as to whether the costs spoken to by Mr Keane could be categorised as the "reimbursement of the factor of any expenses properly incurred by him in performing his duties in relation to Rosebank Tower?" The appellants relied on their submissions that the appellants were prohibited by local authority law from being remunerated for their factoring services. Further, the appellants distinguished between the management fee and other charges and submitted that while the council flats gained benefit from the other charges they did not gain benefit from the management fee. The services described by Mr Keane were purely for the benefit of the private homeowners within Rosebank Tower and the council flats gained no benefit. No submissions were made, despite an invitation so to do, in relation to the WSS provided to the respondent by the appellant.

[54] The WSS was referred to by the tribunal in its decision. It was issued by the appellant to the respondent. Having heard evidence the tribunal formed the view that the list of functions narrated by Mr Keane were expenses properly incurred by the factor in performing his duties in relation to Rosebank Tower. Given the nature of the costs and functions and the fact that the witness led was the appellant's factoring manager it was a reasonable conclusion by the tribunal that the narrated functions would involve outlays by the factor and that the reimbursement of expenses involved would be covered by clause 1(6)(c), the section of the Deed specifically referable to factor's remuneration and

reimbursement of expenses incurred by him in performing his duties in relation to Rosebank Tower.

[55] Where, as here, a challenge is based on a failure to give reasons, in some cases quite minimal explanation might suffice; reasons could be stated briefly, and the level of detail required would be dictated by the issues requiring determination. The informed reader should be left in no real or substantial doubt as to why the decision was taken: *Stefan* v *General Medical Council* 1999 1 WLR 1293, p1201F; *South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953, paragraph 36. In my view there is no doubt as to why the decision was taken. It also needs to be remembered that the tribunal decision is governed by the evidence and submissions which parties elect to place before it. The tribunal did not have the benefit of the comprehensive submissions made by Mr Upton. The tribunal is obliged to make its decision on the basis of the evidence and submissions which it has before it at the time of the hearing. During the course of these proceedings the appellant's legal representative was specifically asked about the WSS and about whether the costs spoken to by Mr Keane could be categorised within clause 1(6)(c) of the Deed. The appellant's legal representative had no submissions to make in relation to either issue (tribunal decision paragraph 20). Certain of the examples put forward by Mr Upton in support of his argument were not put to Mr Keane. While I recognise that certain examples are now being raised for illustrative purposes, conclusions in relation to those examples are reached with which both the witnesses and the expert tribunal may take issue. For example, the arrangements for the allocation of costs for court proceedings to recover factoring charges is and the subsequent allocation of recovered funds are matters which will likely be within the knowledge of Mr Keane. The issue was not raised with him in evidence and as such the Upper Tribunal cannot know if the factual premise of the example contained within

paragraph 47 of the appellant's written note of argument and subsequently developed by Mr Upton is accepted by Mr Keane or not.

[56] The fact finding and reasoning of the tribunal in relation to the presented evidence and submissions relative thereto does not disclose an error in law. Criticism was made by Mr Upton that the tribunal did not address the separate questions of how the management fee was calculated and how it was divided up. I disagree. Mr Keane and the respondent provided evidence which formed a basis to allow the tribunal to address both its basis and its calculation. The list of functions narrated earlier form the basis of the calculation and the respondent's uncontested account of the basis of the division was considered and addressed by the tribunal in its determination.

Incorrect interpretation of title conditions

[57] Mr Upton categorised the main substantive issue within the appeal as involving two matters; "(i) what costs are charged by way of management fee?" and " (ii) under which of any of heads (a) to (f) in clause 1(6) that fee consequently falls?" relative to the proper construction of the Deed of Conditions. From the Findings in Fact made by the tribunal it is noted that Rosebank Tower is a residential tower block in Cambuslang, South Lanarkshire. There are 72 flats within it including the respondent's property which is flat number 15. The property includes a share of the common parts of the residential block. Nineteen of the flats are owned by private owners (hereafter "the private flats") and the other 53 flats are owned by the appellant and let out by them to tenants (hereafter "the council flats").

[58] On behalf of the appellant it was submitted before the tribunal and before the UT that the council flats were administered separately by the appellant. The appellant did not require to communicate with the factors of the council flats since the appellant themselves

were the proprietors. The respondent was charged the same management fee as other proprietors of private flats. The appellant met expenditure relating to the council flats in Rosebank Tower from its general income derived from its estate management services. A point was made before the tribunal that because the appellant is registered as a social landlord it is not entitled to income from its tenants to assist in the provision of factoring services to private homeowners.

[59] The basis of the charges was explained to the tribunal by Mr Keane, who is the factoring manager of the appellant. The appellant calculates their costs in relation to all 8,518 properties which they factor. These costs are divided into (a) direct costs and (b) shared costs. The direct and shared costs respectively were then divided equally between all 8,518 factored properties to give an annual figure of £67.81 per property for direct costs and £49.51 per property for shared costs. The tribunal specifically asked the appellant's representative about whether the costs spoken to by Mr Keane would 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 Rosebank Tower." And no submissions or representations were made thereon (tribunal decision paragraph 20).

[60] In answer the reason that was advanced for the distinction in approach between the management or factoring fee and other charges was that while the council flats gained benefit from the other charges they did not gain benefit from the management fee. Services to 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. It was submitted that the appellant's approach to the factoring fees gave owners of private flats in Rosebank Tower the advantage of the appellant's economies of scale. It was also said there was a cross-subsidy of private flats in

tower blocks who generally received more services than factoring customers in more traditional buildings.

[61] It was argued by Mr Upton, with regard to the tribunal's decision at paragraph 27 that the issue of whether the management fee should be treated as a "common charge" in terms of the Deed was a question of its interpretation. Reference was made to general principles of interpretation and in particular to section 14 of the Title Condition (Scotland) Act 2003 which provides that: "Real burdens shall be construed in the same manner as other provisions of Deeds which relate to Land and are intended for registration". It was argued that section 14 was enacted to implement the Scottish Law Commission's Report on Real Burdens. Having regard to that Report it was submitted that the same general rules should apply to the interpretation of title conditions that apply to the interpretation of deeds generally. For all practical purposes these are the same general rules which applied to the interpretation of written contracts. Absent contrary express provision or necessary implication a deed is to be construed so that the result of its application will be fair and reasonable. Further, it was submitted that it is also a long standing and fundamental rule of interpretation of burdens on land ownership that they are interpreted strictly, so that doubt is resolved in favour of placing the least restriction or obligation on the affected party. Finally, it was argued that another important principle of interpretation is that a deed is construed upon the assumption that parties will act lawfully.

[62] In response the respondent referred to the title deeds which he submitted committed all proprietors, both private owners and the appellants to a contract. The appellants do benefit from the factoring service. The amenities are maintained for the appellants and their tenants as much as for the private owners. The title deeds state that the costs are to be apportioned equally between all dwellinghouses on the basis of one share per

dwellinghouse. The appellant's principal interest in factoring is to ensure that the building as a whole is maintained to a satisfactory standard in order that the appellants can fulfil their duties to the tenants. The appellants, as proprietors, have no entitlement to pay less factoring fees than others in Rosebank Tower, and as factors it is their duty to apportion the costs as provided for in the Deed.

[63] Mr Upton developed his submissions to suggest that the factoring or management charges should be categorised elsewhere. The factoring charged should be properly included within clause 1(6)(f). In developing the argument the appellant raised certain hypothetical possibilities. For instance the appellant suggests an alternative construction to the Deed. It is argued that its basis is in clauses 1(6)(c) and (f) of the definition of common charges. Clause (c) refers to "expenses properly incurred by the factor in performing his duties in relation to Rosebank Tower". Clause (c) makes an expense a common charge if it relates to the building as a whole. For example, expenses incurred in the administration or provision of services for the building as a whole are covered. A typical question asked is whether such expenses in relation to matters which serve or benefit the building as a whole, such as expenses incurred by the factoring or administrating matters common to all dwellings should be construed as common charges?

[64] What is then argued, in contrast, is that if an expense which is incurred by the factor in performing his duties in relation to a single dwelling in the building such expense would not fall within clause 1(6)(c). That being true, it is also true of matters relating to a number of dwellings, being less than the whole number. In short, it is argued as implicit in clause 1(6)(c) that there are expenses of the factor which he may not treat as a common charges or must not treat as common charges. In particular significance was drawn to clause 1(6)(f) and it was argued that this clause was wide ranging inasmuch as it applies to

all expenses (however arising) and that it envisages expenses other than those which are included within clauses 1(6)(a) to (e) may be incurred in practice. Accordingly, clauses (a) to (e) do not exhaustively set out all expenses which the factor may incur and may charge.

[65] Further, where such an expense has been incurred, clause (f) requires a factor to reach an opinion about it. Clause (f) contemplates a clear distinction. The factor has to judge whether it "should properly be borne by all the proprietors of the dwellinghouses in Rosebank Tower" It is argued that the factor is entitled to form only one or two opinions: the expense issue should be properly be borne by all 72 or it should properly be borne by a smaller number. So head (f) involves a judgment about allocation of expense either to all of the 72 proprietors or to some of them. The factor must make that judgment by reference to what "should properly" be done. In that regard it is argued that it is reasonable to consider that who should properly bear an expense should depend on who benefits it from it. Where only one flat has benefitted from the expense the factor may lawfully reach the opinion that its owner should pay it. Where 19 flats have benefitted it may lawfully conclude that the 19 owners should pay.

[66] The appellant's presented argument raises certain hypothetical possibilities. For instance in paragraph 47 of the appellant's written argument the position in relation to an owner who refused to pay the factor an expense is considered The argument is then developed to include the possibility of instructing solicitors to recover the unpaid debt, and the question of recovery of some but not all expenses is considered. It is submitted that in such a situation these expenses would not be expenses in relation to the property.

[67] Mr Upton developed his argument such that, if the factor's opinion is that the "expenses should not properly be borne by all proprietors of the dwellinghouses" then they are not common charges. Clause 1(6)(c) does not apply and in the view of the appellant the

respondent's argument does not apply. Clause 1(6) (f) obviously cannot mean that expenses judged not to be properly payable by all the owners cannot be recouped by the factor from anyone. It cannot mean that the factor has to bear such expense himself. The implication, in the submission of the appellant is that an expense should not properly be borne by all 72 then it should be borne by as many of the flats as it relates to. That is a necessary implication because the only alternative is that the factor is not to be reimbursed but to be obliged to act gratuitously, which must be rejected, it is argued.

[68] The appellant then argues that as between heads (c) and (f) for the purposes of the appeal it does not matter under which they fall. It is sufficient that they may fall under one or the other or both.

[69] It is argued by the appellant that the factor is in fact duty bound to allocate the expenses only to the 19 owner/occupied flats. Any judgment about that must be fair and reasonable and it would be patently unfair and unreasonable not to allocate such costs solely to the owners who benefit from them. The important feature is that the factor may so allocate the expense.

[70] The respondent argues that "there is no provision in the deeds for the factor to decide to apportion a charge differently" and that such expenses could only fall under clause (c). If the Deed had only intended that certain costs were met by certain properties then that would have been made clear within the Deed. The appellant carries out administration and management for all of Rosebank Tower. Clause 1(6)(f) covers expenses that are not common charges.

Decision relation to incorrect interpretation of the title conditions

[71] The tribunal found within paragraph 27 that "The cost of the services spoken to by Mr Keane 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 respondent's submission that the cost of these services was thus a "common charge in terms of the Deed. The issue for the UT is whether in so finding it erred in law. The dispute related to the facts and their application to the Deed.

[72] Clause 1(6) of the Deed is a sequential list which defines common charges. Certain expenses are specifically mentioned as being within the definition of common charges (eg repair, maintenance, renewal, authorised improvement of the common parts) and these included the factor's remuneration and reimbursement of his properly incurred expenses. The use of the word "his" means that the expenses that can be reimbursed must have been expenses incurred by the factor in the discharge of his duties. The costs listed are all costs which would be incurred by the factor. The factoring manager spoke to that in evidence before the tribunal. The tribunal concluded that factoring costs spoken to by the factoring manager should be included and categorised within the section of the Deed of Conditions that relates to factoring. I can identify no error of law in that conclusion which was one the tribunal was entitled to reach on the evidence.

[73] The submission referable to whether the specified costs were wrongly included in clause 1(6)(c) rather than clause 1(6)(f) was not made before the tribunal. The factual basis of the worked example was not put before Mr Keane or the tribunal. However, since it was presented at length by the appellant and since it is germane to the issue in respect of which permission to appeal was granted it is incumbent on me to deal with the argument. It is

only once the specific itemised functions mentioned in clauses (a) to (e) have been considered that the Deed provides a further clause (f) which affords the factor a discretion as to whether to include any other expenses, however arising which in the opinion of the factor should properly be borne by all proprietors of the dwellinghouses in Rosebank Tower. Clause (f) specifically refers to any "other expenses". It does not say "any expenses". The word "other" is important. The conclusion which must be drawn in interpreting the clause is that functions can only be considered for inclusion in clause (f) if they have not already been included earlier in the section. One therefore concludes that it is only if expenditure is not categorised or included within the definitions in clauses (a) to (e) that clause (f) engages. The list within the deed is sequential and clause (f) only relates to those costs which have not been categorised within clauses (a) to (e). Otherwise the word "other" would not have been included. It seems to me to be clear that clause (f) is a residual clause incorporated to address a situation in which a proposed charge does not fit into the earlier clauses. It is drafted deliberately widely. As such it is always possible to argue that a wide range of costs and outlays could be incorporated into that clause. However, that is not the point. It is only once the earlier clauses have been considered that one turns to consider clause (f). Simply because a particular outlay could conceivably be included within clause (f) without reference to the earlier clauses is to be unfaithful to the structure and the wording of the whole section of the Deed.

[74] The appellant's argument as presented to the UT is that there has been an error of law for the reasons stated. The factoring charges and the reimbursement of any expenses incurred by the factor in the performance of his duties in relation to Rosebank Tower should be properly included within clause (f). I do not accept that contention. Clause (f) is only operational in relation to costs that cannot and have not been categorised in paragraphs (a)

to (e) of the clause. An expert tribunal, having heard the appellant's factoring manager testify in relation to items categorised as being within what is termed the factoring fee regarded these charges as being properly categorised within clause 1(6)(c) of the Deed. That is the section which refers to remuneration of the factor and the reimbursement of factoring costs. No error of law is apparent.

An unfair and unreasonable result arising from the incorrect interpretation of the title conditions

[75] Mr Upton invited attention to the fact finding of the tribunal decision whereby it is noted that the management fee is charged to cover costs for factoring services for the proprietors of the private flats at Rosebank Tower and these were "Services for which the appellant or their tenants … gained no benefit" (paragraphs 25 and 29 of the tribunal's decision.) I observe in passing that this is not precisely what the tribunal found. The tribunal found that its determination "might" require the appellants to bear the cost of some services for which the appellants or their tenants gained no benefit (tribunal decision paragraph 29.) It is argued that the charges for these services are distinct from what were described as "uncontroversial" common charges, such as those for common repairs with reference to clause 1(6) of the Deed of Conditions. It is common ground that only clauses (1)(6)(c) and (1)(6)(f)apply. Other than in respect of clause (b) liability for common charges is for one equal share per flat. The respondent's case is predicated upon clause (1)(6)6c as a finding of the tribunal. If a sum due is not a common charge then the respondent's case fails.

[76] What was then argued is that if the element of direct cost and the management fee were allocated both between the 19 flats and the 53 flats as a consequence;

> "This might require the appellant as proprietors of the council flats to bear the cost of some services for which the appellant or their tenants in those flats gain no benefit" (tribunal decision paragraph 29).

It is argued that this is inequitable because it would attribute to the appellant as owner of the 53 part of the liability for expenses incurred solely of the benefit of the 19 and that was an unfair and unreasonable result. It would be no more fair or reasonable than the converse, of sums paid by private owners being obliged solely for the benefit of the appellant's properties or tenants.

[77] It was further argued that to say part of the costs should be borne by the appellant, would be to say to that extent it must make a gift of its services to the respondent and his fellow private owners. It is argued that offends against the presumption "in favour of freedom." The Deed is not, in case of doubt, to be read as meaning that the owner of the property which does not benefit from a service should pay for it, essentially as a gratuitous contribution to his neighbour's pocket. Equally, there is a strong presumption against donation; the Deed of Conditions is presumed not to require the factor to act gratuitously and the arrangements for the factoring of Rosebank Tower cannot be construed to require the appellant to act gratuitously.

[78] In response the respondent argued that the title deeds commit all proprietors in Rosebank Tower, both private and the appellants to a contract of factoring service. The appellants as proprietors benefit from the service. The Deed states that costs incurred providing the factoring service are apportioned equally between all proprietors. That is fair and reasonable it was argued. It is further argued that the appellant's principal interest in factoring is to ensure the building as a whole is maintained to a satisfactory standard "so the appellants can fulfil their obligations as landlords to their tenants" The appellants as proprietors have no entitlement to pay less factoring fees than others. The factoring service

maintains the property and benefit of amenities for all of the properties. The factoring service is not only for private housing. The appellant and their tenants all receive benefit from the factoring service as the service improves the amenities for all. Reference was made by the respondent to the case of *Crampshee* v *North Lanarkshire Council*; Court of Session 20 February 2004 and in particular to the legal position detailed therein whereby it is stated that a factor is a person charged with the management of the property. The factor may have a discretion in the manner in which he carries out his task, but he cannot impose a greater obligation upon the proprietors than is defined in the deed (the Deed of Conditions in this case).

Decision in relation to unfair and unreasonable outcome

[79] The concept of "fair and reasonable" is abstract and can be viewed from a number of different perspectives. What is fair and reasonable to one party may not be such to another. The respondent argues that it is fair and reasonable that each proprietor (and the appellant is a proprietor) all pay an equal share for a factoring service. It has to be said that on an objective view that could be considered fair and reasonable. On one view it is that very distinction between each parties' perception of what is fair and reasonable which justifies the very existence of the Deed of Conditions to regulate the position. There is nothing inherently unfair and unreasonable in the conclusion of the tribunal and no error of law is apparent.

The Housing (Scotland) Acts

[80] In developing his argument Mr Upton referred to the Housing (Scotland) Act 1987. He indicated that the problems with the respondent's submission arise not simply because it

would leave either the owner of the tenants of the 53 dwellinghouses to bear 73.6% of the expenses which had been incurred exclusively for the benefit of the 19, but also because the appellant could not pass on that cost to its tenants. The 19 owners and the 53 tenants cannot lawfully be treated *pari passu* (on an equal footing) in respect of the management fees. It is argued that is because it is against the law, namely the Housing (Scotland) Act 1987 for the appellant to apply any part of the rents or other payments which it receives from its tenants to defray costs incurred providing services to private persons such as the respondent. Put another way the appellant cannot lawfully use rental income from its own tenants to meet expense incurred in respect of the private flats in the same building – as opposed to common parts from which its own tenants benefit.

[81] The appellant's flats are provided to tenants in terms of the Housing (Scotland) Acts. As a consequence of this legislation it was argued that it would be unlawful to apply rent or service charges paid by tenants towards private flats, as opposed to common parts or for common benefits. It was, therefore, submitted that it would not be "fair or reasonable not to charge the management fee to the 19 flats". Insofar as it is not charged to the 19 it must be passed on to other third parties or borne by the appellant itself which is perhaps another way of saying that the appellant must make a gift of its services to the respondent and provide them gratuitously.

[82] Adopting that approach the appellant urges that as a matter of practicality the management or factoring fee cannot be treated as a common charge and it was argued that it was highly improbable that the Deed of Conditions was intended to require expenses to be deemed to be common charges where they cannot be allocated to all of the 72 occupiers equally.

[83] The respondent's position was quite simply that the current case had nothing to do with the Housing (Scotland) Acts and the situation currently under consideration was quite different.

Decision in relation to the Housing (Scotland) Acts

[84] The difficulty with the appellant's submission is that it fails to recognise that the appellants hold a number of different positions all in the context of Rosebank Tower. Insofar as the respondent is concerned he is an owner. The appellant is also an owner of 52 of the flats in Rosebank Tower. Separately, the appellant also provides factoring services to the respondent. These factoring services are regulated by the Deed. Separately, the appellant has a relationship of landlord and tenant insofar as it relates to the properties which it itself owns and lets. It has entered into an entirely separate legal arrangement with its tenants. How the appellant discharges its separate obligations both as the provider of factoring services to home owners and separately as a landlord to its tenants is a matter entirely within the gift of the appellant. What it cannot do is fail to follow the terms of the Deed and argue that there are provisions within the legislation referable to its discharge of its separate legal functions as a landlord to prevent such a discharge. I completely accept that the respondent cannot as a matter of law apply any part of the rents or other payments which it receives from its tenants to defray costs incurred in providing services to private persons such as the respondent. However, if there is a conflict in law caused by the different capacities in which the appellant acts it is for the appellant to resolve. I am unable to sustain an argument that the interpretation of the title conditions is unfair because there is an apparent conflict between the legislation in terms of the Housing (Scotland) Acts and the Deed to which the appellant, in a different capacity, is subject in a mixed tenancy property.

[85] It is for the appellant to determine how to discharge its obligations and how to legally harmonise these determinations. The appellant is legally disentitled from relying on its obligations in one capacity as a basis not to fulfil its obligations in a separate and distinct capacity. It cannot be that the Housing (Scotland) Acts which relate to the appellant in the capacity as a landlord can prevail over its separate and distinct obligations as factors? The appellant needs to consider the separate suite of obligations which exist in its different capacities and find a process whereby they can be reconciled. Failing to follow the Deed of Conditions is not an option. The legislative obligations in one capacity do not disapply the terms of the Deed.

[86] Indeed it may be argued that the appellant itself recognises this. The appellant provided a written statement of services to the respondent and other homeowners. That written statement clearly states that the title deeds will provide conditions relating to the management and maintenance of common parts.

> "The Title Deeds for the property will provide conditions relating to 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 the maintenance.
>
> 'our management fee represents the cost of administration and carrying out of the property management duties highlighted in this guide'".

It does not state that this will be subject to any qualification or specific legislative provision which may affect the appellant in a different capacity.

[87] The tribunal decision clearly sets out the narrative of the services provided by the appellants as factors. It then concludes, having given both parties an opportunity to present argument that the list of the services provided falls within cause 1(6)(c). It was entitled as a matter of law so to do. Simply because another option- which was not argued before the tribunal - may have been available does not result in an error of law. The tribunal was

legally entitled to conclude that clause 1(6)(c) and not 1(6)(f) applied. In addition, the issue before the UT is not exclusively a question of interpretation of the Deed. It is also a question of the application of the facts to the Deed. To succeed the appellant would require to demonstrate an error of law in that application. It has not done so. The dispute related to the facts. The tribunal reached a discerning, reasoned and explained decision on the basis of the evidence it heard. No error of law is evident..

Over-riding practical considerations

[88] Permission to appeal was also granted on the basis that over-riding practical considerations in the public interest are a factor to be considered. This relates to the scale of the factoring work undertaken by the appellant. Eight thousand five hundred and eighteen properties are factored by them and the re-allocation of factoring costs would be a significant undertaking. However, this information was before the tribunal and was considered by it (tribunal decision paragraph 23). As was properly identified by the tribunal its task is to decide whether there had been a breach of the appellant's legal duty. No error of law is apparent.

Acquiescence

[89] Mr Upton tentatively introduced an argument in relation to acquiescence since the current arrangement has been ongoing since 2011. He argued that the respondent could not now say to the appellant "You brought this about, now you sort it." This was on the basis of the respondent's apparent agreement to, and participation in, the arrangement for a number of years. I disagree. Acquiescence was not mentioned before the tribunal. It was not put to the witnesses and of course there is no evidence as to when the respondent became aware of

his current argument. There are no findings in fact which would justify a conclusion of acquiescence on the part of the respondent. Permission to appeal was not granted in relation to a submission about acquiescence. Whether a party is barred from asserting that an obligation has not been fulfilled is a question of fact to be determined objectively upon a consideration of all of the relevant evidence. Since the position was not put to any of the witnesses who testified before the tribunal such a determination cannot be made.

Final issues

[90] I indicated to the respondent at the outset of the appeal that the appellant's argued that current arrangement for factoring appears to allow the respondent a financial advantage in as much as he and indeed the other home owners benefit from economies of scale. In the event that he were to be successful the success may be hollow as the necessary change in arrangements by the appellant may result in the economies of scale no longer being available. The respondent indicated that he did not "believe" that he was currently benefitting from the said economies of scale. He offered no basis for his lack of belief. I express the comment that the success of the respondent in this aspect of the appeal may be financially disadvantageous to him and to his fellow home owners.

[91] The motion of the appellant to quash the decision of the tribunal of 5 April 2020 is refused no error of law is apparent. Standing outcome of this part of the appeal I will assign 23 April 2021 as a hearing in relation to the second aspect of the appeal, namely that of the consequent PFEO.

The PFEO

[92] On 23 April 2021 the hearing reconvened to consider the appellant's submissions in relation to the PFEO. Paragraph 1 of the PFEO issued by the FtT is in the following terms;

> "The appellants shall by no later than 31 March 2021 issue to the respondent or any successor as proprietor of the Property (15 Rosebank Tower) a statement of quarterly common charges with said statement including notification that the proportion of the quarterly management fee for the core services provided by the appellants ending in the quarter in question payable by the proprietor of the Property is one seventy-second of the management fee for Rosebank Tower., Cambuslang"

[93] The appellant was again represented by Mr Upton, advocate and the respondent again represented his own interests. Mr Upton indicated that he was not insisting upon his argument in relation to the uncertainty about what is meant by the use of the phraseology "core services" within the PFEO. He concentrated on the question of timing and invited the UT to substitute for 31 March 2021 the date of 31 March 2024. Mr Upton explained the complicated procedures which will necessarily require to be undertaken by the appellants to fulfil their obligations and the particularly time consuming nature of these. The original time scale of the PFEO has expired (31 March 2021) and an extension was inevitable. The only issue was the length the extension. It was explained that from the appellant's perspective a financial year had ended on 31 March 2021. The next financial year will endure from 1 April 2021 until 31 March 2022. During that year the necessary data will be captured. During the next financial year invoices will be issued and during the third financial year it is hoped the invoices would be paid. It is recognised that the appellant's factor in excess of 8,500 properties and the operation will necessarily be time consuming. The respondent did not oppose Mr Upton's submission. In the circumstances the appeal relative to the PFEO is granted to the limited extent that the figure "2021" where it appears in line 1 of the PFEO is delete and in substitution therefore is inserted the figure "2024."

[94] Save in relation to the motion to amend the date of the PFEO as narrated above which the UT granted of consent and on the basis that to do otherwise would be wholly impractical the appeal is refused.