

PROPERTY FACTORS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Property Factors (Scotland) Bill introduced in the Scottish Parliament on 1 June 2010. It has been prepared by the Govan Law Centre on behalf of Patricia Ferguson MSP, the member in charge of the Bill, to satisfy Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 51–EN.

POLICY OBJECTIVES OF THE BILL AND CURRENT LAW

2. There is presently no statutory framework regulating the behaviour and conduct of property factors in Scotland, and this absence causes significant consumer detriment in Scotland.¹ The Bill's primary objective is to create a statutory framework which would protect Scottish homeowners who contract with property factors. Part 1 of the Bill would do this by requiring property factors to be registered to ensure that they were "*fit and proper persons*" operating to minimum standards in the public interest. Part 2 furthers this public protection by creating an accessible and effective form of alternative dispute resolution between property factors and homeowners.

3. In 1999, the Scottish Consumer Council published its report, "*In a Fix*", which dealt with the experiences of homeowners whose factor was a local authority. The report found that it was almost impossible for homeowners to obtain redress when they were dissatisfied with repair works. Homeowners felt like "*second class citizens*".² If a property management dispute could not be resolved between the parties, the only option was for a homeowner to raise court proceedings or, if the title deeds permit, refer the matter to independent arbitration (typically at a cost of around £500 per day, excluding representation costs).

4. In February 2009, the Office of Fair Trading (OFT) published its market study on "*Property managers in Scotland*". The OFT found that almost one third of homeowners were dissatisfied with their property factor. Of those homeowners who had complained to their property factor, around two-thirds were dissatisfied with the way their complaint was handled. This level of customer dissatisfaction is head and shoulders above any other industry or sector providing services or products to the public in Scotland.

¹ "*Property managers in Scotland – A Market Study*". Office of Fair Trading, February 2009
<http://www.offt.gov.uk/OFTwork/markets-work/completed/scottish>

² <http://scotcons.demonweb.co.uk/publications/reports/reports99/rp07inaf.pdf>

5. In addition, a series of high profile Scottish television and newspaper investigations have highlighted the vulnerability of customers of property factors, and documented cases of serious exploitation.³

6. There are a number of inherent weaknesses in the current Scottish legal system as regards property factors:

- (a) anyone can set up and operate as a property factor – there are no checks and balances on suitability, honesty, past criminal convictions, or fitness to operate;
- (b) there are no statutory rules or principles setting out the minimum standards which the public are entitled to expect from their property factor;
- (c) homeowners generally buy a property with a factor already appointed, subject to terms and conditions of contract which they cannot amend, and it will be impossible to replace their factor if they are unhappy unless a majority of their neighbours agree. Even then, the factor may have contractual terms and policies in place which obstruct their removal;
- (d) where homeowners do complain to their factor about a particular service or bill, many factors use the small claims system to treat the complaint as a failure to pay a debt, which effectively circumvents the customer's ability to complain;
- (e) the current legal system permits some property factors to exploit their customers through excessive administration charges and interest rates, and the aggressive use of litigation and diligence to rack up costs;
- (f) the current legal system does not provide an accessible or speedy remedy for homeowners, and entering into litigation can take many months or years; meantime the management of the property may be prejudiced; and
- (g) the fact the OFT's study revealed almost one third of all homeowners were unhappy with the service from their factor, with two-thirds of those complaining remaining dissatisfied, confirms that the current law is not working.

7. The proposed Bill would resolve these difficulties with a robust, but straightforward, statutory framework.

BACKGROUND

8. Around 34% of all households in Scotland live in either a tenement, 4-in a block, multi-storey flat, or converted flat.⁴ Owners of such properties may share communal facilities such as the main structural elements of a property, its roof, entrance, common close, stairwell or lift. Amenities such as gardens, drying and landscaped areas may also be shared.

³ For example, a detailed investigative campaign throughout February 2008 was organised by the Glasgow Evening Times (see: http://www.govanlc.com/glc_newsarchive_2008.htm); see also BBC Scotland Frontline Scotland investigation, "Scotland's Property Nightmare" on 9 January 2008 (<http://www.bbc.co.uk/programmes/b008nlvg>)

⁴ See Table 3, Scottish House Condition Survey - <http://www.shcs.gov.uk/pdfs/SHCS%20Key%20Findings%202003-04a.pdf>

9. Responsibility for the repair and maintenance of communal property and amenities is generally shared between owner occupiers. Owners of former council property may share responsibility for repair or maintenance in common with the local authority or housing association. Common responsibilities are usually listed in a property's title deeds or the burdens section of a land certificate.⁵

10. The management of shared repair and maintenance responsibilities is often administered by property factors.⁶ Property factors undertake a range of management tasks, such as:

- hiring, supervising and paying day-to-day maintenance workers such as a caretaker, cleaner or gardener;
- organising owners' meetings so that decisions can be made about repairs or improvements;
- cyclical inspection of the building, and arranging to instruct any necessary maintenance work, including hiring contractors and overseeing their work;
- arranging for repairs to be carried out, including obtaining quotations and instructing necessary work;
- dealing with any complaints owners have about maintenance or repair work;
- taking charge of a joint maintenance bank account, collecting payments and pursuing owners who fail to pay; and
- organising common insurance for the building.

11. Some factors are members of the Property Managers Association Scotland Ltd.⁷ Yet property management in Scotland is by and large unregulated. Many factors are private companies competing for fees. They provide management services which are regulated by the contract they provide to owner-occupiers. Typically, contracts will be pre-printed and will be amended by the factor from time to time. Some title deeds may require a factor to be appointed, others may not.

12. Traditionally, there has been a problem with title deeds that require all owners to consent before repair works can be carried out. The Scottish Executive addressed this problem by the introduction of the Tenements (Scotland) Bill, which was enacted in 2004.⁸ It resolves the problem where title deeds omit to make adequate provision for the management of repairs. Under the Tenements (Scotland) Act 2004 a majority of owners can now make management decisions; and there is now a default set of rules for tenements, known as the "*Tenement Management Scheme*".

⁵ See further the Scottish Executive's "A Guide to House Purchase in Scotland", available online: <http://www.scotland.gov.uk/library3/housing/gthp-00.asp#b3>

⁶ Property managers (traditionally known as "factors") manage a range of properties in Scotland: from traditional tenements, modern flats, office blocks, industrial units to shopping centres. Some owner occupiers may be in a position to manage their properties jointly without the appointment of a factor.

⁷ <http://www.pmas.org.uk/ABOUT.asp>

⁸ <http://www.opsi.gov.uk/legislation/scotland/acts2004/20040011.htm>

KEY ASPECTS OF THE BILL

13. Part 1 of the Bill requires the Scottish Ministers to prepare and maintain a public register of property factors of residential premises in Scotland. Operating as a property factor of residential property without registration will become an offence under the Bill. The definition of “property factor” in section 2 does not apply to homeowners who “self-factor”, those who manage property which is not owned in common, and those who manage commercial property. Instead, the section 2 definition only applies to property factors providing services to land, buildings, or parts thereof, used for residential purposes where the property factor:

- is a business and the parts are owned in common by two or more persons;
- is a local authority or housing association and the parts are owned by it and another person in common, or wholly owned by two or more other persons in common; and
- owns and manages or maintains land or buildings, which is available for use by the owners of any adjoining or neighbouring residential properties, where those owners are required by the terms of their title deeds to pay for the cost of the management or maintenance of that land.

14. Registration is effectively a system of licensing, commonly used to safeguard the public interest in relation to a wide range of services and products. A registration approach is consistent with the registration system in place for private sector landlords who let residential property⁹ or for landlords who let houses in multiple occupation.¹⁰ By adopting a mandatory system of registration, the Bill ensures that property factors are a “fit and proper person” operating to a statutory code of conduct.

15. Property factors failing to operate to the proposed statutory code will face de-registration, and the prospect of this should be sufficient in most cases to ensure compliance, with the ultimate sanction being available in extreme cases. Given the relatively small number of property factors in Scotland it is envisaged that the register would operate on a national basis. However, section 26 of the Bill permits the Scottish Ministers to delegate the functions of administering the register if so required. The cost of administering the register would be met by proportionate registration fees, set by the Scottish Ministers, and payable by property factors.

16. Part 2 of the Bill creates a homeowner housing panel and homeowner housing committee (HHC), broadly similar to the private rented housing panel and private rented housing committee (PRHC) established by Housing (Scotland) Act 2006. This new form of alternative dispute resolution would enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether their property factor had failed to comply with any term of the contract between the parties or with the statutory code of conduct. Where the case was eligible in terms of section 17(1)(a) of the Bill, it would be remitted to a HHC. It is envisaged that the HHC would utilise the same personnel of the PRHC, with additional training, and staffing, as required.

17. The HHC would only consider cases where the parties had been unable to resolve matters through the property factor’s internal complaints procedure, thus creating an incentive for factors to resolve disputes amicably. Like the PRHC, the HHC would not require parties to be

⁹ Part 8, Antisocial Behaviour etc. (Scotland) Act 2004

¹⁰ Part 5, Housing (Scotland) Act 2006

represented by solicitors or advisors, and would be free from the worry of legal expenses and costs, which can be a powerful barrier to access justice.

18. If, on the facts, the HHC found that a property factor had failed in its contractual duties to a homeowner or failed to ensure reasonable compliance with the Bill's statutory code of conduct (made by the Scottish Ministers under section 13) a "*property factor enforcement order*" would be made, setting out what action the factor required to take within a specified timeframe. Where appropriate, the HHC could order what, if any, financial recompense should be made to the homeowner by the property factor. Before granting such an order, a property factor would have a full opportunity to make a case against granting an order by oral and/or written representations. It would be an offence to fail, without reasonable excuse, to comply with a property factor enforcement order. Parties would have a right of appeal, on a point of law, to the sheriff only.

IMPLEMENTATION

19. The provisions of the Bill will come into force on 29 September 2011, or such earlier date as the Scottish Ministers may by order appoint. This would provide sufficient lead in time for the Scottish Ministers to appoint, or second, personnel to begin the process of creating the Bill's register of 140 to 200 property factors. Most of the property factors are already known to the Scottish Ministers. It is envisaged that the homeowner housing panel and committee would utilise the existing personnel of the private rented housing panel and committee, with appropriate training, with the recruitment of further staff subject to take-up and demand.

CONSULTATION

20. A consultation on the general principles of the Bill was launched on 19th October 2007 and ended on 20th January 2008. As well as being made available on the Scottish Parliament's website¹¹, the consultation document was issued initially to organisations and individuals with an interest in the issue and recipients were encouraged to bring the consultation to the attention of others. Further copies were issued on request as well as being downloaded from the Scottish Parliament's website.

21. The main areas covered in the consultation were whether there should be a register for property factors and an accessible form of alternative dispute resolution between homeowners and property factors in Scotland. The main questions of the consultation were as follows:

- Q1. what type/category of property managers should be registered?
- Q2. should everyone involved in the direct control of a business appointed as a property factor have to meet a "fit and proper person" test?
- Q3. who should administer and enforce the property factors' register?
- Q4. how should the costs of maintaining and enforcing a property factors' register be funded?
- Q5. what are the disadvantages and advantages in extending the jurisdiction of the private rented housing committee to resolve disputes between homeowners and factors?

¹¹ <http://www.scottish.parliament.uk/s3/bills/MembersBills/index.htm>

Q6. how should a new form of dispute resolution for homeowners be financed?

Q7. what other difficulties with property factors could the Bill address?

22. There were 124 responses which comprised of: 97 individuals, 8 property management/factoring companies, 4 residents associations, 3 housing associations, 3 charities, 2 property managers associations, 1 MSP, 1 community council, 1 political party, 1 legal organisation, 1 rural property and business association, 1 independent consumer organisation, and 1 independent statutory body.

23. Of those responding to the consultation, 87% were generally supportive of the aims of the Bill, with 76% of respondents supporting the Bill in whole or in part, and 11% of respondents not explicitly stating their position, but given the content of their responses had indicated support for some or all of the Bill's proposals. The consultation and its responses were key to the framing of the Bill. A summary of the responses to the consultation can be found on the Parliament's website.¹²

ALTERNATIVE APPROACHES

24. The principal alternative approach would be to make improvements to self-regulation, an approach currently advocated by the Scottish Government and the OFT. Scottish Ministers first announced their support for the establishment of a voluntary accreditation scheme in July 2008 and since that time have indicated that they would consider stronger statutory measures if accreditation did not prove effective in raising standards within the industry.

25. Since March 2009, the Scottish Government has been working in partnership with representatives of the property management industry and others to develop a national, voluntary accreditation scheme. On 10 May 2010, the Scottish Government announced a public consultation on its proposed voluntary scheme¹³.

26. It is understood that to join the scheme, property factors will be expected to show clear and transparent accounting and billing systems and to provide clear, written contracts and an explicit and robust complaints procedure. Those who fail to meet the standards set out in the proposed scheme would have their accreditation taken away.

27. The Scottish Government's scheme was developed in response to the OFT investigation (discussed at paragraph 4, *supra*). The OFT recommended that the Scottish Government take the lead in ensuring implementation of a self-regulatory scheme. As noted, the Scottish Government has pledged to consider statutory law reform if problems with the poor quality of services provided by property factors persist.

28. The problem with accreditation is that it represents an extension or minor variation of the failed *status quo* position, which is very likely to be ineffective for the following reasons:

- accreditation would be voluntary and toothless in terms of sanction;

¹² <http://www.scottish.parliament.uk/s3/bills/MembersBills/index.htm>

¹³ <http://www.scotland.gov.uk/News/Releases/2010/05/10110711>

- any self-regulatory solution could never root out those individuals who were unfit to control or manage property management firms;
- the worst property factors in Scotland would continue to operate alongside, and unaffected by, the Scottish Government's voluntary accreditation scheme;
- an accreditation scheme would provide no direct legal remedy, solution or recompense for individual homeowners in dispute with their factor; and
- given the unparalleled level of consumer detriment that the property management industry generates, it is clear that a solution based on industry goodwill or greater market competition alone can never work for the reasons cited above, and in paragraph 6(a) to (f).

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

29. The member is confident that the provisions of the Bill would benefit people equally irrespective of gender, race, ability, ethnicity, religious belief, age, or sexuality. None of the consultation responses suggested that the Bill contained particular equal opportunities issues.

Human rights

30. It is considered that the provisions in the Bill are compatible with the European Convention on Human Rights. In particular, sections 11 and 21 of the Bill provide the right of appeal to a court of law, ensuring compliance with Article 6 of Schedule 1 to the Human Rights Act 1998. Where the private rights of property factors may be interfered with by the terms of the Bill, such interference is proportionate (having regard to Article 8 and Article 1 of the First Protocol of Schedule 1 to the said 1998 Act), with the *status quo ante* being protected until either the time period for an appeal elapses without an appeal, or an appeal is disposed off following a determination by a court of law.

Island communities

31. It is not expected that the Bill will have any differential impact on island communities and none of the consultation responses suggested otherwise.

Local government

32. None of the consultation responses suggested that the Bill contained issues for local government, other than local authorities being subject to the Bill where they act as a property factor falling within the definition in section 2(1)(b).

Sustainable development

33. It is not expected that the Bill will give rise to any issues in relation to sustainable development and none of the consultation responses suggested otherwise.

This document relates to the Property Factors (Scotland) Bill (SP Bill 51) as introduced in the Scottish Parliament on 1 June 2010

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