

## SPICe Briefing

# Property Factors (Scotland) Bill

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On 1 June 2010, Patricia Ferguson MSP introduced the Property Factors (Scotland) Bill in the Scottish Parliament. The Bill would require property factors to be registered on a property factors register and makes provision for an accessible form of dispute resolution between homeowners and property factors.

This briefing is intended to provide some background and context to the Bill. It describes the property services market, including the land maintenance market, in Scotland and considers existing legislative provisions and remedies for resolving disputes with property factors. It also considers a number of issues which, although not directly covered by the Bill, are nonetheless relevant to the subject of property management services in Scotland. These include the provision of pre-purchase information and the ability of residents to switch service provider. This briefing also examines how other jurisdictions (the Republic of Ireland and New Zealand) have attempted to address this issue.



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# INTRODUCTION

Property factors (or managers) generally manage and maintain the common parts of homes in multiple ownership. Property factors form part of the property services industry, a marketplace that currently operates without any statutory regulatory body<sup>1</sup>. Within the property services market, there is a variety of service providers who adopt a range of business models and approaches. In recent years, property factoring and, in particular, the management of open spaces, has been an area of some public controversy and has been the subject of a recent Office of Fair Trading (OFT) study ([OFT 2009](#)).

Recent legislative changes have been intended to bring some improvements in relation to the management and maintenance of residential property in Scotland. However, the legislative landscape surrounding property factoring remains complex and some of the relevant legislative provisions are untested.

Disputes with a property factor can arise for a variety of reasons, including the absence of financial transparency (i.e. hidden commissions, unspecified charges, lack of competitive quotes for work, high rates of interest, high administration charges, overcharging, errors in bills, etc.). Poor service, inadequate complaints handling and the absence of a cost effective and independent dispute resolution mechanism are other criticisms associated with the industry. Difficulties in switching service provider are perceived as a particular problem in this industry.

It is also worth observing, however, that property factors face difficulties too. These include non-paying residents (and the absence of a cost-effective resolution mechanism against proprietors who do not pay), absentee landlords (who may not wish to spend money on their properties because they do not live in them) and poor maintenance of common areas. In addition, because property managers deliver simultaneously to several parties, often with different or competing expectations, it can be difficult to obtain agreement between those parties. It should also be noted that the majority of respondents to the OFT consumer survey said that they found it easy to get repairs carried out, felt that services offered by property managers represented value for money and were of good quality ([OFT 2009](#), page 5). Furthermore, property managers may provide a maintenance programme and managerial stability that is in the long-term interests of the property as a whole.

In July 2008, the Scottish Government announced plans to work with the property management industry to support the establishment of a voluntary accreditation scheme for property managers ([2008](#)). A working group was subsequently established to develop the scheme. On 1 June 2010, Patricia Ferguson MSP introduced the Property Factors (Scotland) Bill. The Bill is intended to require property factors to be registered on a property factors register and makes provision for an accessible form of dispute resolution between homeowners and property factors.

# BACKGROUND

Common property management and the management of open spaces in Scotland has been the subject of a number of policy discussions and reviews in recent years, culminating in the Bill now before Parliament. The key elements of these discussions are summarised below.

In its final report in 2003, the Housing Improvement Task Force recommended that a national voluntary accreditation scheme for property managers be established ([Scottish Executive 2003](#)). However, the task force considered that regulation and licensing of property managers (i.e.

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<sup>1</sup> Some degree of statutory regulation has been introduced across the sector (for example, in relation to the services of estate agents and landlords)

legislation to make it illegal for unlicensed persons to provide residential property management services) would be too heavy handed and bureaucratic. Moreover, it referred to existing research which suggested that there was a reasonably high level of satisfaction with property management ([Scottish Executive 2003](#), page 70). For these reasons the Housing Improvement Task Force favoured a voluntary accreditation scheme.

In 2004, Communities Scotland commissioned a study to determine the feasibility of establishing and maintaining a national accreditation scheme for property managers in Scotland. It found general support for the principle of establishing a national accreditation scheme (ODS Consulting 2004).

In 2007, the Scottish Consumer Council published a study of consumer experiences of property management (factoring) services in the Dennistoun ward area of Glasgow ([Scottish Consumer Council 2007b](#)). The study found that the maintenance of property with common and shared parts was an unsatisfactory experience for many. The Scottish Consumer Council subsequently indicated its support for the recommendations of the feasibility study and called on the then Scottish Executive to establish a working group to take forward the development of a Property Managers' Accreditation Scheme ([Scottish Consumer Council 2007a](#)).

In March 2007, Gordon Jackson (formerly MSP for Glasgow Govan) lodged a draft proposal for a Bill to create a register of property factors and make provision for an accessible form of dispute resolution between homeowners and property factors ([Scottish Parliament 2007b](#)). The proposal fell at dissolution.

In June 2008, in response to submissions from the Scottish Consumer Council (now Consumer Focus Scotland) and others, the OFT launched a short [market study into property managers in Scotland](#) to establish whether the market for residential property management services was working effectively in Scotland.

In July 2008, the Scottish Government announced plans to work with the property management industry to support the establishment of a national accreditation scheme. However, the Scottish Government decided to await publication of the OFT report before entering into discussions with stakeholders on how to proceed.

The OFT received nearly 200 responses from consumers and also consulted directly with property managers, representatives of residents' associations, consumer organisations, independent regulators, Scottish Government, the Property Managers Association Scotland, academics and other stakeholders. It also conducted a telephone survey of consumers and an online survey of property managers.

In February 2009, the OFT published the report on its market study ([OFT 2009](#)). The OFT recommended that the Scottish Government should take the lead in ensuring early implementation of a self-regulatory scheme. It also recommended that, if a voluntary scheme did not prove to be effective, the Scottish Government should take steps to introduce a statutory scheme. In particular, the OFT indicated that if a voluntary scheme received widespread backing and included a provision for an independent and robust complaint and redress mechanism, this would be a big step toward solving the most serious problems in the market ([OFT 2009](#), page 8). Any voluntary scheme for property managers (or statutory scheme if voluntary arrangements prove unsuccessful), the OFT recommended, should apply to land maintenance service providers as well.

The OFT Market Study also found that most people (70%) were happy with their property manager. The majority of respondents to the OFT consumer survey said that they found it easy to get repairs carried out, felt that services offered by property managers represented value for

money and were of good quality. On the other hand, a substantial minority of respondents to the OFT consumer survey were less happy about the services provided ([OFT 2009](#), page 5).

The OFT report found that there was a need for an effective independent complaints and redress scheme which is easily accessible to the owners of shared property. It further found that in order for such a scheme to work effectively, it must operate within a framework which lays down minimum requirements for best practice so that complaints are assessed against clear standards. The OFT recommended that property managers should:

- set out in writing the details of the services they will provide and the relevant delivery standards
- encourage property owners to form an organised body (either a formal residents' association or limited company)
- provide, as a matter of course, a detailed financial breakdown and description of the services provided and such supporting documentation as is appropriate (for example, invoices where appropriate)
- provide proactive explanations of how and why particular contractors have been appointed, demonstrating that the services being procured are charged at a competitive market rate
- automatically return floats to owners at the point of settlement of final bill, without consumers needing to request the return of the float
- have and operate a complaints procedure and to proactively make details of it available to consumers
- follow Financial Services Authority (FSA) guidelines on disclosure of commission on insurance, whether FSA authorised or not
- allow the audit of payments to contractors, either on a random basis or reactively in response to complaints, to reassure consumers that no improper payments are involved.

The OFT also recommended that the Scottish Government should work with local authorities to develop a centralised information, advice and mediation service for private sector property owners and all types of property managers providing services to private sector owners.

In May 2009, the Scottish Government issued a written response to the OFT report in which it indicated its support for the OFT's recommendations for an industry-wide voluntary accreditation scheme and stronger, statutory, measures should they prove necessary ([Neil 2009](#)). The Scottish Government's response also indicated that the accreditation body would not be a public body, but instead ownership of it would "lie clearly with the property management sector".

The [Property Managers Association Scotland Limited](#) (PMAS) welcomed the recommendations, saying it already had a code of practice and supported the Scottish Government's intention to introduce accreditation of property managers in Scotland ([The Herald 2009](#)). A spokesman said:

"PMAS recognises that a simple system of dispute resolution would be advantageous to managers and clients. PMAS had proposed such a mechanism in its evidence on the Reform of the Law of the Tenement but the Scottish Government disregarded this suggestion when the Tenements (Scotland) Act was passed and left disputes to be resolved in the Sheriff Courts".

Jennifer Wallace, of Consumer Focus Scotland, said:

"The findings of the OFT study reinforce what we have long suspected - that this is a market that does not serve its consumers well. The patience of consumers is wearing thin. If the industry does not develop self-regulation including an independent complaint system then we will, with the support of the OFT, move to external regulation of the market" ([BBC 2009](#)).

Peveler Scotland, which manages 10,000 properties across Scotland, welcomed the report but said it did not go far enough. A spokesman said:

"We feel that more rigorous regulation is required to ensure more than mere lip service is paid to OFT's good intentions" ([BBC 2009](#)).

Mike Dailly, of the Govan Law Centre, said:

"This shows that our regulators, who let us down with the banking meltdown, are letting us down again. Does anyone really believe bad factors are going to start being nice if we ask them nicely? The OFT's conclusions are utterly incompatible with their finding that two-thirds of people who complained about their factor remained dissatisfied with them. That remarkable statistic blows any idea of voluntary self-regulation out of the water" ([The Herald 2009](#)).

Since March 2009, the Scottish Government has been working in partnership with key industry, consumer, housing and local authority stakeholders to develop a national accreditation scheme for residential property managers. Development work has been informed by the recommendations of the OFT market study. A stakeholder working group was established to carry out development work (minutes of its meetings are available on the [Scottish Government's website](#)). The proposed scheme will be voluntary, industry-led and open to all sectors offering property management and land maintenance services (private firms, housing associations, local authorities, sheltered housing and land maintenance companies - including land-owning land maintenance companies). Property managers who join the scheme will be required to meet high and clearly defined standards of service and compliance will be underpinned by a complaints system linking to robust and independent third party redress (provided by an Ombudsman service or similar). Development of these standards has been a priority for the working group and has been carried out with input from the consumer representatives on the stakeholder working group (including the OFT, Consumer Focus Scotland and Trading Standards).

On 10 May 2010, the Scottish Government launched a public consultation on the core standards for the scheme ([draft accreditation scheme](#)). The news release accompanying the consultation indicates that, to join the scheme, property managers 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. It further provides that those who fail to meet the standards set out in the proposed scheme would have their accreditation taken away. The news release also indicates that the Scottish Government will consider tougher, legal reforms if problems persist and the Minister for Housing and Communities, Alex Neil MSP, said

"I continue to take a keen interest in the passage of the Member's Bill being promoted by Patricia Ferguson MSP in this area. I support the outcomes it seeks to achieve.

"We will consider further statutory regulation if the voluntary scheme does not produce the results that we need."

The scheme was endorsed by the Property Managers Association Scotland, Consumer Focus Scotland and the OFT.

A Labour Party debate on factoring services took place in March 2010 ([Scottish Parliament 2010](#)). In responding to the debate, the Minister for Housing and Communities (Alex Neil MSP) acknowledged the cross-party support for action on this issue and indicated that the Government was “open to the possibility of the need for legislation” and would approach the Members’ bill “empathetically” ([Scottish Parliament 2010](#)). A previous parliamentary debate on common land surrounding housing estates took place in September 2007 ([Scottish Parliament 2007a](#)). The motion debated referred specifically to complaints about the neglect of common land on housing estates and to accusations that the Greenbelt Group failed to honour its obligations to householders in relation to the maintenance of local common land.

The Scottish Government has recently consulted on a proposed Private Housing (Scotland) Bill. This Bill is intended to improve the standard of private rented housing in Scotland. The proposals include changes that could help the landlord registration system to operate more effectively; improve the enforcement of the house in multiple occupation (HMO) licensing system; address overcrowding in the sector; and amend laws relating to aspects of the tenancy regime in order to facilitate the exercise of some landlord rights, clarify processes and improve tenants’ knowledge of their rights and responsibilities. The consultation closed on 20 April 2010 ([Scottish Government 2010](#)).

## **THE PROPERTY SERVICES MARKET**

There are two overlapping elements to the property services market in Scotland: property management services (normally of flatted accommodation) and land maintenance services (in relation to external, commonly owned parts of a housing estate). Some property managers provide services in both sectors of the market. These two elements are considered in greater detail below.

Although there is currently no comprehensive register of companies that act as property managers in Scotland, the OFT estimates that the property services market is worth approximately £66 million in cash terms ([OFT 2009](#), page 20). There are currently no specific legal requirements in Scotland when setting up a business as a property manager (anyone can provide such services), nor is there a commonly accepted quality framework to which consumers can refer when appointing or assessing the performance of property managers in Scotland.

### **Property management services**

It is estimated that around 36% of the population in Scotland (780,000 households) live in a tenement flat, maisonette or apartment and around 50% of people living in privately owned flats and apartments have a property manager ([OFT 2009](#), page 4). There is no obligation on tenement owners to appoint a property manager and the remainder either do not use a property manager and arrange the services themselves (either collectively or individually) or have no arrangements in place.

The type of service provided will depend on the contract between the property manager (or factor) and their client, but typically this will include the cleaning, repair and maintenance of common areas in flatted accommodation (including stairways, hallways, lifts and common gardens), instructing contractors and sometimes organising insurance cover.

There are regional variations in relation to the provision of property management services in Scotland. For example, in Edinburgh tenements have not traditionally had a factor.

## Land maintenance services

Land maintenance services include the maintenance of open areas, such as play areas, grass verges, drainage systems or woodland, typically surrounding new housing developments. The growth of private sector flatted accommodation over the past two decades, coupled with the requirement for maintenance arrangements to be put in place as a condition of a planning consent for developments with shared external space, has led to increasing numbers of property management companies entering this sector of the market ([Scottish Consumer Council 2007a](#)). Land maintenance services are not limited to flatted accommodation and are increasingly provided in relation to the open spaces around new property developments.

Historically, open spaces on housing developments were owned and maintained by local authorities. However, the OFT market study ([OFT 2009](#), page 65) identified three models of land maintenance now in operation:

- local authority ownership
- communal ownership
- land maintenance ownership

Under the land maintenance ownership model, the land maintenance company actually owns the land being managed. Under this model of ownership, the deeds of modern developments often reserve to the developer the power to appoint a property manager. The developer will typically appoint a property manager before completion. In some cases the contract will be put out to tender, but in other cases a less formal appointments process will be used.

Obligations on property owners to pay for the land maintenance services are often incorporated into the title deeds. Where this is the case, it is very difficult to change provider and, according to the OFT market study, there is very limited protection for the property owners against price increases or the failure of a company to deliver services ([OFT 2009](#), page 9). Under this model, because the land maintenance company owns the land, it can be very difficult to remove and replace it with another provider. As a result, home owners are effectively locked into a contract with a particular land maintenance company.

Greenbelt (which was set up by Strathclyde Regional Council, Scottish Natural Heritage and Scottish Enterprise in 1992) was the first land maintenance company to operate in Scotland and it retains a prominent market position ([OFT 2009](#), page 68-69). Other operators include Ethical Maintenance, Meadfleet, Peverel Property Management and Hacking and Paterson Management Services.

The management of open spaces is currently an area of particular controversy. A substantial volume of negative coverage about land maintenance companies has appeared in the press<sup>2</sup> and the performance of land maintenance companies has a high public profile ([OFT 2009](#), page 70). Indeed, there have been a number of parliamentary debates and parliamentary questions on the subject.<sup>3</sup> The land maintenance ownership model was a particular focus of the recent OFT market study and a number of action groups, including Greenbelt Group Action and Peverel Action, have been established to tackle the particular problems experienced in this sector.

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<sup>2</sup> See for example, [Scotland on Sunday](#), *Residents refuse to pay 'unfair' garden firm fees*, 14 March 2010

<sup>3</sup> In a parliamentary debate in September 2007, Fergus Ewing, the Minister with responsibility for this area, indicated his intention to establish whether it would be possible to change the law to prevent the transfer of communal areas in a housing development to a third party ([Scottish Parliament 2007a](#)).



# JURISDICTION

During a Labour Party debate on factoring services ([Scottish Parliament 2010](#)) the Minister for Housing and Communities (Alex Neil MSP) said that the issue of property factors raised both devolved and reserved matters. For example, the Minister stated that the regulation of professions is a reserved matter and, as such, indicated that discussions would need to be held with colleagues at a UK level.<sup>4</sup> There are certain other matters that may be relevant to the regulation of property services that are reserved to the UK Parliament, including the regulation of anti-competitive practices and consumer protection.

## THE BILL

The Bill will require property factors to be registered on a property factors register. The Bill also makes provision in relation to the resolution of disputes between homeowners and property factors. The main provisions of the Bill are described below.

### Registration

Section 1(1) of the Bill places a duty on the Scottish Ministers to prepare and maintain a register of property factors. Section 1(2) requires that the register must be available for public inspection at all reasonable times. Section 4 provides that the Scottish Ministers must only enter the person into the register if they are satisfied that the applicant is a fit and proper person to be a property factor (Scottish Ministers are entitled to refuse to enter a person in the register if they are not deemed to be a fit and proper person). Scottish Ministers may also remove a property factor from the register where they no longer meet the fit and proper person test or where they fail to comply with the code of conduct or any order of the proposed 'homeowner housing committee'. In refusing to enter a person into the register, Scottish Ministers must provide a written statement of reasons for doing so. Section 5 sets out the criteria that Scottish Ministers should consider in determining whether a person is a fit and proper person to be a property factor. The criteria to be considered includes conviction for any offence involving fraud or dishonesty, violence or drugs; unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability; contravention of any provision of the law relating to tenements, property or debt.

Section 9 provides that if a property factor is refused entry in the register (or once a property factor has been removed from the register) any fees charged for work done will be irrecoverable in law. Furthermore, section 12 makes it an offence for a person to operate as a property factor without being registered. A person found guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (£5000) or to imprisonment for terms not exceeding six months, or both.

Section 11 provides a right of appeal by way of summary application to the sheriff in cases where a person is refused entry in the register or where a property factor is removed from the register. A decision of a sheriff may be appealed to the sheriff principal, but only on a point of law.

Section 13 requires Scottish Ministers to prepare a code of conduct as to the minimum standards of practice expected of registered property factors.

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<sup>4</sup> Certain professions are specifically reserved by Section G, Schedule 5 of the Scotland Act 1998 c. 46, but not property managers.

## Dispute resolution

Part 2 of the Bill relates to dispute resolution. It creates a 'homeowner housing panel' and a 'homeowner housing committee'. These new bodies are intended to be broadly similar to the [Private Rented Housing Panel](#) and the Private Rented Housing Committee that were established by the Housing (Scotland) Act 2006. Under the Bill, these new bodies would determine whether a property factor had failed to comply with any contractual obligation to a homeowner or with the statutory code of conduct. It is envisioned that the new homeowner housing committee would be administered by the Private Rented Housing Committee. The homeowner housing committee would only consider cases where the parties had been unable to resolve matters through the property factor's internal complaints procedure. If the homeowner housing committee finds that a property factor has failed in its contractual duties or failed to ensure reasonable compliance with the Bill's code of conduct, it could issue a 'property factor enforcement order' which would set out what action the factor is required to take within a specified timeframe. The enforcement order could also set out what, if any, financial recompense should be made to the homeowner by the property factor. Parties would have a right of appeal against such an enforcement order, on a point of law, to the sheriff only.

## Financial memorandum

The Financial Memorandum indicates that it is not anticipated that there will be any significant costs on the Scottish Administration as a result of Part 1 of the Bill (registration of property factors). It is stated that the Bill's provisions for fee-charging will enable the cost of administering the register to be self-financing and cost neutral to the Scottish Administration. Registration costs would fall to property factors. Under the Bill, it would be for Scottish Ministers to determine fees payable for registration. The Financial Memorandum calculates that the average cost of registration would equate to £750 to £1000 per annum.

In terms of Part 2 of the Bill (dispute resolution), the Financial Memorandum refers to the costs of running hearings of the homeowner housing committee (including staff fees and expenses), obtaining reports and the hire of premises for hearings. The Financial Memorandum anticipates modest costs, as the Bill would utilise the existing infrastructure of the Private Rented Housing Panel. The Financial Memorandum indicates that precise costs cannot be quantified because the service will be demand-led.

## EXISTING LEGISLATIVE PROVISIONS

Both the Title Conditions (Scotland) Act 2003 ('the 2003 Act') and the Tenements (Scotland) Act 2004 ('the 2004 Act') contain provisions relating to property management services that are designed to strengthen the position of owners in relation to managers or factors. In particular, the 2004 Act introduced a statutory management scheme called the Tenement Management Scheme (TMS), which acts as a default management scheme for all tenements in Scotland. The TMS provides a structure for the maintenance and management of tenements where this is not provided for in the title deeds. Where the title deeds are silent on matters of decision making, the TMS allows the owners in a tenement to make decisions by majority vote. The 2003 Act and the 2004 Act also strengthen the statutory powers of owners to appoint and dismiss a manager. The relevant provisions are summarised below under the heading 'Switching provider' (the OFT market study also includes, at Annex F, a [summary of the regulatory and legislative background](#)).

The title deeds of a property are the legal documents which state who has title or ownership of a particular property and set out any 'burdens' (legal conditions to which the owner must abide).

These burdens may include, for example, an obligation to pay a proportion of common repairs or a restriction on the uses of a property. The title deeds may also contain information about the management and maintenance of the property. Title deeds vary markedly from property to property, reflecting local and regional variations and age.<sup>5</sup> Where there is no provision for a property manager in the title deeds of a property, maintenance and repair can be organised and contracted for directly by the owners of the shared tenement property or development.

## Criticism of existing legislative provisions

The existing legislative remedies in relation the management and maintenance of common property are considered to be complex.<sup>6</sup> The OFT market study found that many consumers do not understand their legal rights and obligations and are unsure about what they should expect from their property manager. In addition to its complexity, a further criticism of the existing law in this area is that it lacks certainty, exacerbated by the fact that it has not been properly tested in the courts. The OFT indicated that it was not aware of any consumers who had used the provisions of the 2003 Act to switch their land maintenance supplier, possibly because of the cost and/or complexity involved ([OFT 2009](#), page 10). In a recent SCOLAG article, Nigel Don MSP articulates the criticism of the 2003 Act in his analysis of the legislative provisions:

“The intention was that homeowners should have a way of banding together to replace an unsatisfactory factor, no matter what the Deeds say (s.64). But the Act failed to provide a clear and simple way for these things to happen. Had the authors of this Act set out to confuse and subvert the good intentions of the Scottish Law Commission, they could not have done a better job” ([Don 2009](#)).

## OTHER REMEDIES FOR RESOLVING DISPUTES WITH PROPERTY FACTORS

### Complaints

In theory, the existing legislation already provides owners with a legal right to dismiss a factor and appoint a new one. However, often an owner will simply wish to take issue with a particular aspect of a factors work (e.g. the size of the bill for maintenance carried out, maintenance work not done to a satisfactory standard etc). What remedies, therefore, are available short of the statutory process to remove a property manager?

Any property manager or factor who is a member of the [Property Managers Association Scotland](#) (PMAS) should have a formal complaints process in place to deal with any problems. If a resident is not happy with the service provided by the factor, they can first make a complaint using this process. If they are not satisfied with the outcome of that complaint, they can subsequently complain to the PMAS. The PMAS code of conduct allows it to impose sanctions on any member who breaches that code and identifies PMAS as the final adjudicator in its members' complaints procedures. For private sector property managers who are not members of PMAS, service delivery is a contractual matter between the property manager and their customers, enforceable in the courts.

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<sup>5</sup> Older title deeds tend to make almost no provision for common decision making in contrast with the title deeds for newer, and often much larger, developments in multiple ownership where the individual properties are sold on the basis that comprehensive management services will be provided.

<sup>6</sup> See, for example, Nigel Don's contribution to the March 2010 debate on factoring services ([Scottish Parliament 2010](#)).

If the manager isn't a member of the Property Managers Association, the resident can write to the manager to make a complaint and, if this has no effect, the owner may seek advice from a solicitor or a local trading standards office. Local trading standards offices have powers under the Unfair Terms in Consumer Contract Regulations 1999 to bring proceedings in the sheriff court against a property factor for unfair practices.<sup>7</sup> The Office of Fair Trading also has such powers. However, there is no evidence of such powers being used against property managers in Scotland.

The [Scottish Housing Regulator](#) has published performance standards and self-assessment guidance on factoring. It expects housing associations to follow the principles of these standards in their activities and, where appropriate, they test performance against these principles during inspections. In spring 2009 the [Scottish Federation of Housing Associations](#) published its own factoring guidance, which is designed for social landlords ([SFHA Factoring Guidance](#)).

## Civil court action

If a property owner considers that the property factor or manager has breached the terms of their contract, there may be a 'self-help' remedy available under the 'principle of mutuality' in contract law. The principle of mutuality provides that parties' rights and obligations are interdependent on each other and so the enforceability of a person's rights is dependent on them having performed their own duties. In other words, a party who is in breach of obligations cannot enforce performance by the other party.<sup>8</sup> So, in theory, if the property factor or manager does not perform an obligation to provide a particular service, then, broadly speaking, the property owner is not obliged to perform his or her obligation of paying for that service.

If the factor or manager raises a formal civil court action against a property owner for payment of outstanding sums it may also be possible for the property owner to lodge a defence that the services were not in fact provided. The court will assess the merits of that defence, along with the merits of the arguments presented by the property factor or manager.

The obvious risk with the self-help remedy in practice is that if a court does later rule that there was no breach by the property factor or manager, or the breach was not material enough to justify the non-performance of the property owner's obligations, the property owner will then be found in breach of contract for his or her earlier actions. It is, therefore, always advisable to seek legal advice on the application of the law to individual cases.

The need to establish a more accessible form of dispute resolution suggests that the small claims court in Scotland may not currently be providing an effective or accessible remedy for resolving disputes of this type. This may reflect a general anxiety about raising disputes using the civil court system in Scotland (see, for example, [IPSOS MORI 2009](#)), perhaps on the grounds that the civil courts system in Scotland provides a service to the public that is regarded as slow, inefficient and expensive ([Scottish Courts Service 2009](#), page i). A case in which a resident is pursuing a refund from a property manager for inadequate services is currently being pursued at Perth Sheriff Court using the small claims procedure. Depending on its outcome,

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<sup>7</sup> In general, whether a complaint is within the jurisdiction of trading standards depends on whether the contract is a consumer contract (they do not deal with legal contracts) and whether it is considered unfair. If, for example, the title deeds include a requirement for the owner to use a property manager, then this is considered a legal matter and not with TS jurisdiction. Indeed, the OFT report questioned whether these Regulations actually apply to a developer's Deed of Conditions ([OFT 2009](#), page 84).

<sup>8</sup> See McBryde 2007 (chapter 20, part 8) for a more detailed analysis of this principle.

this case may encourage more residents to use the small claims system for resolving disputes with property managers.

## **Alternative dispute resolution**

Court actions can be expensive and there is no guarantee of success. Sometimes forms of alternative dispute resolution such as mediation or arbitration can be a better alternative. There is no obligation on parties to go to mediation or to be bound by any agreement reached but such an approach can be effective in certain cases and may be free at the point of delivery. However, there is little evidence available to suggest that mediation is currently being used to resolve disputes with property managers in Scotland. The [Scottish Mediation Network](#) can provide details of local mediation providers. An obligation to refer a dispute to a third party arbiter (and be bound by his or her decision) is sometimes provided for in title deeds relating to particular developments. A charge is usually made for this service. Again, there is no evidence of mediation being used to resolve disputes of this type.

In England and Wales the Leasehold Advisory Service ([LEASE](#)) is funded by the government and provides free legal advice to leaseholders, landlords, professional advisers, managers and others on the law affecting residential leasehold and commonhold. It also provides a website with resources for consumers. The OFT recommended that the Scottish Government should work with local authorities to develop a centralised information, advice and mediation service for private sector property owners ([OFT 2009](#), page 99). The [Govan Law Centre website](#) contains some further suggestions on how to resolve problems with property managers.

## **ISSUES NOT SPECIFICALLY COVERED BY THE BILL**

The following issues are relevant to the discussion of property factors but are not specifically addressed explicitly by the Bill.

### **Pre-purchase information**

For some, factor charges are a hidden aspect of buying a property. A solicitor acting for a prospective buyer should inform them of the provisions in the deeds of the property. From 1 December 2008, houses for sale in Scotland have to be marketed with a Home Report which must include a property questionnaire which includes information about property management arrangements and costs. However, anecdotal evidence would suggest that many home buyers do not fully appreciate the nature of their relationship with a property manager when they purchase a property.

The recently introduced (1 April 2010) consumer code for house-builders (Consumer Code for Home Builders Scheme [2010](#)), which applies to new build housing, provides that home buyers must be given enough pre-purchase information to help them make suitably informed purchasing decisions, including a description of any management services and organisations to which the Home Buyer will be committed and an estimate of their cost.

### **Switching provider**

A particular grievance for some homeowners is the difficulty (or inability) to remove a poorly performing factor. The OFT market study highlighted the low level of switching despite perceptions of providing poor value for money. It attributed this to the difficulties residents have coordinating the individual owners in a tenement block or property development and problems in understanding the processes involved in switching to another property manager. It also found very little evidence of active competition between property managers to encourage consumers

to switch ([OFT 2009](#), page 5). In response to the OFT consumer survey, only about 50% agreed that they understood the steps needed to appoint a new property manager ([OFT 2009](#), page 40).

If a group of residents wish to replace a company providing property management services to a tenement building, legal mechanisms exist for doing so. It is less clear, on the other hand, whether the procedures for switching providers apply to providers operating under the land maintenance ownership model (see p 6 above for an explanation of this model) as there are no reported cases of such switches taking place. Under this model, the land maintenance company owns the land, so it is very difficult to replace it as supplier. The OFT Report (page 91) suggested that it would be desirable for the legislative provisions to be tested, so that the uncertainty about the ability to switch supplier using the Title Conditions (Scotland) Act 2003 and likely costs of switching using this method is resolved. The OFT indicated that it had been in discussions with Consumer Focus Scotland about supporting a group of residents wishing to take a case to the Lands Tribunal for Scotland in order to see whether the provisions of the 2003 Act provide a means of changing the provider of land maintenance services. It is understood that work on this proposal is ongoing.

The Title Conditions (Scotland) Act 2003 potentially enables property owners, acting together, to transfer responsibility for the maintenance of open spaces from an incumbent land maintenance company and provides for majority decision making where the title deeds are silent on this matter. The relevant provisions of these two Acts are considered below.

#### *Section 3(7) – prohibition of a long-term monopoly*

The 2003 Act includes provisions intended to prohibit a long-term monopoly situation in respect of common property management.

#### *Section 63 - manager burdens*

Section 63 of the 2003 Act contains provisions in relation to a type of real burden known as a 'manager burden'. A manager burden is meant to be used by a developer to appoint a manager in the initial years of a new housing development. A local authority or RSL may also make use of a manager burden where a property is sold under the right to buy. A manager burden stipulates who has the power to appoint or to act as the manager for the scheme and to administer and enforce the title conditions imposed.

The key feature of a manager burden is that the overriding power of individual property owners to dismiss a manager cannot be exercised whilst there is a manager burden in force (but see below in relation to right to buy cases). However, manager burdens cannot last forever (in contrast to the position prior to the 2003 Act). Section 63 provides that manager burdens come to an end on the earliest of these dates:

- five years from the registration of the manager burden in the property register (this is changed to three years for sheltered or retirement housing and 30 years for properties sold under the 'right to buy' scheme)
- 90 days after the individual or body on whom the powers are conferred ceases to be the owner of one of the properties affected by the manager burden
- on a date specified in the title deeds

In right to buy cases, the provisions of section 64 on the dismissal and appointment of managers apply straight away even if a manager burden is in force.

### *Sections 28 and 64 – appointment and dismissal of property managers*

Section 28 of the 2003 Act provides that, where the title deeds do not make alternative provision (and a 'manager burden' is not in force) a simple majority of property owners in a development can dismiss a manager and appoint a new person to be a manager on the terms they specify. There are similar provisions contained in the Tenement Management Scheme of the 2004 Act in relation to appointing and dismissing factors in tenements (in particular rule 3.1(c)).

If the title deeds do impose a higher voting threshold than that provided for in section 28, section 64 restricts that threshold. Section 64 provides that regardless of what the title deeds say (and as long as there is not a manager burden in force) owners of two thirds of the properties can dismiss a manager of related properties and appoint a new person to be a manager.

### *Sections 33-34 – changing the title deeds to dismiss a property manager*

Sections 33 and 34 of the 2003 Act allow a majority of owners to dismiss a property manager and appoint another by amending the existing title deeds. This requires a solicitor to draw up a new deed which is then signed by the majority of owners. In contrast to the approach in section 28 (see above), the deed must be intimated to those owners who did not agree with the proposed change and these owners are permitted eight weeks to raise any objections with the Lands Tribunal for Scotland. A property manager who is also an owner may object, preventing the title deeds from being amended in this way.

If no objection is raised within the eight week period, the owners may have the deed endorsed by the Lands Tribunal and proceed to register the deed in the Land Register or the Register of Sasines which gives effect to the variation or discharge.

### *Section 91 – applications to the Lands Tribunal*

Section 91 of the 2003 Act permits the owners of at least one quarter of the units in a community to apply to the Lands Tribunal to vary or discharge a title condition.

The Lands Tribunal has statutory power to deal with various types of dispute involving land or property. In addition, at the request of parties, it can act as an arbiter to deal with certain types of property dispute. With the passage of the 2003 Act, the Tribunal can now, in some cases, determine questions as to the validity, applicability or enforceability of title conditions.

The cost implications and the uncertainty of outcome may act as a disincentive to pursuing a section 91 application through the Lands Tribunal, particularly as such an application is likely to bear the additional financial costs associated with being the first application of this type ([OFT 2009](#), page 82).<sup>9</sup>

A particular consequence of the absence of an effective and accessible switching mechanism is the creation of a virtual monopoly position which removes any commercial incentive to do a good job and invest in the correct maintenance of common areas ([Don 2009](#)). In addition to the expense, difficulties associated with obtaining legal representation, uncertainty and complexity, residents may also experience difficulties organising the large numbers of owners that may be necessary to amend the title deeds.

The OFT reported that Consumer Focus Scotland had indicated its willingness to support a group of residents wishing to take a case to the Lands Tribunal for Scotland in order to see whether the 2003 Act provides a means of changing the provider of land maintenance services

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<sup>9</sup> See para 6.62

([OFT 2009](#), page 10).<sup>10</sup> Some service providers (including Greenbelt) have indicated that they would not oppose applications to remove them as provider and would consider transferring ownership on a case by case basis ([OFT 2009](#), page 82-83).

Legislative mechanisms exist which enable switching from one service provider to another. These provisions are available to residents under the traditional property factoring model. Although there is little, if any, evidence of the legislation being used under this model, the existence of a legislative remedy, however complex, may render its actual employment unnecessary. However, it is unclear whether the legislation applies to the land maintenance model and, although the absence of legal clarity may not be the only factor that inhibits the incidents of switching under this model, it is certainly a factor that contributes to the difficulties associated with this industry.

## **Housing associations and local authorities acting as factor**

Where housing associations also act as the property factor, particular issues may arise. Concerns in this regard were raised by a number of members during the March 2010 debate on factoring services ([Scottish Parliament 2010](#)).<sup>11</sup>

Research into the views of owner-occupiers towards factoring services provided by local authorities in relation to ex-Right to Buy properties was undertaken by the Scottish Consumer Council in 1999 ([Scottish Consumer Council 2007b](#)). Similar types of issues arose in relation to the provision of such services by local authorities arise in relation to private sector providers (i.e. inadequate pre-sale information, dissatisfaction with the quality of work, lack of basic information regarding charges, etc.).

The OFT Market Study included the provision of property management services by local authorities and housing associations to individual property owners. Although housing associations in Scotland are regulated by the Scottish Housing Regulator, its purpose is not designed to encompass the handling of complaints about property management services. The [Scottish Public Services Ombudsman](#) (SPSO) may hear complaints about the property management activities of both housing associations and local authorities, but only where those relate to tenants and not where the property management services are provided on a commercial basis to individual property owners ([OFT 2009](#), page 24-25).

## **Local authority adoption of open spaces**

Historically, many local authorities took on maintenance of new open spaces. Over the last decade or so, local authorities have often required a developer to pay it a capitalised maintenance charge (also known as a commuted sum) where the local authority is to take over the maintenance of an open space. While the requirement to pay the local authority a commuted sum (typically around 10-20 times the annual maintenance costs) to adopt the land aims to avoid additional financial burdens for the authority, it may also make transfer to a land management company, without the need for such a lump sum payment, an attractive option to developers ([OFT 2009](#), page 72). More recently, and taking into account concerns around private maintenance arrangements, there is evidence that some local authorities (eg Aberdeenshire Council) are looking to encourage public maintenance arrangements once again.

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<sup>10</sup> It is understood that work towards progressing a test case is ongoing at the time of writing.

<sup>11</sup> For example, Robert Brown indicated that there had been issues with the Glasgow Housing Association's factoring services across Glasgow (col 24232) and Bob Doris observed that "Owners who dispute bills for major works find it virtually impossible to get a full breakdown of how bills were arrived at by the GHA or a specific scheme of works for their own properties, with appropriate costings" (col 24238).



Petition PE1195 by Dr David L. McNally called on the Scottish Parliament to urge the Scottish Government to place a statutory duty on local authorities to maintain common areas on new housing developments ([Scottish Parliament 2008](#)).

On 27 January 2009 the Public Petitions Committee agreed to close the petition on the grounds that the Scottish Government was liaising with the Office of Fair Trading which was due to report shortly on the issue of property managers in Scotland. Further, that the industry had agreed to develop its own code of conduct and redress scheme for consumers which was expected to be operational by March 2010 and that the Scottish Government was expected to bring forward secondary legislation to establish a development management scheme which would make it clearer for owners' associations what the obligations and liabilities are in relation to shared facilities ([Scottish Parliament Public Petitions Committee 2009](#)).

## **Development Management Scheme**

Last year, the UK Government made the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729). This allows land owners to create Development Management Schemes to manage property where there is a shared interest. Under these arrangements, the management is entrusted to an owners' association, the membership of which consists of all the owners of the units in the development. The Order provides that the owners' association will be a body corporate.

## **INTERNATIONAL EXPERIENCE**

### **Republic of Ireland**

In the Republic of Ireland, the [Property Services Regulatory Authority \(PRSA\)](#) has recently been established on an administrative basis and is currently operating a voluntary code of practice for auctioneers and estate agents.

Legislation, currently before the Oireachtas, is intended to establish the PRSA on a statutory basis and will apply to all Property Services Providers (PSPs). PSPs are defined to include all those involved in the purchase, sale and letting of any land or property as well as those involved in the provision of property management services.

Under the proposed legislation, the functions of the PRSA will include operating a licensing system covering all providers of property services; setting and enforcing standards for the grant of licences and provision of services; establishing a system of investigation and adjudication of complaints; promoting increased consumer protection and public awareness; and establishing a compensation fund to compensate parties who lose money as a consequence of the dishonesty of a licensee

The PSRA will have power to sanction a licensee up to and including the revocation of a licence and may also impose fines of up to €250,000 where a PSP is found to have engaged in "improper conduct". The Authority may bring a prosecution against a PSP for failing to comply with his or her statutory obligations or against any person providing a property service without a licence which may result in either a large fine or imprisonment or both. Under the new regulatory regime all PSPs are required to contribute to the "Property Services Compensation Fund". Where a person suffers a loss due to the dishonesty of a PSP the Authority may award compensation from the "Fund".

The Property Services (Regulation) Bill 2009 was commenced in the Senate on 7 May 2009 and the second stage debate was taken on 21 May 2009. The next stage is committee stage debate in the Senate. However, it is understood that the Bill is not expected to progress in the foreseeable future (Haughey 2010).

## **New Zealand**

The New Zealand Ministry of Justice recently completed a review of the regulation of property managers ([New Zealand Ministry of Justice 2009](#)). The review focussed on the relationship between property owners and property managers, the risks for property owners and whether property managers should be required to comply with any specific duties and obligations. The review examined property managers in the broader sense (including functions such as marketing properties and finding tenants, letting and collecting rent, as well as organising maintenance and repairs). Following completion of the review, the Associate Minister of Justice, Hon Nathan Guy, announced on 2 July 2009 that no new occupational regulation would be imposed on property managers ([New Zealand Government 2009](#)). In rejecting the case for regulation, the Associate Minister observed that property managers were already subject to a wide range of obligations under the general law, including contract law and fair trading legislation, which could already be enforced through the courts.

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