

Property Factors (Scotland) Bill

Consultation Paper

October 2007

Patricia Ferguson MSP

Bill Proposal

The text of the draft proposal for a Member's Bill that Patricia Ferguson MSP lodged is as follows:

Property Factors (Scotland) Bill

Proposal for a Bill to require property factors to register and make provision for an accessible form of dispute resolution between homeowners and property factors.

Foreword

In the second session of the Scottish Parliament (2003-2007), my colleague, Gordon Jackson introduced a proposal for a Bill to require property factors to register and to make provision for an accessible form of dispute resolution. Unfortunately Gordon was not returned to Parliament at the elections in May and cannot therefore take forward his proposal. As someone who supported his proposed bill and who represents a constituency where factoring issues arise, I have decided to take forward Gordon's initiative.

The system of property management in Scotland offers little opportunity for people who are unhappy with the service their manager or 'factor' provides to question their activity.

Constituents complain that it is sometimes impossible to query the need for repairs or improvements and some raise issues about the invoices which are often unclear, excessive and subject to high rates of interest and penalty charges.

In Scotland, property managers are largely unregulated; they do however operate from a position of some power, trust and influence. Often the owners of flats in tenement properties are required by their title deeds to appoint a factor and many have no choice as to who is appointed.

This bill proposal has two main aims. Firstly, to create a registration scheme where persons appointed to manage properties would be required to meet a 'fit and proper person' test. This would help eliminate unreasonable practices. Secondly, the Bill would provide a form of straight-forward dispute resolution where homeowners and factors can resolve contractual disputes without having to incur prohibitive legal expenses or costs.

Before finalising the Bill I would like to hear a wide range of opinion. This consultation paper sets out the detail of what could be done to prevent and resolve property management disputes in Scotland. I look forward to hearing your ideas, your experiences and your views on how we can strike a fair balance between the rights of factors and the rights of homeowners. Your response will assist me in formulating the best policy to take this initiative forward.

Your written response to this consultation will be welcomed and I would be grateful if it could be sent to me at 154 Raeberry Street, Maryhill, Glasgow G20 0AG or patricia.ferguson.msp@scottish.parliament.uk by 20th January 2008

E-mail contributions would be preferable if possible.

If you have any queries please do not hesitate to get in touch with my office on 0141 946 1300

Patricia Ferguson MSP

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1. Background

Around 34% of all households in Scotland live in either a tenement, 4-in a block, multi-storey flat, or converted flat.¹ 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.

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.²

The management of shared repair and maintenance responsibilities is often administered by property factors.³ Property factors can 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
- organising common insurance for the building.

Some factors are members of the Property Managers Association Scotland Ltd.⁴ Yet property management in Scotland is by and large unregulated. 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.

¹ See Table 3, Scottish House Condition Survey -

<http://www.shcs.gov.uk/pdfs/SHCS%20Key%20Findings%202003-04a.pdf>

² 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>

³ 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.

⁴ See the Appendix for further details on this body.

2. Recent changes in law

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 has addressed this problem by the introduction of the Tenements (Scotland) Act 2004.⁵ It resolves the problem where title deeds omit to make adequate provision for the management of repairs. Under the Tenements Act 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*' (TMS).

3. Problems in practice

But what happens if an owner occupier is unhappy with work undertaken by his or her factor? They may take issue with the level of 'administrative charges' or 'interest' added to their bill. They may argue that essential work has been overcharged or has not been carried out – what can they do to resolve such disputes?

The short answer, is that it is not very easy to progress a dispute with a factor.

In 1999, the Scottish Consumer Council published its report, *In a Fix*, which dealt with the experiences of homeowners whose factor was the local authority.⁶ 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'. Little has changed since then.

If a property management dispute cannot be resolved between the parties, the only option is for an owner occupier 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).

There are several inherent problems with current practice:

- (a) court proceedings if opposed can take many months or years, meantime what happens to the management of the property?
- (b) most people of modest means would only run the risk of raising court action with the benefit of civil legal aid – for those with a modest income (which many owner occupiers have) civil legal is either not available on financial grounds, or only with a significant contribution. Also, if the Scottish Legal Aid Board thinks the other residents have an interest, they may refuse legal aid because there are multiple interests (some of which may not be financially eligible for legal aid);

⁵ <http://www.opsi.gov.uk/legislation/scotland/acts2004/20040011.htm>

⁶ *In a Fix* (1999), Scottish Consumer Council:

<http://www.scotconsumer.org.uk/publications/reports/reports99/rp07inaf.pdf>

- (c) the small claims system is of limited scope.⁷ Firstly, it only applies to money disputes of up to £750 and does not extend to other remedies such as declarator and interdict⁸. This financial limit may be too low for many disputes. Secondly, although the small claims system is designed to be less formal than other court proceedings, it remains the case that most businesses employ solicitors to represent them. This can place the homeowner at a disadvantage in terms of the principle of 'equality of arms';
- (d) finally, because property factors generally decide the terms of the contract between the parties, owner occupiers may find themselves legally 'boxed in'.

Paragraph (d) raises a particular cause for concern which can be render homeowners vulnerable. The following case studies illustrate this concern:

- **Case One.** Owner occupiers in a tenement in Glasgow signed a mandate to dismiss their factor. The factor was ineffective and they wanted to replace them. One or two owners had arrears with the factor, and for this reason the factor claimed they could not be sacked until all arrears were repaid. Five of the owners were not eligible for civil legal aid, and lawyers sought to persuade the legal aid board to grant legal aid for the owner who was financially eligible. The factor initially declined to reply to the owners' solicitors. Each month, as per the contract, the factor continues to bill the owners (although no work is done) and adds 'administrative charges' and compound interest each month. The owners have no accessible remedy and the 'debt due' is mounting.
- **Case Two.** Various homeowners have complained that their factors do not provide them with any vouching for repairs done – how can they check that costs are fair and properly incurred? They also complain that their factors charge anything from 2.5% to 8% compound 'interest'⁹ per month, as well as £15 per reminder letter. Some factors' contracts say they will not charge more than £15 per 5 day period – resulting in charges as much as £90 per month. The practice of many factors appears to be to send as many reminder letters as possible to maximize their fee – such charges often outstrip the factors legitimate monthly charge. While homeowners could argue such charges are possibly unlawful penalty charges or an unfair term of contract this

⁷ Research carried out by the SCC (Knowledge of Consumer Rights in Scotland, 2003) confirmed that only 7% of members of the public surveyed would consider using the small claims procedure for a consumer problem. In England and Wales (where the small claims limit has been raised twice – to £3,000 in 1996 and £5,000 in 1999) empirical evidence has confirmed that these increases only produced a minor uptake in claims: <http://www.dca.gov.uk/research/2002/8-02es.htm>

⁸ A 'declarator' is an order of the court which declares a party's rights; an 'interdict' is an order of the court which prohibits conduct.

⁹ 'Compound interest' is interest which is added to a principal sum due, and thereafter interest is applied to the interest and principal sum, resulting in the debt due rising sharply over time.

would require (a) paying the charges and (b) raising sheriff court proceedings to recover them – not an easy solution.¹⁰

In Glasgow, the latter issue of unfair ‘administrative charges’ is exacerbated in practice as many factors frequently sue customers for debts of a few hundred pounds using the small claims procedure. Scottish law centres have noted that many ‘*Exceptional Attachment Orders*’ (the replacement for poindings & warrant sales) are applied for by property factors typically for small debts. However, there are no judicial statistics available.¹¹

4. A fair solution?

A balance has to be struck between the private interest of property factors and the public interest of owner occupiers in Scotland. As such I propose a twofold solution.

1. **A Property Factors’ Register** – there is already a register for Registered Social Landlords (Housing (Scotland) Act 2001). Part 8 of the Antisocial Behaviour (Scotland) Act 2004 introduces a Register for Private Sector Landlords. While the former register is operated by Communities Scotland, the latter must be operated by the local authority.

Where any ‘relevant person’ was appointed to manage property in terms of a title deed, burdens section, or enactment such as the Tenements (Scotland) Act 2004, my Bill would require that they are first registered in the Property Factors’ Register. The definition of a ‘relevant person’ would exclude the local authority but include any individual, partnership or corporate body.

My proposed Property Factors’ Register would operate in a similar way to the Register for Private Sector Landlords, with the following features:

- the register would be administered by the local authority
- the duty to register would be compulsory
- any person involved in the direct control of a business which was appointed as a property factor would have to meet a ‘fit and proper person’ test - similar to the requirement on persons running private landlord businesses under the Antisocial Behaviour (Scotland) Act 2004
- failure to be registered would be an offence liable to prosecution and a fine on conviction, or alternatively the local authority may decide to serve a ‘Property Factor Penalty Notice’ with the effect

¹⁰ A judicial tribunal in Scotland can decide that a term of contract is unfair in terms of the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083). The Office of Fair Trading publishes a regular Bulletin of enforcement decisions where *inter alia* unfair terms of contract imposing excessive ‘administration charges’ have been found to be unfair and subject to deletion under regulation 10 of the Regulations: see for example <http://www.of.t.gov.uk/NR/rdonlyres/79D156F1-46E6-4EC6-90FB-84DF717B748C/0/oft656.pdf>

¹¹ The latest Civil Judicial Statistics for Scotland are for 2002:

<http://www.scotland.gov.uk/Publications/2004/02/18897/33079> This series of statistics is under review.

that no charges would be payable under the contract between the factor and homeowner until the notice was revoked

- the provision of false information or the failure to provide information to a local authority could result in an offence liable to prosecution and a fine on conviction
- the cost of administering the Property Factors' Register would be met by an annual registration fee.

2. **Accessible dispute resolution** – Disputes between homeowners and factors could be resolved by extending the jurisdiction of the Private Rented Housing Committee. The Housing (Scotland) Act 2006 re-named and extended the remit of the former 'Rent Assessment Committee' (under the Rent (Scotland) Act 1984) to the new 'Private Rented Housing Committee' (PRHC).

My Bill would make provision for the PRHC to sit as a 'Property Management Committee' (PMC). A PMC could hear disputes between homeowners and factors. Homeowners would still have the choice of raising proceedings in the Sheriff Court.

However, the PMC would be more accessible than the small claims system as legal representation would not be essential – as it would be an inquisitorial tribunal - without fear of legal expenses. As an independent and impartial tribunal, a Property Management Committee could determine all aspects of contractual disputes and provide efficient and effective legal redress.

5. Consultation questions

(1) What type/category of property managers should be registered?

(2) Should everyone involved in the direct control of a business appointed as a property factor have to meet a 'fit and proper person' test?

(3) Who should administer and enforce the Property Factors' Register?

(4) How should the costs of maintaining and enforcing a Property Factors' Register be funded?

(5) What are the disadvantages and advantages in extending the jurisdiction of the Private Rented Housing Committee to resolve disputes between homeowners and factors?

(6) How should a new form of dispute resolution for homeowners be financed?

(7) What other difficulties with property factors could my bill address?

(8) What have we missed? For instance, does my proposal affect any equality issues? Please feel free to give any comments you feel would be relevant to this Bill proposal.

6. How to take part

Please send all responses to Patricia Ferguson MSP. E-mailed responses are preferable, but if you have no access to e-mail then please post your response. Copies of the paper or alternative formats can be requested using the contact details below. An on-line copy is available on the Scottish Parliament's website www.scottish.parliament.uk

Patricia Ferguson is also keen to meet with interested groups to hear their thoughts on the proposed Bill, so if you are interested in doing so please do not hesitate to get in touch with us to arrange this.

Please feel free to pass this paper onto other individuals and organisations who you think might be interested in participating in the consultation process.

Confidential Responses

To help inform debate on the matters covered by this paper and in the interests of openness it is intended all the responses submitted on this consultation document will be made public. You should therefore be aware that by submitting this response you are indicating consent to the publication of all the material contained in your response. Unless you indicate otherwise this will include your name and address and any other biographical information you have provided about yourself. You should note that personal data referring to third parties included in the response cannot be accepted without explicit written consent from the third party. This consent should be provided with your response.

We are not entitled to process your personal data by publication without your consent. If therefore you want parts of your response to remain confidential please indicate which parts are not for publication. Similarly, if you wish all of the contents of your response to be treated in confidence and not made public then please indicate so.

All responses will be included in any summary or statistical analysis, which does not identify individual responses

Patricia Ferguson MSP

Constituency Office
154 Raeberry Street
Glasgow
G20 6EA

e-mail: patricia.ferguson.msp@scottish.parliament.uk
telephone: 0141 946 1300

APPENDIX 1

<http://www.pmas.org.uk/index2.asp>

PROPERTY MANAGERS ASSOCIATION SCOTLAND LTD



HISTORY

The Association in its present form can trace its history back to an incorporated Association formed in 1867 called the Association of House Factors and Property Agents. At that time House Factors (now known as Property Managers) managed residential properties for the landlord owners of many tenement buildings throughout Scotland but particularly in the industrial areas such as the City of Glasgow and towns such as Paisley, Greenock and Dundee.

The Association in its present form was incorporated as The Property Owners and Factors Association Glasgow Limited in 1917. This Association amalgamated with the local associations in Greenock, Paisley and Dundee and became Property Managers Association Scotland Limited in January 1991. The Association is a company limited by guarantee with three classes of membership, life and ordinary Members and Property Manager Members. Life and ordinary members are individuals and comprise partners, directors, associates and principals in Property Manager firms and the Property Manager Members are Property Manager firms through out Scotland.

In addition the Association has a class of honorary membership which is conferred upon former ordinary Members who have served the Association with distinction.

ACTIVITIES

The Association concerns itself with all aspects of property management and the law relating to heritable property. The Association regularly provides comment and evidence to the Scottish Executive and the Scottish Parliament on legislative changes. The Association provides guidance on legislative changes to its Members and provides educational opportunities through its programme of seminars.

The Association provides social and sporting activities for its Members.

ASSOCIATED ORGANISATIONS

Property Managers Association Scotland Limited is a corporate member of British Property Federation (www.bpf.org.uk) and through its membership of British Property Federation provides access for its Members to the largest property industry body in the United Kingdom.

The Association is a founder member of the Institute of Residential Property Management (www.irpm.org.uk) and supports the IRPM in its introduction of professional qualifications for Property Managers.

The Association works closely with its counterpart organisation in England and Wales, the Association of Residential Managing agents (www.arma.org.uk) and has regular meetings with its office bearers on matters of mutual interest.

The Association is supported in its sponsorship of IRPM in Scotland by the assistance of Asset Skills Scotland in providing educational opportunities for Members and vocational training expertise. Asset Skills can be contacted on www.assetskills.org.