Justice Committee

Inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003

Written submission from the Office of Fair Trading

Please find attached to this letter our response setting out the views of the Office of Fair Trading (OFT) to this inquiry concerning the Title Conditions (Scotland) Act 2003 (TCA).

The OFT’s primary aim is to make markets work well for consumers. The OFT’s powers allow it to tackle anti-competitive behaviour by undertakings, but also to address public restrictions on competition. This includes studying markets and recommending action where required and taking enforcement action under the Competition Act 1998 when necessary. The OFT also has responsibility to provide information and advice to government on competition and consumer issues.\(^1\)

The OFT carried out a market study in 2008-9 to determine whether the market for residential property management services in Scotland was working effectively. This included the supply of communal land maintenance services. Our report\(^2\) identified difficulties with switching property factors in general and to dismiss, transfer or replace land maintenance companies in particular. We noted that the legal provisions which would enable consumers to dismiss, transfer or replace land maintenance companies, in particular where they owned the land, were untested. We explored the possibility of a test case to establish whether the as yet unused sections of the TCA would assist homeowners to change supplier but we understand that has not progressed, although legal opinions have been issued on certain relevant questions. At the time of our report we concluded that, if costs and complexity of amending real burdens and changing land maintenance suppliers meant such change was beyond practical reach, the Scottish Government should reconsider the provisions of Title Conditions (Scotland) Act 2003. We therefore welcome this inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003.

The findings and recommendations of the OFT report remain relevant, in particular the analysis of the causes of the low level of switching in this market. Opportunities to clarify the law and, as appropriate, to reduce the duration for which homeowners are tied into land-maintenance arrangements are especially welcomed. We recognise however that, even where it is technically feasible, changing company is not the only solution. Homeowners still require mechanisms that resolve concerns arising with existing service suppliers effectively and at low-cost. In this regard, we

---

\(^1\) By virtue of the Enterprise Act 2002, section 7(1) ‘The OFT has the function of – (a) making proposals, or (b) giving other information or advice, on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).’

stand by the recommendations in the OFT’s 2009 market study report and look forward to evaluation of the impact of the mechanisms set in place under the Property Factors (Scotland) Act 2011.

The Committee clerk has asked us about any relevant material in the report published by OFT on 14 February into the private lettings market\(^3\). That review of consumer protection concerns contracts in the lettings market, not the services of property managers themselves, and we do not see a direct connection with the enquiry being undertaken by the Committee. But we will be pleased to consider any specific questions the Committee may have.

I hope the OFT’s further comments contained in the annexe to this letter are of assistance to you. If you require further clarifications please do not hesitate to contact me.

Kyla Brand  
OFT representative for Scotland, Wales and Northern Ireland  
25 February 2013

ANNEXE

**OFT response to the inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003**

1. *Section 53 of the 2003 Act allows enforcement rights in relation to real burdens to be created by implication where properties are “related”. Are there problems with the way this section operates in practice?*

This is not an issue that was raised or that we considered in the 2009 OFT’s market study (and is not an issue that has been raised with the OFT since). We cannot comment on how Section 53 of the 2003 Act currently operates.

2. *Section 63 of the 2003 Act controls the duration of “manager burdens” (the ability of a developer to appoint a property factor). Do the timescales contained in section 63 strike the right balance between the interests of homeowners and the interests of developers?*

There is clearly a balance to be struck here. It is not clear what is the underlying justification for the current three and five year periods. Our concern is that homeowners should not be tied into a land maintenance company that may be providing a poor standard of service for any longer than is absolutely necessary to discharge the developers’ responsibilities on the site. We recommend consideration be given to achieving benefits for homeowners through reducing the timescales.

3. Local authorities and housing associations can impose a manager burden which lasts up to 30 years on properties purchased under “right to buy” legislation. Is it necessary to tie homeowners into an arrangement for such a long period of time?

While the OFT has not examined or carried out any specific research into this issue, the 30 year duration seems lengthy. Unless there is some objective justification for such a long duration we would recommend a shorter timeframe be considered.

4. “Right to buy” homeowners can vote to replace a property factor with a two-thirds majority despite a manager burden being in place. Are there any examples of situations where this right has been exercised? Is a two thirds majority achievable in mixed tenure developments?

The OFT does not have any examples of this right being exercised. We cannot therefore comment on whether there are any problems with the way the 2003 Act currently operates in this regard. However we know that in general it is difficult to achieve two thirds majority across developments and that alternatives such as a simple majority have been proposed by consumer groups.

5. A local authority/housing association may own units in a development and provide the factoring service. Should the local authority/housing association’s voting rights be modified to make it more difficult for them to block a vote to dismiss them as property factor?

The consumer survey we carried out as part of our market study examined the attitudes to switching of consumers with an RSL or local authority property manager. Respondents who had property management services provided by a social landlord identified barriers that would prevent them from changing their current arrangements including:

- problems reconciling final bills and floats
- obtaining the co-operation of all residents
- obstruction by the incumbent factor
- In general many owners perceived that the process of changing the provider of the factoring service would be onerous or ‘a lot of hassle’

It may be even more difficult to achieve change in circumstances where homeowners have no, or limited, understanding of the procedures for changing their property factor (our consumer survey found that 71% had not changed their factor during their tenure and only 13% had changed their factor in the last five year period). Modification of the local authority/housing association’s voting rights may be of some benefit, especially if the arrangements are well communicated to home owners so that they believe in the potential to achieve change.

6. Section 28 of the 2003 Act allows owners to dismiss a property factor by a simple majority vote where the title deeds are silent on the issue. Section 64 provides that, regardless of what is stated in any real burden, a property factor can be dismissed with a two-thirds majority vote. Are these provisions workable in practice? The
Committee would be interested in any experiences of homeowners/residents’ associations in using the legislation in this way.

The OFT does not have any examples of the legislation being used in this way and is therefore unable to draw any conclusion as to whether the provisions are workable in practice. Low instance of invoking Section 28 and 64 would be reasonable grounds for concluding that these provisions are not working as well as they might and may be inhibiting switching.

7. Under a “land-owning maintenance company” model, an organisation owns green space around a development (which may encompass landscaped areas, drainage systems, play parks etc.). The land-owning maintenance company is required under real burdens affecting the land to maintain it and homeowners are required to pay for this service.

(a) Are the current options available to homeowners who are unhappy with the service provided by such a company effective?
(b) Are there options for reform which balance the interests of homeowners and land-owning maintenance companies?

The OFT concluded in 2009 that the options available to homeowners who were unhappy with the service provided were not effective. (40% of submissions made during our study concerned the land maintenance company ownership model.) We have not re-examined the market in any detail since but the thrust of the recommendations made in 2009 appear still to be valid.

We recommended then that Consumer Focus Scotland support a test case in order to assess the feasibility of residents taking action within the provisions of the TCA. Scottish Governments’ 2011 Maintenance of land on private housing estates: consultation confirmed that the provisions of the TCA for dismissing and replacing land maintenance companies had still not been tested in the courts or the Land Tribunal for Scotland. It outlined possibilities for either a model policy on how consumer choice should operate which land owning land maintenance companies could adopt, or legislation to amend the TCA to make it clear that the owners of two-thirds of properties with an obligation to pay land maintenance bills on an estate should be able to dismiss and replace the body carrying out the land maintenance, regardless of what the title deeds may say. The OFT position is that if the Scottish Parliament is satisfied that the existing provisions do not work in practice, there should be amendment, whether through legislative change to the TCA or the preparation of a model policy, whichever of these routes may be most effective.

It is also worth flagging here that a major source of consumer dissatisfaction was the lack of awareness among home owners of the arrangements and charges for maintenance. Full information and transparency about the terms of service is therefore helpful.

We also identified that, where homeowners cannot switch, it is extremely important that they can access information to assess whether they are getting value for money and can make complaints effectively and secure redress.
OFT recommended in particular that property factors and land maintenance companies 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 by the land-maintenance company and such supporting documentation as is appropriate (for example, invoices were 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

- have and operate a complaints procedure and to proactively make details of it available to consumers

- provide a mechanism to 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.

8. It is possible to vary or remove real burdens under sections 33 and 34 of the 2003 Act. However, if one owner objects, the variation will not be effective for the whole development. Do these provisions set the right balance between the interests of separate homeowners? The Committee would be interested in the experiences of homeowners/residents' associations in using this aspect of the legislation.

The OFT cannot comment on the experiences of homeowners/residents' associations in relation to Sections 33 and 34 of the 2003 Act as it has no direct evidence or examples to refer to.

9. It is also possible to vary or remove “community burdens” (a form of burden affecting a number of units in a development) under sections 90 and 91 of the 2003 Act by application to the Lands Tribunal. A sum may require to be paid in compensation to any homeowner negatively affected. Do these provisions set the right balance between the interests of separate homeowners? The Committee would be interested in the experiences of homeowners/residents' associations in using this aspect of the legislation.

The OFT cannot comment on the experiences of homeowners/residents' associations in relation to sections 90 and 91 of the 2003 Act as it has no direct evidence or examples to refer to.

10. An application to the Lands Tribunal may require the interested party to instruct a solicitor. The losing party may also be liable to pay the legal expenses of the winner. Note also that legal aid is available where the applicant meets the qualifying criteria.
Is this form of procedure appropriate to the issues at stake? Does it inhibit homeowners from bringing applications under the 2003 Act? Is it appropriate/desirable to create an alternative procedure?

Cost is clearly a concern and our evidence shows it may be a significant barrier to effective complaint redress. If the inquiry finds that cost, and the risk of meeting opponents' expenses, is inhibiting the number of complaints being taken to the Lands Tribunal it may be appropriate to consider an alternative procedure such as a mediation or binding arbitration mechanism to replace the formal legal process.