Justice Committee

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

Written submission from Ethical Maintenance CIC

What information is the Committee looking for?

The Committee is looking into whether the provisions in the 2003 Act act as a barrier to switching property factor and whether it offers sufficient recourse for those dissatisfied with the services of land-owning maintenance companies. The Committee is also interested in views and experiences of the options available under the 2003 Act to vary or remove existing real burdens.

It is Ethical Maintenance’s limited experience that the 2003 Act is a barrier to those communities that want to do something about an unsatisfactory factor. The Property Factors Act 2011 enables more information to be provided to homeowners and offers a good dispute resolution mechanism; but does not in itself enable homeowners to change their factoring set up. The principle barriers are:

- the complexity of the 2003 Act
- the lack of guidance for communities on how to use the 2003 Act
- The cost of professional advice should a community want to change a part of the Title Conditions.

From Ethical Maintenance's perspective, the most useful thing that could be done would be to provide guidance on how a community might use the 2003 Act for its benefit.

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?

Ethical Maintenance has not met the problem where a burden is enforced on related properties. However, we can envisage that it might be a problem if a few households do not enjoy the same benefits as the majority. Say in a development of five flats, the owners of four of the flats in the main building choose to vary the burdens so that they themselves clean the stairways, but the fifth flat which is not part of the main building does not wish to contribute to these costs. Might the owners of the four flats impose the new burden on the fifth flat as they have the same title conditions?

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?

Ethical Maintenance only works on private housing developments and so cannot comment on in social housing (30 yrs) or in sheltered or retirement housing (3 yrs) Manager Burdens.
The Manager Burden imposed by the developer ensures control of the common areas whilst the houses are built and also initial stability in the management of the common areas as the new residents settle in. There is significant benefit to both parties in this arrangement and the five year period seems appropriate. Of course, should the residents not be happy with their Manager Burden, they can override it using Section 64 and a two thirds majority.

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?

Ethical Maintenance has no experience of housing associations and so does not comment on this.

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?

Ethical Maintenance has no experience of right-to-buy homes in this and so does not comment on this.

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?

Ethical Maintenance has no experience in this, but does not, in principle, see why they shouldn't have the same voting rights as everyone else.

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.

We have some experience of working with Residents' Association to take on the maintenance work themselves. It is not easy to get the simple or the two thirds majorities required, but these are useful “hurdles” to ensure sufficient numbers of householders are engaged with the proposals.

We are not supportive of the thresholds being reduced. Not only is the longevity of an association in doubt without widespread support, there is always the chance that a small active group may take the community in a direction that the "silent" majority do not support, even though initially they may acquiesce.

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?**

It is our view that the processes are not effective as there is only a very weak understanding by homeowners of what can be done to change things and then working through the process is difficult without professional, and perhaps expensive, guidance.

For example, it is argued by some land-owning maintenance companies that there is benefit in combining the routine landscape maintenance of a site with the landowner's responsibilities to keep it safe (SUDS, bridges etc), in good condition in liaising with any statutory bodies. The landscape maintenance may be relatively simple to carry out and is more easily organised by the homeowners. And of course this is where the residents have much greater interest and where they spend most of their money. The landowner's responsibilities still need to be looked after, and paid for by the residents, but the cost of the professional input required to look after these aspects is considerably less than the routine maintenance. So if the homeowners understood this, they could separate the two functions and appoint their own maintenance contractor, just paying the land owner (the original land-owning maintenance company) to look after the owner's responsibilities.

To do this the homeowners would need to vary the burdens within their title conditions. And unfortunately the 2003 Act is almost impenetrable for the average homeowner and so, even if a community was clear in what it wanted to do, they could probably not achieve it ... without of course professional advice. For example, a householder may go round in circles untangling the dismissal of a manager. A manager may be dismissed by a simple majority of households if appointed by that community (Section 28(1)), but may not be dismissed by a majority if operating under a Manager Burden (Section 63(8)) but may be dismissed by owners from two thirds of the properties (Section 64). Working through all the cross references would not be straight forward. Guidance would be most useful, say along the lines of the flow chart produced for Housing Associations on [http://www.scotland.gov.uk/Publications/2004/08/19790/41573](http://www.scotland.gov.uk/Publications/2004/08/19790/41573).

(b) **Are there options for reform which balance the interests of homeowners and land-owning maintenance companies? (Note that the Scottish Government has consulted on this issue[1]).**

We do not feel competent to comment on how to reform the 2003 Act to make it more understandable by the common man; but, in repeating our view, perhaps an easy to use guide on using the Act to vary burdens and dismiss managers would be welcome.

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.

Ethical Maintenance does not have experience of one or a small group of owners objecting to a change in the community burdens, and we do not have a good alternate suggestion for protecting the interests of an individual against the proposals of a majority.

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.

Ethical Maintenance does not have experience in varying community burdens, but it seems appropriate to compensate anyone adversely affected. However, we can envisage the cost of employing advisers to work through the 2003 Act to vary burdens and then argue out any compensation might be a real barrier to overcome.

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?

The Committee’s focus is on the operation of the 2003 Act and what barriers it may create in regard to these issues. It cannot, however, intervene in individual cases.

The complexity of the way the 2003 Act is written means it is inevitable that residents will turn to professional help and then be put off by the cost. As said earlier, a guide to using the Act for the benefit of residents would be most welcome.

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26 February 2013