Justice Committee

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

Written submission from the Scottish Federation of Housing Associations

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 real problems with the way this Section operates in practice?**

Many housing organisations within Scotland rely on this provision when enforcing provisions contained in Deeds of Conditions which, although referred to in title deeds, do not include a title plan or sufficient detail to allow a reader to identify the extent of the development or estate which purports to be affected by the conditions. This is the case in many Scottish Homes’ transfer areas where the Scottish Homes Deeds of Conditions are referred to in the titles to many properties purchased through right to buy, but where the extent of the area which is covered by the deed is not identifiable either from the deed or the title plan. Whilst the conditions themselves are quite clear in relation to maintenance obligations they impose, what is unclear is which properties are affected within a common “scheme” and thus it is impossible to determine the extent of this scheme or the number of properties bound by the conditions. Whilst it may be that some organisations hold historic Estate plans which would confirm the position, others do not and as such rely on this s 53 of the Title conditions Act. In reality however, the extent to which the properties are “related” is one which could give rise to debate. Scottish Homes, for example, often registered one Deed of Condition over hundreds of properties as one development or estate, obliging all owners within this estate to contribute to the cost of maintaining common areas. Such common areas may be located geographically many streets away from the houses where the owners are bound to contribute to the cost. The extent to which the development extends and the properties which are encumbered by the burdens created by the Deed of Conditions is not clear. There are some organisations (and indeed legal advisors) who feel that such disparate properties are not adequately ‘related’ in terms of the Title Conditions Act and as such provisions such as these cannot be enforceable despite the clear indication from the deed that this should be the case.

2. **Section 53 of the 2003 Act controls the duration of “manager burdens” (the ability for a developer to appoint a property factor). Do the timescales contained in Section 63 strike the right balance between the interests of homeowner and the interests of developers?**

Whilst it is important that the voice of homeowners should be heard and consumer choice applied to the appointment of property factors, more often than not apathy rules in relation to the maintenance of the common parts of a development. Many developments are built in phases and the numbers of owners within such developments fluctuate and increase. It is imperative that a property manager is appointed in order to manage the common parts of the development. It is generally felt that the best placed individual/individuals to appoint such a property manager would be the developer themselves. This allows properties to be purchased with a
property manager in situ and maintenance be carried out without any active participation required by the owners within a new build scheme. It is the participation, or lack of it, that often renders self factoring or residents associations unworkable and leaves owners who do wish to appoint a manager with insufficient support from their neighbours to do so. It is generally accepted by most homeowners that there is a benefit of having a property factor. An unmanaged development often results in a decline in the general condition and amenity of a development. This may lead to prospective property managers being unable or unwilling to take on the management task of a development which has been allowed to fall into a very poor state of disrepair. Having had some experience of this, housing associations have been approached on a number of occasions to take over the management of developments or blocks of properties which are currently unmanaged, or a commercial factor has withdrawn or been dismissed by the owners. Initially it was anticipated that the owners within such developments would self-manage. However this often proves to be too challenging and as such some owner occupiers within the development approach a local housing association to factor the development. In one such case, on reviewing the development itself, the housing association found that the common parts of the development were in such a state of disrepair they advised the owners that they would not take management of development unless a sum from each of the owners was lodged with them in order to bring the property up to standard. From discussions with all of the owners only some agreed to payment of this sum and as such management of the property was not taken on by the organisation. This would not have been the case had the property continued to be factored by the original property manager before the owners made a decision to transfer the role of property manager to an alternative organisation. It is the apathy of homeowners to participate in making decisions in relation to the appointment of a property manager or the on-going maintenance of a development that can result in the decline of the amenity of a development. If a developer is entitled to appoint the first manager then it would only be through a pro-active approach by owners within the development or by the factor which would result in a change of factor.

3. **Local Authorities and Housing Associations can impose manager burdens which last up to 30 years on properties which are purchased under “Right to Buy” legislation. Is it necessary to tie homeowners into such an arrangement for such a long period of time?**

It is the opinion of the majority of housing associations that the imposition of a manager burden in favour of the association/local authority selling the property is imperative when the property is purchased under the Right to Buy legislation. It is likely that the housing association /local authority will continue to own a number of properties surrounding those properties which are purchased under Right to Buy. Without the imposition of a manager burden it becomes difficult, if not impossible, to ensure the future maintenance and preservation of amenity of the wider development. Housing organisations see property management as part of their wider role function. Many housing associations are charitable organisations who are required to ensure that the money obtained by them through rents is used to further their charitable purposes and as such these sums cannot be utilised to subsidise the maintenance of the wider development. Collection of the appropriate sums from
owner occupiers is necessary. The subsidy of owner occupiers through tenants’ funds would not be in furtherance of a housing association’s charitable purposes.

4. **Right to Buy Homeowners can vote to replace a property factor with a 2/3rds majority despite a manager burden being in place. Are there any examples of situations where this right has been exercised? Is a 2/3rds achievable in mixed tender developments?**

We have received no feedback confirming that any of the organisations which we represent have had experience of this.

5. **Local Authorities/Housing Associations may own units in a development and provide factoring service. Should the Local Authorities/Housing Associations voting rights be modified to make it more difficult for them to veto a vote to dismiss them as property factor?**

Many social landlords only provide factoring within developments where they own properties. Many organisations see factoring as a “necessary evil” which must be carried out ancillary to the maintenance of their own properties. Very few make any profit from carrying out factoring - in fact most struggle to meet their own costs. Where social landlords own properties within developments both new build and traditional it is imperative that they are entitled to the same rights as owners within the development. If organisations are obliged to meet the share appropriate to the number of properties which they own within the development there should be no dilution of their ability to vote in relation to the appointment/dismissal of a property factor. In relation to new build properties public money has been utilised to acquire, build and retain assets such as shared ownership properties and it is the duty and responsibility of housing associations and local authorities to ensure that the public’s money is preserved in these assets though appropriate maintenance of the properties and the development of which they form part. It is the obligation of a social landlord to ensure that asset worth is preserved and asset’s amenity is maintained. Where the owners within a development cannot dismiss a local authority or housing association due to the number of properties owned by them, they do have an opportunity to ensure that the organisation adheres to their factoring duties and responsibilities as established in the Property Factors Code of Conduct under the Property Factors (Scotland) Act 2011.

6. **Section 28 of the 2003 Act allows the 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 2/3rds majority vote. Are these provisions workable in practice? The committee would be interested in any experiences of Homeowners/Residents Associations using the legislation in this way.**

Whilst the Act provides for dismissal of a property factor in this way it would be rare for a housing association to experience the Act being used in such a manner. In fact, in the experience of many housing organisations it is rare for a group of homeowners to come together to dismiss a property factor at all unless there is a good reason for doing so. If there is a good reason for dismissal one would hope that
such disaffected homeowners would get together in order to dismiss the factor either by the provisions as set out in their titles or those set out in the Title Conditions Act.

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 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**

Whilst housing associations have very little involvement within traditional properties with land owning Maintenance Company Models, a similar situation arises where a housing association owns an area of land and imposes title conditions which oblige homeowners within the development to participate in and contribute to the maintenance of that land. It would appear that there are very few options available to homeowners who are unhappy with the cost of the service provided by a housing association or a land owning Maintenance Company where the said organisation owns the land in question. The Property Factors (Scotland) Act 2011 deals with the duties and responsibilities of a property manager/land factor however it does not address the cost effectiveness of such organisations and the ability of homeowners to question the costs imposed upon them by the companies managing such areas of ground. The new legislation and the Homeowner Housing Panel established by this new legislation are quite clear in that they have no locus in reviewing the charges imposed by property factors and land management companies. As such, we would suggest that whilst the options which are open to homeowners in relation to service delivery have been improved by the introduction of the Property Factors (Scotland) Act it still does not address the issue of the homeowner’s ability to query the cost of such a service.

(b) **Are there other options for reform which balance the interest of homeowners and land owning maintenance companies?**

Whilst it is helpful that the Scottish Government acknowledges that many homeowners are unhappy with the ability of Land Maintenance Companies to maintain ground in a matter at their discretion and recharge the cost of such maintenance without consultation or reference to the homeowners they must also be mindful that any change in the ownership of such open space would involve an element of conveyancing and thus a cost which the owners of the properties within the effected development would require to bear. In the event that a local authority agree to take over the area of ground for maintenance purposes and adopt same the local authority will require a payment of around 10 to 15 years of the cost of such maintenance to be paid as a lump sum. Again, the costs of this adoption would be passed to the owners within the development. The practicalities of such payments must also be considered and whether indeed there would be any obligation on homeowners to meet any of this cost.

8. **It is possible to vary or remove burdens under Section 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 between separate homeowners? The committee would be interested in the experiences of Homeowners/Residents Associations in using this aspect of the legislation.

It is not the case that if one owner objects to a proposed variation or removal of a title condition under Section 33/34 of the legislation it will not be effective. A proposal to register the Deed of Variation must be intimated to the other owners within the “community” if they have not been party to the deed. This intimation will involve sending a copy of the deed together with notice as is set out in the Act together with an explanatory note. Each owner who has not been party to that deed and has received such intimation has then a period of 8 weeks to apply to the Lands Tribunal for preservation or the community burden unvaried. It is not the case that the owner will simply be able to object and therefore the deed will not be entitled to be registered. It is likely that the Lands Tribunal would hold a hearing to discuss the proposed variation / discharge and the interested parties allowed an ability to be heard, setting out their reasons for the proposed variation / discharge and the reasons by the alternative owner for their opposition to that proposal and thereafter a decision made as to the merits of the variation.

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 be required to be paid in compensation to any homeowner negatively affected. Various 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.

Housing associations and local authorities often find difficulty where they own properties within blocks or developments where the composite number of the properties has been changed through amalgamations or where commercial properties have been split and converted to residential properties. An important recent case in the Lands Tribunal of Paterson v Drouet has given clarity to this position. This case involved the owners of ground floor and basement flats within a tenement, originally of eight flats but after sub-division comprising nine flats. These owners brought an action in terms of Section 91 of the Title Conditions (Scotland) Act 2003. By virtue of this Section of the Act the Lands Tribunal were asked to vary the burdens for the community (the owners in the tenement) to make the allocation of common repair costs equitable. The number of owners required in terms of the legislation (in excess of one quarter of the owners of the properties within the tenement) joined in the application and as such the Lands Tribunal were able to consider this case on its merits. The titles to the property in the tenement contained provisions setting out that the common repair costs were to be split on the basis of rateable values of the properties. When domestic rates were abolished in 1989 legislation provided that all existing maintenance obligations calculated with reference to rateable values or assessed rental or annual value of the various properties should continue to stand.

New valuations would be undertaken and effectively the valuation of each property as at 1 April 1989 would be the basis of all calculations. In 1989 the ground floor
units in the tenement in this case had been commercial units and the owners were jointly liable for around three quarters of the total maintenance costs of the common parts of the tenement block. The flats, having been converted, had changed from commercial to residential use. However the titles remained unchanged and the owners of these residential properties were now liable for a large share of the costs of maintaining the common parts of the block. Matters could have been adjusted if the proprietors of the tenements had agreed to a variation of the community burdens to divide common repairs costs in a more equitable footing. In order to achieve this, a majority of the owners of the flats in terms of the Title Conditions Act could have applied for this change. In practical terms, however, few owners would have agreed to this as it would have resulted the owners of the upper floors agreeing to pay a far greater share of the common repair costs than they were currently liable for. Application under Section 91 of the Act was therefore the only avenue open to the owners of the ground floor of the tenement. On hearing the case the Tribunal had no difficulty finding in favour of the Applicants. The title provisions which once were fair and reasonable had, due to the unforeseen freeze of valuations, become unfair and unjust. The Tribunal also considered further compensation to the proprietors of the upper floor properties should be granted. In terms of the legislation the Tribunal is entitled to make an order for payment of compensation for “substantial loss or disadvantage” suffered by benefited proprietors. In this particular instance the Tribunal declined to make such an order giving the reasoning that whilst a change in the apportionment of the common repair costs would have a positive effect on the value of any ground and basement floor properties of the tenement it did not automatically follow that the values of the upper floor flats would be reduced. The Tribunal determined that there was an undoubted benefit to the tenement as a whole of replacing the inequitable scheme with that which was equitable, resulting in no compensation being appropriate. From the findings in this case it is clear that the Lands Tribunal will readily find in favour of Applicants facing inequitable apportionment of common repair costs but only where unfairness has occurred by superseding events, not simply inequitable drafting in the first instance.

10. An Application to a 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 a 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? It is appropriate / desirable to create an alternative procedure? It is our opinion that whilst participation in any form by homeowners in relation to the maintenance of development or block common parts should be encouraged and accessible to homeowners, the line must be clearly drawn between participation and interference. Application to the Lands Tribunal may require an interested party to instruct a solicitor, but instructing such a solicitor may give focus and prospective of the issues at hand to an otherwise scattergun approach by an interested individual. Careful consideration of the provisions of the Act and the approach previously taken by the Lands Tribunal must be given prior to any applications, and in the event that such applications are readily accessible by any individuals who have issues with their property factor or are unhappy with the set up of their titles may likely result in an influx of applications of questionable merit. Should an Applicant meet the criteria
of Legal Aid this is available to owners but again would only be taken on by an agent if the applications and claims had a chance of success.

Scottish Federation of Housing Associations
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