

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2006](#): review and simplify the legislation in relation to dismissal of property factors, lodged by Ewan Miller

The petition calls on the Scottish Parliament to urge the Scottish Government to amend the Property Factors (Scotland) Act 2011 to cover dismissal of property factors or bring forward other regulations that would achieve the same aim. The petition states that this could include giving the First-tier Tribunal powers to resolve disputes related to the dismissal of property factors.

Property factors

Property factors manage the repair and maintenance of property (e.g. common property and communal areas in flats and housing estates) on behalf of homeowners.

The [SPICe Briefing “Property Factors - Frequently Asked Questions”](#) (‘SPICe Briefing’) includes responses to certain frequently asked questions on property factors including a summary of the main rules on their dismissal.

Property Factors (Scotland) Act 2011

The Property Factors (Scotland) Act 2011 (‘the 2011 Act’) regulates the sector. It includes:

- compulsory registration for property factors operating in Scotland
- a [Code of Conduct](#) with minimum standards which property factors have to follow
- a dispute resolution system - homeowners can bring cases to [the First-tier Tribunal for Scotland \(Housing and Property Chamber\)](#) if their property factor breaches the Code of Conduct.

There is no fee for applying to the First-tier Tribunal and legal representation is not necessary. Cases can therefore be brought without legal support.

Title deeds

The title deeds to properties often contain rules on the maintenance of common property and the work of property factors. They will often:

1. indicate which parts of the property are owned in common; and

2. contain "[title conditions](#)" (known as "real burdens") on the management of common property, including obligations to pay towards maintenance, and rules on how property factors should be appointed or dismissed.

The title conditions may also name a particular organisation which must be appointed as a property factor.

Dismissal of property factors

The rules on appointing and dismissing property factors are not dealt with in the 2011 Act. Cases on dismissal itself are not heard by the First-tier Tribunal, although the Code of Conduct touches on limited aspects of dismissal (e.g. requiring property factors to provide clear information on how to terminate the service).

To assess whether a property factor can be dismissed, one needs to look at the title deeds in conjunction with fallback powers in:

1. the Tenements (Scotland) Act 2004 ('the 2004 Act') for flats; and
2. the Title Conditions (Scotland) Act 2003 ('the 2003 Act') for land and property more generally.

This can be a very complex process as the legislation is complicated and needs to be read in conjunction with the title deeds. There can also be complicated legal questions on whether conditions in title deeds are enforceable. As a result, it may often be necessary to seek legal advice. Court actions may also be necessary if a dispute between homeowners and a property factor cannot be resolved.

Justice Committee inquiry in 2013

There have been various inquiries into this system over the years, in particular in relation to "land-owning maintenance companies".¹ These are property factors which own the land they maintain (normally open spaces on housing estates) and which require payment for the management of these areas based on title conditions.

In March 2013, the then Justice Committee conducted an inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003 in relation to the appointment and dismissal of property factors. [The Justice Committee's report](#) published on June 5, 2013 made a number of recommendations for change. The Committee noted that:

"... difficulties appear to have arisen regarding the switching of factors. In particular, the complexity of the legislation may be creating barriers to switching." (paragraph 67)

The Committee therefore called to on the Scottish Government to:

¹ See page 30 of [the SPICe briefing](#) for details

“ ... give careful consideration to whether the legislation could be amended to remove these types of barriers.” (paragraph 68)

The Committee also noted that the evidence it received on land-owning maintenance companies:

“ ... demonstrates the complexity of the law in this area, in particular, regarding the enforceability of real burdens where the land-owning maintenance company model is involved. The Committee notes that this lack of clarity can create uncertainty which is unsatisfactory for all parties.” (paragraph 95)

The Justice Committee called on the Scottish Government to review the law in this area, whilst noting that a test case might clarify some of the issues.

[The Scottish Government responded to this report in a letter dated 4 September 2013.](#)

The response took the view that general changes to legislation in relation to the appointment, dismissal and replacement of property factors were not needed (paragraph 19).

The Scottish Government did, however, indicate in its 2013 response that, in relation to land-owning maintenance companies, “doing nothing is not an option, given the concerns in this area”. It stated that it would be preferable to prepare a Voluntary Code of Practice on dismissing and replacing land-owning maintenance companies rather than to legislate. The Scottish Government stated that:

“26. Preparing a Code of Practice does not rule out legislation in future if the Code of Practice should turn out to be ineffective. The Government will review the effectiveness of the Code of Practice after it has been operating for three years and will provide a report to the Committee on the outcome of this review.”

The Scottish Government’s response in 2013 also agreed that a test case on the enforceability of title conditions in this area would be helpful.

Test case and Voluntary Code of Practice

There was a [test case at the Lands Tribunal \(the Marriott case\) challenging various aspects of the land-owning maintenance model.](#)

Work on the Voluntary Code of Practice was paused while the Marriott case was being considered by the Lands Tribunal. The Lands Tribunal published its judgment at the end of 2015. It held in favour of the applicants, albeit on relatively narrow grounds which do not affect the validity of the land-owning maintenance model or the rules on dismissing property factors.

It appears that work on the Voluntary Code of Practice is continuing. However, based on public information, it is currently not clear when this work will be completed or when the Voluntary Code of Practice will be published. [On 30 June 2022, Ash Regan MSP, the then Minister for Community Safety, responded to a parliamentary question on the timeframe as follows:](#)

“The Scottish Government has prepared a draft Voluntary Code of Practice on dismissing and replacing land-owning land maintenance companies. To ensure that the draft Code is fair and workable for all users we will seek views from consumer facing bodies and land owning land maintenance companies before we progress to publication. Plans for engaging are underway.”

Angus Evans
Senior Researcher
31 March 2023

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

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