

Citizen Participation and Public Petitions Committee

7th Meeting, 2023 (Session 6), Wednesday 3
May 2023

PE2006: Review and simplify the legislation in relation to dismissal of property factors

Lodged on	28 March 2023
Petitioner	Ewan Miller
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to amend the Property Factors (Scotland) Act to cover dismissal of property factors or bring forward other regulations that would achieve the same aim. This could include giving the First Tier Tribunal powers to resolve disputes related to the dismissal of property factors.
Webpage	https://petitions.parliament.scot/petitions/PE2006

Introduction

1. This is a new petition that was lodged on 28 March 2023.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. While not a formal requirement, petitioners can collect signatures on their petition while it remains under consideration. At the time of writing, 720 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.
6. The Committee has received a new submission from the petitioner which is set out in **Annexe D**

Action

The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Annexe A

PE2006: Review and simplify the legislation in relation to dismissal of property factors

Petitioner

Ewan Miller

Date lodged

28 March 2023

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to amend the Property Factors (Scotland) Act to cover dismissal of property factors or bring forward other regulations that would achieve the same aim. This could include giving the First Tier Tribunal powers to resolve disputes related to the dismissal of property factors.

Previous action

I have contacted Rona MacKay MSP and brought the matter to the attention of the Minister for Public Finance, Planning and Community Wealth.

Background information

I am the Chair of my local Residents Association (RA) of an estate of 860 privately owned properties. After many years of dissatisfaction, the RA ran a vote to dismiss our factor. In our opinion, the motion was passed in alignment with the deeds for the estate.

Subsequent to this, the factor appointed a legal firm who challenged the vote on the basis that 38 (of 860) properties were tenanted in the estate and the RA could not provide evidence the tenant had passed the voting paper to the owner. The First-tier Tribunal confirmed they could not decide on this matter as it involved interpretation of deeds and proposed seeking a decision in a civil court. If the factor is correct, this would appear to set a precedent, making it very difficult to replace a factor in Scotland.

Annexe B

The logo for SPICe (The Information Centre) is a purple rounded rectangle with a gradient. The text 'SPICe' is in white, bold, sans-serif font.

The Information Centre
An t-Ionad Fiosrachaidh

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:

“ ... 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 Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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Annexe C

Scottish Government submission of 23 March 2023

PE2006/A Review and simplify the legislation in relation to dismissal of property factors

Title Conditions (Scotland) Act 2003

The Title Conditions (Scotland) Act 2003 (“2003 Act”) provides homeowners with communal responsibilities important rights with regard to property managers.

Section 28 provides that a majority of owners within a community of properties may appoint or dismiss a manager. Section 28 is a default rule which applies where alternative provision is not made in the title deeds. The title deeds might specify a higher threshold than a simple majority is required to remove a manager.

Under section 64 of the 2003 Act, two thirds of the owners can remove a manager – whatever the title deeds say. Consequently title deeds which seek to require that owners be unanimous before a manager could be removed will have no effect – two thirds will be sufficient.

For tenement properties, if the title deeds are silent, then the Tenement Management Scheme in Schedule 1 of the Tenements (Scotland) Act 2004 applies. Rules 2 and 3 set out that appointment or dismissal a manager of a manager can be made by majority decision.

Importantly however, the powers to remove managers in sections 28 and 64 of the 2003 Act, and under the Tenement Management Scheme, cannot be exercised while a manager burden remains in effect.

A “manager burden” is a title condition by which a developer empowers a party either to act as a manager of related properties or to appoint another person to be manager. Manager burdens are typically used by a developer to appoint a manager in the initial years or a housing or other development – and so the permitted duration of manager burdens is restricted.

Manager burdens can only exist so long as the holder owns one of the properties being managed. Otherwise, the normal rule is that a manager burden comes to an end after five years, but this is reduced to three years for sheltered or retirement housing. It is possible to provide for a shorter duration in the title deeds.

Manager burdens can exist for a longer period of up to thirty years if they are imposed in a sale under the right-to-buy legislation for council houses. Where they are allowed to exist for this longer period of 30 years, two-thirds of the properties can choose to remove a manager at any time, i.e. before the thirty year period has expired.

There is guidance on the dismissal of property factors on Under One Roof website <http://www.underoneroof.scot/articles/1108>

Property Factors (Scotland) Act 2011

The Property Factors (Scotland) Act 2011 implements a framework for the regulation of property factors through regulation. It provides minimum industry standards, to better protect homeowners who use factoring services by establishing a registration scheme, a code of conduct and a dispute resolution service.

A property factor is required, by section 1 of [the code of conduct](#) (the code) to provide each homeowner with a written statement of services (“WSS”). The WSS must set out –

- clear information that homeowners may (by collective or majority agreement or as set out in their title deeds) terminate or change the service arrangement including signposting to any relevant legislation, for example the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004. This information should include any "cooling off" period or period of notice;
- a clear statement confirming the property factor's procedure for how it will co-operate with another property factor to assist with a smooth transition process in circumstances where another property factor is due to or has taken over the management of property and land owned by homeowners; including the information that the property factor may share with the new, formally appointed, property factor (subject to data protection legislation) and any other implications for homeowners. This could

include any requirement for the provision of a letter of authority, or similar,

(These requirements do not apply to situations where homeowners do not own factored land – i.e. where the factored land is owned by a land owning land maintenance company.)

A revised version of the Code came into force on 16 August 2021 which has brought it up-to-date, clarified and strengthened it, ensuring that all registered property factors operate consistently to the appropriate standards, while also giving homeowners confidence in what their factor is offering them. The Code can be found at <https://www.gov.scot/isbn/9781802011388>

Proposal

The processes to appoint and dismiss a property factor are set out in the 2003 Act and within the Tenement Management Scheme. Individual title deeds may also stipulate how a property factor can be removed. Any issues arising as to the application of these procedures can be resolved through application to the courts.

It is the responsibility of a factor to ensure that the whole process is conducted in accordance with any detailed procedures set down and agreed by the homeowners/Residents Association. A factor is answerable to all homeowners.

Where there are isolated procedural disputes then these are best placed to be taken to court in order to receive a ruling which may then set a precedent.

The Scottish Government has currently no plans to amend the legislation.

Annexe D

Petitioner submission of 12 April 2023

PE2006/B Review and simplify the legislation in relation to dismissal of property factors

We wish to bring to the attention of the committee the clear challenge any residents or residents committee would have if they encountered a situation like one faced by the residents committee within our estate. The incumbent factor has challenged the vote. In all engagement directly with their legal representatives and our local MSP the factor has not been able to offer any way to resolve the situation other than paying them to run the vote (an offer which they have since withdrawn). Residents should not have to pay a factor to sack themselves. Most factors are replaced in Scotland by residents forming residents associations and doing exactly as our resident association did so there is plenty of precedent that supports what the committee did (albeit not in a court of law that I am aware of). They have made quite clear that should the residents association wish to seek a decision on interpretation of the deeds in a civil court they would not support allocating residents' funds to progress this. They have however been quite clear they have used residents' funds to appoint legal representation for themselves in order that they can defend their position. This is both wholly unfair but more worrying leaves open an opportunity for all factors to create favourable and questionable, in my opinion, interpretations of deeds in order to keep themselves in role for perpetuity. Referral to a civil court is not practical when the action is from all residents. Whilst crowd funding the legal costs may be possible it would act as a considerable deterrent to any individual resident or residents association who wish to seek recourse.