

SPICe Briefing

Frequently Asked Questions: Factoring and maintenance of common property

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Richard Hough

This briefing is intended to assist MSPs in dealing with factoring and common maintenance issues that may arise in the context of their constituency casework. It provides a general introduction to the law in relation to a variety of recurring topics, including how decisions about the maintenance of communal areas should be made, how payment can be obtained from uncooperative owners, how poorly performing property factors can be removed and what effect the Property Factors (Scotland) Act 2011 will have on the management of common property.

It should be noted that nothing in this briefing constitutes legal advice or opinion for which it is recommended that a solicitor should be consulted.



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It is important to note that the answer to the following questions may vary depending on the circumstances of the case in question and it is advisable, therefore, to take further advice before applying the general principles of the law to any particular case.

1. WHAT IS COMMON PROPERTY?

Common property is property that is owned by more than one person. In the context of a tenement, this might include a close or stair, the gutters and down-pipes, external walls, roof, chimney or garden, and may also include landscaping and drainage systems surrounding property developments. It may be possible to identify common property by consulting the title deeds (see question 2 below) or, where these are silent on this issue or incomplete, by referring to the relevant statutory rules (sections 1-3 of the Tenements (Scotland) Act 2004). If it is unclear or if there is a dispute, it may be necessary to consult a solicitor and, ultimately, take the matter to court.

2. WHAT ARE TITLE DEEDS?

Title deeds are the legal documents that state who has ownership (or “title”) of a property. Title deeds also give details of the property (such as boundaries and access rights) and set out any conditions (or “burdens”) that may affect the property (such as repair and maintenance responsibilities).

Title deeds are registered in the Land Register of Scotland or, in the case of older records, are recorded in the General Register of Sasines. Both of these registers are maintained by the [Registers of Scotland](#) in Edinburgh.

3. HOW SHOULD DECISIONS ABOUT THE MANAGEMENT AND MAINTENANCE OF COMMON PROPERTY BE MADE?

The title deeds may set out the rights and responsibilities (“burdens”) of property owners in relation to the maintenance, repair and management of common areas. However, wide variation is found between the burdens imposed by title deeds. Where title deeds include provisions about the maintenance of common property, these should be followed by property owners. Title deeds are ultimately enforceable in the courts.

In addition to the title deeds, a separate service contract may be in place between a factor and the residents and this may include provisions for how common repairs are to be organised and paid for. Where such a contract exists its terms are likely to be legally binding. However, such contracts would not necessarily override the title deeds.

The Tenements (Scotland) Act 2004 (“the 2004 Act”) is intended to make it easier for owners to reach decisions and, ultimately, reduce the number of disputes over the management and maintenance of common property. If the title deeds are silent, defective or have gaps with regard to the management and maintenance of common property, the Tenement Management Scheme (introduced by the 2004 Act) will apply.

The Tenement Management Scheme (TMS) sets out how decisions about maintenance should be taken and how costs should be shared. Under the TMS all owners share equal responsibility for the costs of maintenance and repair as well as for running costs, including management fees (except in certain specified circumstances¹). Under the TMS, decisions on maintenance can be

¹ Where the floor area of the largest flat is more than one and a half times the size of that of the smallest flat, liability for repair costs is determined by the floor area of each flat.

taken by a simple majority of owners. Maintenance includes repairs and replacement, cleaning and day-to-day running of a tenement but does not cover alteration, demolition or improvement.² Decisions about improvements must be unanimous (unless the title deeds provide otherwise). A properly made decision under the TMS is legally binding on all owners and enforceable through the courts. As disputes of this nature are essentially between private individuals, the onus is on the individuals concerned to seek to resolve the matter themselves, with recourse to the civil courts if necessary. There is not, for example, any government agency or authority responsible for resolving disputes between homeowners regarding the management and maintenance of common property.

4. HOW CAN PAYMENT FOR REPAIR OR MAINTENANCE BE OBTAINED FROM AN UNCOOPERATIVE OWNER?

Where a decision has been taken requiring payment from owners relating to repair and maintenance, either under the TMS or in accordance with the title deeds, and an uncooperative owner(s) refuses to pay, there are several steps the other residents could take. In the first instance, it may be possible to find a remedy through informal discussions between the parties concerned (perhaps employing an independent mediator). Secondly, one of the residents could write to the owner(s) who is refusing to pay or, if necessary, engage a solicitor to do so on their behalf, pointing out their legal obligations. Court action could subsequently be threatened unless payment is made by a certain date and, as a last resort, and if payment is still not forthcoming, court action could be taken. As with the decisions about the maintenance and management of common property, in obtaining payment from uncooperative owners, the onus is on the individuals concerned to seek to resolve the situation themselves. It should be noted, however, that a court judgement in favour of the other resident(s) does not necessarily mean that an uncooperative owner will pay. Further enforcement action involving, where necessary, sheriff officers may be necessary in order to secure payment.

5. IS A PROPERTY FACTOR ENTITLED TO RECOVER THE DEBTS OF NON-PAYING RESIDENT(S) FROM THE OTHER RESIDENTS?

Whether a factoring company is legally entitled to divide an outstanding bill of non-paying resident(s) between the other owners will depend to a large extent on the relevant provisions within the title deeds and/or any contractual arrangements in place between the parties. If, for example, the title deeds provide that each property is liable for an equal share of any maintenance costs, the factor cannot compel the owners to pay more ([Scottish Law Commission, Report on the Law of the Tenement](#), para 5.81).

Property managers should generally take all steps to pursue a defaulting owner but, in some cases, it may not be possible to recover outstanding sums. In these circumstances it may be appropriate that the other owners who have benefited from the repairs should meet the cost. However, spreading the unpaid debt may only be possible if there is a contractual arrangement in place, either through the title conditions or in the contract between the manager and the owners, which allows for spreading of the debt. The common law position is that each proprietor is severally liable for his or her own share of the repair and, unless the common law position is altered by a contract, spreading the debt would not be enforceable by the property manager.

There is, however, a different rule where the costs arise from a scheme decision under the TMS. Rule 5 of the TMS provides that a property factor who has entered into an agreement

² Section 69 of the Climate Change (Scotland) Act 2009 amended the definition of “maintenance” to extend it to “the installation of insulation”.

with an external contractor can divide the outstanding share owed equally between the remaining owners and ask them to pay up. The owners, in turn, have a right to sue the defaulting owner for that sum.

6. HOW CAN I TRACE A LANDLORD OR ABSENTEE OWNER?

In some cases, it may not be known who the owners of a piece of common property are. In such cases there are two mechanisms which can assist in tracing landlords or absentee owners:

- I. For a fee, the [Registers of Scotland](#) can provide details of the most recent registered title (whether in the Land Register or the Register of Sasines), including the name of the registered proprietor.
- II. If the flat is rented, the owner should be registered with the council as a private landlord. The public register is available to search at: www.landlordregistrationscotland.gov.uk. If the property cannot be found on the register the local authority can be contacted for further investigation.

7. WHAT ASSISTANCE CAN THE LOCAL AUTHORITY GIVE WITH THE MAINTENANCE OF COMMON PROPERTY?

In certain circumstances, the Housing (Scotland) Act 2006 gives councils powers to make owners carry out maintenance for which they are responsible. In particular, “maintenance orders” are designed to help councils ensure that privately owned properties do not fall into disrepair. The decision about whether to serve a maintenance order is for the local authority to take. Maintenance orders require the owner to prepare a maintenance plan for the house for a period of not more than 5 years. Where it applies to common property, the plan can require owners to pay into a maintenance account for future expenditure on repairs and maintenance to common parts and set out the arrangements for the operation of the account. If the owner does not comply, for example where they are absent, the local authority can enforce the notice or plan and recover the costs from the owner.

In addition, councils have a duty to prepare and publish a scheme of assistance which sets out how they will help owners maintain their homes. Such assistance may take the form of advice and support rather than financial assistance. Where the owner is unable to pay for maintenance, or it is unreasonable to ask them to do so, or the owner cannot be identified or found, councils have powers to pay “missing shares” into maintenance accounts (although they are not obliged to do so). Financial assistance available under such schemes is likely to be extremely limited.

It is advisable to contact the relevant local authority for details of their policies in relation to the maintenance of common property.

8. WHAT CAN I DO IF I AM NOT SATISFIED WITH THE PERFORMANCE OF MY PROPERTY FACTOR?

If an owner(s) has a complaint about a property factor, they should, in the first instance, write to the company concerned and give them the chance to put things right. If the owner is not satisfied with the response received, they should ask about the complaints procedure.

Any property manager or factor who is a member of the [Property Managers Association Scotland](#) should have a formal complaints process in place to deal with any problems. If a

resident is not happy with the service provided by the factor, they should make a complaint using this process. If they are not satisfied with the outcome of that complaint, they can subsequently complain to the Property Managers Association.

Seeking a refund on future bills is another option that could be considered. There are also reported cases of owners withholding payment. It may also be possible to dismiss the property manager (see question 9 below).

The Property Factors (Scotland) Act 2011 includes provision for the establishment of a system for the resolution of disputes between homeowners and property factors. The provisions of the Property Factors (Scotland) Act 2011 are scheduled to come into force on 1 October 2012 (or such earlier date as the Scottish Minister may by order appoint). Once the 2011 Act comes into force, owners who are not satisfied with the performance of their property factor should find out if the property is properly registered in accordance with the legislative requirements. If a factor is not properly registered under the 2011 Act, any fee charged by the property factor in respect of work done by the property factor is irrecoverable in law. If a factor is registered, a homeowner will be able to take complaints against the factor to the new dispute resolution mechanism (the Homeowner Housing Panel) if they have given the factor the opportunity to rectify the problem and the factor has not done so.

9. HOW CAN I REMOVE AND REPLACE A POORLY PERFORMING FACTOR?

A particular grievance for some homeowners is the difficulty in removing a poorly performing factor. The recent [OFT market study](#) (2009) highlighted the low level of switching (despite the difficulties associated with the industry). Reasons for the low level of switching include the difficulties of coordinating individual owners and the complexity of the legal process.

The Title Conditions (Scotland) Act 2003 ('the 2003 Act') contains various provisions relating to property management services that are designed to strengthen the position of owners in relation to managers or factors. In particular, the 2003 Act was intended to strengthen the powers of owners to appoint and dismiss a factor.

Section 28 of the 2003 Act provides that, where the title deeds do not make alternative provision, a simple majority of property owners in a development can dismiss a manager and appoint a new person to be a manager on the terms they specify. In a block of ten flats, for example, the agreement of 6 owners is enough to secure the removal of a factor using section 28. If the title deeds impose a higher voting threshold than a simple majority, section 64 of the 2003 Act provides that owners of two thirds of the properties can dismiss a manager and appoint a new person to be a manager, regardless of the threshold required by the title deeds.

In a newly built development the developer may reserve the right, by virtue of a 'manager burden' in the title condition, to appoint a property manager, sometimes for an indefinite period. The rationale for this is that the developer will have a legitimate interest in the management of the development where he continues to own properties in the development and is in the process of selling them. However, section 63 of the 2003 Act limits the time during which a developer can retain this right, even where the title deeds say that the developer can appoint a property manager in perpetuity. The duration of the manager burden differs according to the type of housing.

Section 33 of the 2003 Act makes provision for the variation and discharge of a community burden. A community burden is a mutually enforceable burden imposed under a common scheme on four or more units. Community burdens may make provision for the appointment and dismissal of a manager, the powers and duties of a manager and the nomination of a

person to be the first manager. The procedure under section 33 requires a solicitor to draw up a new deed which is then signed by the majority of owners. In contrast to the approach in section 28 (see above), the deed must be intimated to those owners who did not agree with the proposed change. These owners are permitted eight weeks to raise any objections with the Lands Tribunal for Scotland (section 34).

Section 91 of the 2003 Act permits the owners of 25% of the houses in an estate to apply to the Lands Tribunal to vary or discharge a community burden. The Lands Tribunal, after receiving an application, researches Registers of Scotland's database before drawing up a formal notice. The notice is served by the Land Tribunal on potential benefited properties and allows for a three week period of representation/objections. If the Tribunal grants the application, this could be used to change the burdens contained in a Deed of Conditions for an entire community of related properties, not just those for those owners who applied. If all owners agree that the title deeds should be changed, then the Lands Tribunal for Scotland will simply certify the change.

10. CAN I SWITCH PROVIDER IF THE MANAGER ACTUALLY OWNS THE OPEN SPACE SURROUNDING THE PROPERTY?

In modern property developments, a land maintenance company may own the open space associated with the development. These open spaces may include play areas, grass verges, sustainable urban drainage systems (SUDS) or woodland. Obligations on property owners to pay for the land maintenance services relating to these spaces are often incorporated into the title deeds. In such cases there may be limited protection for the property owners against price increases and/or poor service delivery and it can be difficult to change supplier. The provisions of the Title Conditions Act (Scotland) 2003 potentially enable property owners, acting together, to transfer responsibility from an incumbent land maintenance company. However, because of the cost and complexity involved, these provisions have not been used for this purpose.

There is some evidence (see [OFT market study](#), para 6.64-6.66) that land maintenance companies would consider, on a case by case basis, transferring ownership of the open spaces to home owners where home owners expressed an interest in doing so. However, under this model, a larger number of owners may be involved and getting a majority may be difficult. The Scottish Government has consulted recently on possible changes to the Title Conditions (Scotland) Act 2003 in relation to the switching of bodies carrying out land maintenance on private housing estates ([Scottish Government 2011](#)).

11. WHAT DIFFERENCE WILL THE PROPERTY FACTORS (SCOTLAND) ACT 2011 MAKE TO THE MANAGEMENT OF COMMON PROPERTY?

The Property Factors (Scotland) Act 2011 requires property factors to be registered on a 'property factors register' and makes provision for the establishment of a system for the resolution of disputes between homeowners and property factors.

Part 1 of the Act relates to the registration of property factors. Amongst other things, it

- provides that the Scottish Ministers must prepare and maintain a register of property factors

- defines what is meant by the term “property factor”³
- makes it an offence for a property factor to operate without being registered
- requires the Scottish Ministers to consider whether a property factor is a fit and proper person to be registered as a property factor
- requires the Scottish Ministers to prepare a code of conduct as to minimum standards of practice expected by registered property factors; and
- requires Scottish Ministers to allocate a number to each registered property factor which registered property factors must include in any document sent to a homeowner (the “property factor registered number”).⁴

Part 2 of the Act relates to dispute resolution. The main effect of Part 2 is to establish a homeowner housing panel and homeowner housing committees to consider disputes between factors and homeowners; enable a homeowner to apply in writing to the homeowner housing panel for a determination of whether their property factor has failed to carry out their duties or to ensure compliance with the property factors code of conduct; and make it an offence to fail, without reasonable excuse, to comply with a property factor enforcement order issued by a homeowner housing committee.

Although it does not address the question of switching provider, this may become less of an issue if the 2011 Act has the desired effect of raising standards across the sector.

The Act comes into force on 1 October 2012 (or such earlier date as the Scottish Ministers may by order appoint).

12. WHERE CAN I GET FURTHER INFORMATION AND ADVICE?

Advice may be available from the solicitor who carried out the conveyance at the time of purchase or from any solicitor who deals with residential property ([Law Society of Scotland - find a solicitor](#)). The local Citizens Advice Bureau or other advice centre may provide free advice at a legal clinic ([Citizens Advice Scotland - find your local bureau](#)).

Information is also available from the following sources:

- Consumer Focus Scotland, [Common Repair, Common Sense, A short guide to the management of tenements in Scotland](#)
- Consumer Focus Scotland, [Common Repair, Common Sense, A detailed guide to the management of tenements in Scotland](#)
- Scottish Executive, [Guidance on the Tenements \(Scotland\) Act 2004 and the Title Conditions \(Scotland\) Act 2003 for Housing Professionals](#)
- Scottish Government, [Implementing the Housing \(Scotland\) Act 2006: Advisory Guidance for Local Authorities: Volume 3 Maintenance](#)
- [Scottish Mediation Network](#)

³ The statutory definition includes local authorities, housing associations and land maintenance companies (a point clarified during the passage of the Bill). This part of the Act also allows the Scottish Ministers to modify the definition should it be necessary to do so.

⁴ The provisions in the Bill relating to the property factor registered number were added at stage 3.

- Shelter Scotland, [Responsibility for repairs and maintenance in common areas](#)

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RELATED BRIEFINGS

[SB 10-42 Property Factors \(Scotland\) Bill \(347KB pdf\)](#)

[SB 11-15 Property Factors \(Scotland\) Bill: Stage 3 \(294KB pdf\)](#)

[SB 08-68 Common Property and Open Spaces: Management, Repair and Maintenance \(156KB pdf\)](#)

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