

Briefing for the Public Petitions Committee

Petition Number: [PE01691](#)

Main Petitioner: Christopher R Hampton on behalf of Steering Group of Bowman's View

Subject: Title Conditions (Scotland) Act 2003 – Change of factor

Calls on the Parliament to urge the Scottish Government to review the Title Conditions (Scotland) Act 2003, which prohibits a change of factor in the estate unless agreement is obtained by a two-thirds majority of owners in the estate, particularly in terms of the impact of that requirement on residents of sheltered accommodation

Background to title conditions

General

Title conditions (also known as real burdens) are legal obligations set out in the title deeds to properties. They are a much more permanent type of obligation than, for example, obligations contained in a contract.

In communities like sheltered or retirement housing complexes all owners are typically subject to the **same title conditions**. The conditions can be enforced by the owners against each other.

Title conditions can regulate the **management and maintenance of developments**, including the appointment of a property factor. Some schemes of conditions are more comprehensive than others.

Prospective purchasers should have been notified by their solicitor of important title conditions in advance of any purchase.

The Title Conditions (Scotland) Act 2003 ('the 2003 Act') was a major reform of the law relating to title conditions. It covers a wide range of topics.

Sheltered housing

Title conditions typically regulate the **minimum age requirement** for a sheltered or retirement housing development. They also regulate other

special features of sheltered housing, such as the provision of a warden service. Such title conditions are known as **core burdens**.

The 2003 Act says that property owners can only agree to vary the terms of core burdens (rather than remove them) in order to protect the key characteristics of sheltered housing (section 54). Also, such a variation requires a **two thirds majority** of owners to agree.

Appointing and dismissing a property factor by majority vote

It is possible that a **majority of property owners** in a development will be able act together to **dismiss an existing property factor** and, if desired, appoint a new one. If this is possible, the size of the majority required varies according to circumstances.

There are three main scenarios:

- the title conditions **set out the required voting threshold** and the procedure which should be followed
- the title conditions are **silent on this topic**, in which case, in most types of development, a **simple majority** (51%) will be able to appoint or dismiss a factor (2003 Act, section 28).¹ However, for sheltered or retirement housing the relevant threshold is a **two thirds majority** (2003 Act, section 54)
- the title conditions set out a **high voting threshold**. However, in this case **section 64** of the 2003 Act applies, overriding these title conditions. Section 64 says **a majority of two thirds of owners** will always be able to appoint or dismiss a factor.

Note, however, that section 64 **cannot** be used when a **manager burden** is in force. A manager burden is a type of title condition which appoints the developer as a factor – or gives the developer power to appoint a factor.

Sometimes a manager burden purports to last indefinitely. However, section 63 of the 2003 Act prohibits this in practice. It says that a manager burden **comes to an end on the earliest of the following dates**:

- the date specified in the manager burden itself
- the **relevant date**
- the **ninetieth day** of any continuous period which the burden is **not** exercisable (by virtue of the developer having ceased to own one of the units in the development)

¹ Rule 3 of the Tenement Management Scheme in the Tenements (Scotland) Act 2004 provides the equivalent provision where the development is a building containing flats.

The relevant date usually acts as the **long-stop date** at which the power to appoint and dismiss a factor passes from the developer to the individual property owners.

The relevant date for housing purchased under the former 'right to buy' scheme is **thirty years**; for sheltered housing it is **three years** and for other developments it is **five years**.

Other options for dismissing a property factor

It will be clear from the above that there are individual circumstances where changing a property factor by majority vote is not possible, for example where **the applicable voting threshold cannot be reached**.

There are two procedures in the 2003 Act (contained in sections 33, 34 and 91) which make it possible to **alter the relevant title deeds themselves** to allow a property factor to be dismissed and a new one to be appointed. The associated procedures are regarded as cumbersome and potentially expensive. They involve the [Lands Tribunal for Scotland](#).

Regulation of property factors

The **Property Factors (Scotland) Act 2011** and associated secondary legislation introduced a system of **regulation of property factors**. This has three main strands:

- **compulsory registration** for property factors operating in Scotland
- a [Code of Conduct](#) outlining **minimum standards** which property factors have to follow
- a new **dispute resolution system** – initially the Homeowner Housing Panel and now the [First-tier Tribunal for Scotland \(Housing and Property Chamber\)](#)

The First-tier Tribunal is able to investigate a wide range of matters. It can, for example, consider whether factoring fees are transparent and in accordance with the **written statement of services** the factor is required to provide.

However, the Tribunal **cannot** currently take a view on whether the fee charged by a property factor is *per se* excessive or otherwise unjustified.

Scottish Government Action

The Scottish Government has **no current plans** to change the law contained in **section 54 of the 2003 Act or section 64 of the 2003 Act** (either generally or as it applies to sheltered or retirement housing).²

Scottish Parliament Action

In 2013, the then Justice Committee carried out [an inquiry into the effectiveness of the 2003 Act](#).

No specific issues were raised relating to section 64 of the 2003 Act as it applies to sheltered or retirement housing complexes or in relation to section 54 of the 2003 Act.

However, more generally, in recommendations 4 and 5 of its [report](#), the Committee considered section 64. It noted that the **complexity of the current law** can create barriers to switching property factors. Furthermore, the threshold of a **two thirds majority** contained in section 64 might be acting as a barrier to switching factors.

In its [response to the report](#), the Scottish Government addressed a range of points associated with the recommendations. However, it also set out what remains its current view, i.e. **that no change to section 64 is required**.

The work of the Scottish Law Commission

The [Scottish Law Commission](#) is the statutory body tasked with making recommendations to Scottish Ministers for law reform. Following on from the Justice Committee's inquiry, the Commission is currently looking at another aspect of the 2003 Act ([section 53, covering one aspect of enforcement of title conditions](#)).

The Commission's [current programme of law reform](#) runs until 2022.

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² Email to SPICe from the Scottish Government, dated 23 May 2018. Telephone conversation between SPICe and the Scottish Government on 12 July 2018.

