

Citizen Participation and Public Petitions Committee

2nd Meeting, 2024 (Session 6), Wednesday 7
February 2024

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

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. The Committee last considered this petition at its meeting on [3 May 2023](#). At that meeting, the Committee agreed to write to the Scottish Government, the Property Managers Association Scotland, Shelter Scotland, Under One Roof, and Citizens Advice Scotland.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from the Property Managers Association Scotland, the Minister for Victims and Community Safety, Under One Roof, the Petitioner, and Shelagh Young, which are set out in **Annexe C**. Citizens Advice Scotland and Shelter Scotland declined to provide a formal response.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.

6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).
7. Every petition collects signatures while it remains under consideration. At the time of writing, 772 signatures have been received on this petition.

Action

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

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

Extract from Official Report of last consideration of PE2006 on 3 May 2023

The Convener: That brings us to the last of this morning's new petitions. PE2006, which was lodged by Ewan Miller, is on reviewing and simplifying the legislation in relation to the dismissal of property factors. Forgive me for the slightly complicated introduction as I speak to the petition. To clarify a jargon term for the benefit of anybody listening, property factors manage the maintenance and repair of common property and communal areas in flats and housing estates on behalf of the home owners and residents. 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 to introduce regulations that would achieve the same aim. That could include giving the First-tier Tribunal, which is a free dispute resolution service, powers to resolve disputes related to the dismissal of property factors.

In his submission, the petitioner, as the chair of a local residents association, explains his experience of a struggle to dismiss a property factor. He argues that the legal framework around the process is complex and makes the dismissal of property factors unreasonably difficult.

The SPICe briefing explains that dismissal of property factors can, indeed, be a convoluted process, as the relevant legislation is complicated and needs to be read in conjunction with the title deeds of a particular estate. 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 home owners and a property factor cannot be resolved. Of course, all that can be quite an expensive consideration for those involved.

The briefing notes various inquiries into the system over the years, particularly in relation to landowning maintenance companies, which are property factors that own the land that they maintain—normally, open spaces on housing estates—and operate in a particularly complex legal environment.

In 2013, the Scottish Government stated:

“doing nothing is not an option, given the concerns in this area”.

At the same time, it indicated a preference to prepare a voluntary code of practice on dismissing and replacing landowning maintenance companies rather than to legislate. However, the code is yet to be introduced and, on 30 June 2022, Ash Regan MSP, the then Minister for Community Safety, responded to a parliamentary

question on the timeframe, saying that the Government had prepared a draft code and planned to seek the views of stakeholders before it proceeded with publication.

It should be noted that the new code is intended to cover only landowning factors. With regard to non-landowning factors, the Scottish Government, in its submission, states that it has

“no plans to amend the legislation”

and highlights that the current regulations require factors to provide home owners with “clear information” on the dismissal process.

As a constituency MSP, I have come across this issue and have found the whole business almost impenetrable. It is extraordinarily difficult, even for residents associations that are dealing with factors, to be confident that they can proceed, as they are confronted with what are sometimes quite threatening suggestions of the costs for which they may be liable.

Given the period over which the issue has been raised and the comprehensive lack of progress, I wonder what colleagues think.

David Torrance: I wonder whether the committee could write to the Scottish Government to seek an update on the voluntary code of practice on dismissing and replacing landowning land maintenance companies and, in particular, to ask what has been done since June 2022 to seek views on the draft code for customer-facing bodies and landowning land maintenance companies, as well as to ask when the final draft code of practice will be published.

In addition, I wonder whether we could write to relevant stakeholders, including the Property Managers Association Scotland, Shelter Scotland, Under One Roof and Citizens Advice Scotland, to seek their views on the petition.

The Convener: I wonder, too, whether there are any bodies that are representative of home owners rather than factors. When the Scottish Government says that the current regulations require factors to provide home owners with clear information on the dismissal process, I would like to know whether there is anybody who can illustrate that that actually happens. That sounds like one of those vague provisions that I suspect exists in writing but not in practice. That is just from my experience.

Alexander Stewart: You make a valid point, convener. As you identified, there are areas that we are already aware of, but there are other organisations that participate or that may be involved that we do not have information from. It would be useful to see what is there when it comes to the factor side and whether there are other areas that we could incorporate.

Our constituents continue to suffer in relation to this problem. It is about trying to find out who is in control and who has the rights, and, as you indicated, the process can

become very costly for everybody. We should try to find out whether there is any other process that we can tap into.

The Convener: I wonder whether, when we write to the Scottish Government, we could, in addition, ask on what basis it is satisfied that the regulation is being properly implemented or how it would evidence that that is the case.

Fergus Ewing: I certainly do not disagree with the approach that has been recommended—inquiries should be made. I will, however, play devil's advocate a little bit.

My experience from being a solicitor over many years is that, although people do not necessarily enjoy paying factors' fees, the whole purpose of having a factor in a tenement is to ensure that there is a system for carrying out common repairs. If there is such a system, it needs to be paid for. In my experience, factors' fees are not particularly great and, in many ways, being a factor is a bit of a thankless task, because the level of the fees is generally not huge. There is therefore a general public policy imperative that it is desirable that there be a system, which is normally very clearly set out in the title conditions, for the appointment and removal of factors by a majority of owners.

The desirability of having a factor is clear. Indeed, if there is no factor, there is a serious risk of major repairs not being done and things becoming much worse. I would have thought that that would be a rather more serious issue than the few cases where there may be concerns about overcharging and so on.

I say that to stick up for the humble factors who, in my experience, are often on a bit of a hiding to nothing and who have eight masters: eight people who can phone them at any time of the day to demand that action be taken immediately on all sorts of things.

I am just playing devil's advocate, for a change.

The Convener: Thank you, Mr Ewing. I am sure that cups of coffee or something stronger have been raised in toast to your splendid defence.

I do not disagree with any of that. Where good practice is in place, all the positive attributes and advantages that were identified in everything that you have said apply. The issue is simply that, where that is perhaps not the case, residents find themselves in a difficult position—they are not entirely clear as to what they can do, and they find that quite a difficult atmosphere can obtain in trying to take matters forward. So, with an understanding of the very valuable work that is done, are we nonetheless content to proceed on the basis that has been recommended?

Members *indicated agreement.*

Annexe C

Property Managers Association Scotland submission of 7 June 2023

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

Thank you for asking the Property Managers Association Scotland Ltd. (PMAS) to consider the above Petition.

Following consultation within the Council (Board) members of the Association, all of whom are Directors, but none are members of the legal profession, with no legal advice being sought as part of this response, the following, after thorough discussion and some concern expressed about the specific case, is their consideration:

PMAS Council does not believe that empowering the First Tier Tribunal to arbitrate in some way the contractual relationship between homeowners and Property Factors (as opposed to deciding upon alleged breaches of the Code/Duties) would be desirable.

As the Scottish Government response to the Petition https://www.parliament.scot/-/media/files/committees/citizen-participation-and-public-petitions-committee/correspondence/2023/pe2006/pe2006_a.pdf explains, there is legislation around this subject, that Title Deeds provide mechanisms for homeowners and that the courts are there to arbitrate disputes PMAS believes this is sufficient and that homeowners do have the required instruments, should they wish to challenge the Property Factor.

We hope this consideration of the Petition is of assistance.

Minister for Victims and Community Safety submission of 21 June 2023

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

Thank you for your letter dated 10 May 2023 to my officials. I apologise for the delay in responding.

You have asked for the Scottish Government's views to three questions arising from the Committee's consideration of PE 2006 on 3 May 2023. The responses are as follows:-

- what has been done since June 2022 to seek views on the draft Code from consumer facing bodies and land-owning land maintenance companies;

The draft code was considered internally and found to be in need of further development before it could be shared with consumer facing bodies. In particular, further consideration is being given to how any voluntary code of practice on dismissing and replacing landowning maintenance companies would interact with the Code of Conduct under the Property Factors (Scotland) Act 2011.

- when the finalised Voluntary Code of Practice will be published;
and

Given the further consideration referenced above, it is not practical at present to give a date as to when the Voluntary Code of Practice will be published. I will, however, commit to providing an update by early next year on the progress.

I would draw to the attention of the Committee that the volume of correspondence received by the Scottish Government raising concerns about land-owning land maintenance companies has fallen considerably over the last 10 years. We are unable to identify the precise reason for this. One reason could be the introduction of the Property Factors (Scotland) Act 2011 which introduced a Code of Conduct. The Code sets minimum standards that factors need to meet. Where homeowners

consider there has been a breach of the Code they can make an application to the First Tier Tribunal for Scotland (Housing and Property Chamber). This may have brought an improvement to performance resulting in fewer complaints.

- whether the Scottish Government believes that the current legislation on dismissal of property factors is working, and what evidence it has for that view.

The Scottish Government considers that the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 do provide the necessary mechanisms to enable homeowners to dismiss and appoint a property factor where the title deeds do not provide adequate procedures.

That view is supported by the fact that the Scottish Government receives a low volume of correspondence highlighting problems when homeowners decide to switch factor. We tend to see more correspondence from homeowners seeking initial information about the procedure for changing their property factor, rather than subsequent indications that the procedure is not workable.

The Code of Conduct for property factors requires that information on switching factor be set out within the written statement of services provided by a property factor. The website [Under One Roof](#) also provides practical advice on the procedure.

Modern title deeds for developments often include provisions on the dismissal and replacement of property factors.

There is a need for all homeowners to work together to dismiss their factor. Contacting all homeowners can be problematic in some circumstances, for instance where there are absentee owners or where the properties are let. Practical advice is available at [https://underoneroof.scot/articles/1073/How to find your title deeds /T racing absentee owners](https://underoneroof.scot/articles/1073/How_to_find_your_title_deeds_/T_racing_absentee_owners).

It is acknowledged that during the process to dismiss there may be instances where difficulties arise but as this may be attributable to practical rather than legal difficulties, it does not necessarily highlight a need to be addressed by legislation.

There are no current plans to consult on changing the law in this area.

SIOBHIAN BROWN MSP

Under One Roof submission of 22 June 2023

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

Thank you for contacting Under One Roof Scotland for its views on the petition.

Under One Roof believes that factoring, whether by a commercial entity, a housing association, or by owners themselves, is one of the best ways to address building disrepair in the private housing sector.

We also believe that the Property Factors Code of Conduct has provided significant clarity for owners, not just of their rights, but of their responsibilities when engaging their property factor. There are misconceptions about the role of property factors in relation to common repairs, and through our website resources and other activities we attempt to make clear what owners can expect of their factors, and what they are collectively responsible for apart from their factor.

As noted by the Scottish Government's response to this petition, and the briefing from SPICe, there are procedures outlined in existing legislation to dismiss factors, and that the interaction of multiple pieces of legislation and title deeds make this a legally complex issue which may not be able to be resolved without court action.

Also noted by the SPICe briefing's recounting of a report from the Justice Committee in 2013, and from the Scottish Government's response to that Committee, this same complexity throws up barriers that should be addressed.

We should note that legal complexity related to tenement management is not limited to dismissing factors; there are many issues related to common repairs of properties in Scotland which are difficult to resolve due to legislative grey areas of various Acts (proposed clarity of which

the ongoing work of the Scottish Parliament Working Group on Tenement Maintenance is attempting to address).

One barrier to addressing complex issues related to tenement management is the cost of legal proceedings. Under One Roof operates a free Information Service which answers enquiries from owners and property managers of tenement flats, and we often hear of disputes that require engaging a solicitor, but that are unaffordable by those wishing to clarify or resolve a dispute; our worry is that the issue remains unresolved – and the building remains in disrepair.

This is why the First-Tier Tribunal's work is welcome. It clearly provides benefits for owners and property managers to proceed with legally binding proceedings, and clarity to all parties, without the need of solicitors.

Without commenting specifically on this individual case, Under One Roof would like to see the Scottish Government circulate the draft Voluntary Code of Practice for land-owning maintenance companies, as described in the SPICe briefing, and seek the views of housing professionals, owners and other organisations whether such a code, or other options such as the First-Tier Tribunal, would reduce the barriers for owners to replace factors when there is an overwhelming desire to do so, without causing significant unintended consequences that would reduce the number of factored buildings in Scotland.

Petitioner submission of 17 July 2023

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

The submission returned by the Scottish Government (Minister for Victims & Community Safety) I do not feel adequately addresses the specific points raised by my petition and makes no reference to my previous written submission. I would like the Scottish Government Minister to review my previous written submission and consider how the current regulatory framework provides sufficient protection for residents. As per the previous written submission the property factor is blocking residents obtaining funds from their own monies to take the matter to a

civil court. They have, however, used residents' monies to pay for their own legal fees, charging all costs incurred defending themselves at two separate first tier tribunal complaints back to all 860 residents in the estate. This would appear to be a clear breach of the factors of code of conduct and residents are raising yet more complaints to the First-tier Tribunal on this particular matter. Should a factor wish to seek legal support to defend themselves against any complaints raised by individual residents they should fund that themselves.

The property factor in question now refuses to engage at all with the Residents Association. They refuse to properly answer challenges from the hundreds of residents in the estate who wish they would leave. My petition is not to suggest that there is a widespread problem with all property factors operating in Scotland, rather should one particular property factor decide to go rogue it would appear to be worryingly easy to do so without any protection for residents. I would request that the Scottish Government provide a more focussed (less generic) response to my petition.

Shelagh Young submission of 24 January 2024

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

I understand that this petition is due for further consideration from the Committee soon.

I am concerned because, having looked at the minutes from the 3 May 2023 discussion, I feel that some members of the Committee completely misunderstood the gravity of the situation facing communities of owners who feel the need to achieve a better deal from their factors.

I purchased a new build home in Edinburgh in 2016 and it took me some time to realise how the system works and to what extent the appointment and dismissal of factors runs contrary to the interests of consumers. You might be aware that this matter has been raised with the Competitions and Markets Authority (CMA), in the course of its investigation into the housebuilding industry. The [CMA working paper](#)

published in November 2023 expressed the strong view that there is a serious imbalance of power between homeowners and property managers/factors who are given the right to manage public spaces that are co-owned by homeowners, including freehold property owners in Scotland.

In our case the factor appointed by the developers is a member of the same business group, returning a proportion of profits to the developer annually. No contract specifying service levels exists between this developer and the appointed factor (according to both parties) and no deeds exist or other agreement requiring that property owners have to be consulted at any point about what level and scope of services they require. There is a gaping hole in the law/policy in Scotland relating to the key document, the Written Statement of Services (WSS). Although the WSS does define service levels and is a legal requirement, there is nothing in the relevant Scottish legislative framework which prevents the WSS being changed by factors at any point and, however frequently or radically the factors choose to do so without consultation with property owners, there is no right of redress.

Common sense suggests that, if polite negotiation and lobbying from owners for better or different services from a factor were thwarted by that factor's unreasonable refusal to engage or improve then the "customer" would be free to move their business elsewhere. But the point made very clearly in petition PE2006 is that we are not free to do so. In my case, property owners of 206 units have signed deeds which do not grant them the right to organise a postal vote of owners which would facilitate such a decision. That right is restricted to the factors themselves and they may charge the residents unlimited fees for doing so.

Our deeds do grant us the right to organise a face-to-face voting meeting but, as experienced by the petitioner and their residents association, the validity of such a vote is likely to be challenged by the incumbent factors. Worse still, our deeds contain the following, possibly grossly anti-democratic clause, in relation to voting:

“Rule 10.4 But where the Association is proprietor of any Plot or Flat or Commercial Unit, no decision is made unless it

is supported by the vote for that Plot or Flat or Commercial Unit.”

In our case the "Association" referred to in the Deeds is the developer who has a direct business and financial relationship with the factors. I have not consulted a lawyer to double check the meaning of this clause, but the developer appears to have written itself a casting vote into the Deeds by remaining a proprietor through ownership of mid-market rental blocks on this development.

I am concerned that some parliamentarians are thinking more about the relatively simple, small-scale logistics of factoring within tenements and failing to grasp the enormity of the risks being faced by new build homeowners. When roads, paths, playgrounds and shared structures are not adopted by the local authority, the co-owners can face enormous costs but also significant risks. For example, we are reliant on the factors to ensure adequate insurance cover against risks of injury to the public and ours appear to have failed to discharge that duty properly. I am writing to you unable to be confident that we do carry adequate insurance cover should a wall be blown onto a car or, heaven forbid injure a person.

The First Tier Tribunal is a helpful institution but too slow and its remit too narrow to address all the risks that property owners face. Being able to easily appoint and then dismiss incompetent or overly expensive factors is an important consumer right that is not currently existent in any practical sense in Scotland.