

## **PROPERTY MANAGEMENT IN SCOTLAND**

The United Kingdom supports three separate legal systems in England and Wales, Northern Ireland and Scotland producing as a result three separate forms of land tenure and consequently three different forms of property management. Most readers will be familiar with the Association of Residential Managing Agents ("ARMA") but ARMA has a Scottish cousin Property Managers Association Scotland Limited ("PMAS") which unlike ARMA has been in existence for over a hundred years although in its present form as a trade association of property managers for only 16 years.

PMAS in its present form can trace its history back to an unincorporated Association formed in 1867 called the Association of House Factors and Property Agents. At that time House Factors (now known as Property Managers) managed residential properties for the landlord owners of many tenement buildings throughout Scotland but particularly in the industrial areas such as the City of Glasgow and towns such as Paisley, Greenock and Dundee.

Approximately two years later the owners of property in Glasgow also formed an Association which was called The Glasgow House Owners Association. These two Associations worked independently but co-operated in matters of common concern.

When the first Rent Restriction Bill was presented to Parliament in 1915, the two Associations worked closely in submitting representations to HM Government. As a result of the co-operation in submitting representations on this legislation, it was perceived that greater strength would be achieved if the owners and factors (Property Managers) were to come together and this was done in 1918 when the Property Owners and Factors Association Glasgow Limited was incorporated.

It is this Association which became the Property Owners and Factors Association Scotland Limited and subsequently, reflecting the change in emphasis of the Association, became Property Managers Association Scotland Limited. The Property Owners and Factors Association Glasgow Limited became the Property Owners and Factors Association Scotland Limited when the local Associations in Greenock, Paisley and Dundee amalgamated with the Glasgow Association to become the Property Owners and Factors Association Scotland Limited. In addition to parochial matters

affecting property interests which entail contact with Local Authorities in Housing Departments, Building Control Departments, Planning Departments, Environmental Health Departments, Finance, Rates, Council Tax etc, the Association through its Council concerns itself with matters on a national scale such as legislation affecting housing, shops, offices and other types of property, rents, valuation and rating, taxation, town and country planning, compensation for compulsory purchase and many other related subjects.

With the change in emphasis from rented accommodation to owner occupied accommodation, it became apparent that there were fewer and fewer Property Owners in the Association and more and more Property Managers. Accordingly the membership by Special Resolution changed its name to Property Managers Association Scotland Limited on 23rd January 1991 coincidentally at almost the same time as ARMA was being formed in England and Wales.

With a different legal system, Scottish property managers do not have the joys of Leasehold Enfranchisement, Leasehold Valuation Tribunals and Commonhold but what they have had until recently was the law of the tenement and limited forms of sanction against non-paying owners.

In Scotland the feudal system applied with all land held in feu from the Crown through estate owners to individual owners. Although an annual feu-duty was paid land was owned absolutely. If there was a breach of a feuing condition or non payment of feu duty the superior could irritate the feu of his vassal and recover possession but this was a very rare occurrence.

The Scottish common law found multiple ownership of buildings a difficult concept and as the common law developed it produced anomalies such as the ground on which the building was erected belonging to the ground floor proprietors with upper floor proprietors having a common interest in the ground but no title and the maintenance of the roof being the responsibility of the top floor proprietors with the other proprietors having a right of shelter but if the top floor owner did not want to repair the roof or could not afford to it was always going to lead to trouble.

Originally the traditional Scottish tenements were built to be let with one owner of the building and several tenants. The Rent Restriction Acts led to limited investment in properties by landlords in the period from 1916 to the late 1950's as there was insufficient return on capital with the private rented housing stock suffering from neglect and leading to the worst of the stock being compulsorily acquired by local authorities and demolished in Housing Action Areas and the better standard properties being sold to sitting tenants or housing associations and being improved with 90% improvement grants in the 1970's and early 1980's.

The change of emphasis from rented stock to owner occupied stock saw the emergence of the property manager managing multi owned buildings for the owners instead of managing the building as the factor of the landlord.

The legal system needed to catch up with the changing face of owner occupation of flatted property in Scotland and this was just the opportunity the newly devolved Scottish Parliament needed to introduce flagship legislation to bring the law of land tenure in Scotland into the 21<sup>st</sup> century. The outcome was the passing of:-

The Abolition of Feudal Tenure Etc. (Scotland) Act 2000 ("Abolition Act")

The Title Conditions (Scotland) Act 2003 ("TCA"); and

Tenements (Scotland) Act 2004 ("Tenements Act")

The Abolition Act removed the feudal system which was the system of land holding which had been established in Scotland as common law since the Middle Ages. The TCA provided a new legal framework for conditions or real burdens found in title deeds and gave a statutory basis to the enforcement of title conditions. The Tenements Act seeks to restate the common law of the tenement and remove some of the anomalies and injustices which surrounded the Law of the Tenement.

### **Abolition Act**

With the abolition of the feudal system the most obvious area which concerns property managers is the abolition of feuduty. Most property managers are probably still paying feuduty to superiors for tenement buildings and recovering unallocated feuduty

from owners. Although the Land Tenure Reform (Scotland) Act 1974 introduced the voluntary and compulsory redemption of feuduty from 1974, very few unallocated feuduties had been redeemed. Compulsory redemption has resulted in the redemption of a substantial portion of allocated feuduties. However managers have traditionally found it difficult to persuade a group of owners to get together to redeem an unallocated feuduty in respect of which they each pay a portion.

The superior is entitled to compensation for abolition of feuduty. However, the compensation is payable by the owners not a manager who collects the total feuduty from the owners of flats. Under the Abolition Act, it is an obligation upon managers to provide the superior with a note of those owners and their addresses who pay the portions of the total feuduty along with a note of the basis upon which the feuduty has been apportioned in the title or Deed of Conditions to enable the superior to allocate the compensatory repayments.

### **Title Conditions (Scotland) Act 2003 ("TCA")**

The purpose of this Act is to make further provisions in respect of real burdens, servitudes and other obligations affecting land. Sections 28 to 31 of TCA deal with management of the community including power of a majority of owners to appoint a manager and to instruct common maintenance and remuneration of the manager. For the purpose of TCA, a community burden is a real burden imposed under the common scheme on four or more units and each of those units is in relation to some or all of those burdens both a benefited property and a burdened property. Community burdens may make provision in respect of any of the following:-

- (a) the appointment by the owners of a manager;
- (b) the dismissal by the owners of a manager;
- (c) the powers and duties of a manager;
- (d) the nomination of a person to be the first manager;
- (e) the procedures to be followed by the owners in making decisions about matters affecting the community;
- (f) the manner in which such decisions may be made; and
- (g) the resolution of disputes relating to community burdens.

Section 28 TCA gives the majority of owners of units in a community the power to appoint a person to be the manager of the community on such terms as they may

specify; to confer on any such manager the right to exercise such of their powers as they may specify; to revoke or vary the right to exercise such of the powers conferred as they may specify and to dismiss any such manager. The powers mentioned include the power to carry out maintenance, the power to impose community burdens and the power to vary or discharge burdens.

Section 29 TCA gives to the majority of owners in the community the power to decide that maintenance should be carried out and by written notice to require that owners deposit a sum of money, to account of the cost and instruct or carry out such maintenance. This means that TCA makes provision for payment to be made in advance of work being carried out.

Decisions by a majority are binding upon the other owners, although there is provision for appeal.

Section 64 of TCA makes special provision for sheltered housing which is defined as a group of dwelling-houses which having regard to their design, size and other features are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which for the purposes of such occupation are provided with facilities substantially different from those of ordinary dwelling-houses. In a sheltered housing development the requisite majority to confer on managers the right to exercise powers or to revoke such powers is two-thirds.

Part 6 of TCA introduces the development management scheme. The development management scheme is a model set of rules intended as a best practice tool for use by developers when creating new communities. The scheme is intended as a suggested model for new developments. However it is in theory possible for owners to adopt the scheme in replacement of existing rules contained in a Deed of Conditions. This would, of course, require the unanimous agreement of all owners and heritable creditors of the properties in the community.

Section 71 provides that the development management scheme may be applied to any land by registering against the land a Deed of Application granted by or on behalf of the owner of the land. Section 73 provides that a development management scheme may be disapplied to the development or any part of the development by an owners

association established by the Scheme registering against the development, or as the case may be the part, a Deed of Disapplication.

Application of the development management scheme requires a positive application by a developer or the owners unlike the provisions of the Tenement Management Scheme which will be discussed below where these apply in default of owners or a developer imposing an alternative Deed of Conditions which satisfies the requirements of the Act.

### **Tenements Act**

The Tenements Act is the single most important piece of legislation as far as property managers are concerned. It reforms the law of the tenement by making provision about the boundaries and pertinents of properties comprised in tenements, for the regulation of rights and duties of owners of properties comprised in tenements and introduces the tenement management scheme.

The Tenements (Scotland) Bill addresses problems with the existing common law of the tenement property. Common law rules are sometimes unfair and unsatisfactory, particularly the rule which makes the upkeep of the roof the responsibility of the owners of the top flats (in the absence of title provision to the contrary). In addition, some title deeds do not make adequate provision for management and maintenance: in particular they may not specify how owners are to decide on matters of mutual interest. Under the common law, if title deeds make no provision for decision making, the consent of all owners is required before repairs can be carried out. This means necessary repairs may be frustrated by only one recalcitrant owner.

Main Objectives of the Bill:-

- < Clarify and re-state the common law rules which demarcate ownership of the various parts of a tenement where this is not set out in title deeds.
- < Provide a statutory system of management for tenements if none is provided in the title deeds. This will give every tenement a management scheme and hence a mechanism for ensuring that repairs are carried out and decisions reached on other matters of mutual concern. The reform is intended to facilitate repair work and it is hoped that it will lead to many outstanding repairs being carried out.

### General Principles of the Bill:-

- < Title deeds of individual tenements will still take precedence over the new statutory law. The new law will only take effect if the title deeds do not make other arrangements or to the extent that they are defective.
- < The Tenement Management Scheme is a basic scheme containing the rudiments necessary for the proper maintenance and management of a tenement if not provided in the title deeds.
- < Primary responsibility for maintaining and improving the condition of private sector housing rests with owners.

### **Tenement Management Scheme**

- < The scheme sets out in statute the main parts of the tenement in which the owners share an interest, where decisions on their repair and maintenance can be taken by a majority of owners (if the title deeds do not make any provision). Thus even if the roof is in the ownership of the top flat, it will be the responsibility of all owners to pay for its upkeep (in the absence of provisions).
- < The definition of "maintenance" includes repair, rebuilding, replacing, cleaning, painting and gardening.
- < Major improvement works (as distinct from works to repair or maintain the tenement) will still be subject to unanimous agreement. This view was overwhelming supported on consultation.

### **Ancillary Reforms**

The Bill also contains provisions which introduce a range of other desirable reforms on matters including compulsory insurance for all tenement flats, a statutory right of access for repairs, and rules for the demolition of derelict tenement

For the purposes of the Tenements Act tenement means the building or a part of the building which comprises two related flats which or more than two such flats at least two of which (a) are, or are designed to be, in separate ownership and (b) are divided from each other horizontally. Effectively this means that any blocks of flats will be covered by the Tenements Act.

Section 4 of the Tenements Act introduces the Tenement Management Scheme which is set out in Schedule 1 to the Act and applies in relation to a tenement to the extent that no other provision is made in the title deeds. Effectively the tenement management scheme is a default position, and if the issue of ownership, maintenance etc. is covered by a Deed of Conditions the Scheme and the Act will not apply, but if it is not covered then the tenement management scheme will apply. The tenement management scheme sets out what is best practice in respect of management. The common law position whereby the top flat proprietor was responsible for the roof is abolished and the liability for the roof now becomes a liability of all the owners.

The common law position whereby repairs or maintenance require unanimity is abolished and the majority can now instruct repairs and maintenance. There is provision for application by an owner who objects to any decision of a majority.

The Act states that no owner or occupier of any part of a tenement shall be entitled to do anything which would or would be likely to impair to a material extent the support or shelter provided to any part of the tenement building, or the natural light enjoyed by any part of the tenement building.

One of the major changes in the Tenements Act and TCA is an attempt to impose on singular successors of owners of flats a certain level of liability for arrears of common charges. The Tenements Act makes provision for arrears of common charges to be notified to Registers of Scotland using a form of notice set out in Schedule 1A to the Act. A notice can be registered in the Land Register of Scotland and will subsist for a period of three years. A new owner will become responsible for payment of any charges specified in the notice.

Section 14 of the Tenements Act makes provision for owners to have access to other parts of the building for the purpose of carrying out maintenance and inspection works.

Section 15 of the Tenements Act imposes upon an owner an obligation to effect and keep in force insurance against prescribed risks for the reinstatement value of that owner's flat and any part of the tenement flat attached to that flat as a pertinent.



Unfortunately the Act has not gone further and imposed on owners an obligation to contribute to a common policy, but the duty can be enforced by any other owner, and presumably through their agents, the property managers.

As can be seen, property managers in Scotland have experienced significant changes in the law relating to land tenure, of the same significance as the legislation in England on Leasehold enfranchisement. This linked to UK-wide changes in legislation on Health & Safety, Disability Discrimination, Employment Law, Companies Acts, FSA regulation, Fire Precautions. Houses in Multiple Occupation and other forms of regulation make for an interesting life for property managers north or south of Hadrian's Wall.