

PROPERTY FACTORS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT

Part 1 – Registration of Property Factors

Section 9 – Effect of refusal to enter in register or removal from register (and Section 10 – Section 9: interpretation etc.)

38. Subsection (1) of section 9 establishes that subsection (2) applies where a person who is operating as a property factor when the Act first comes into force is refused entry in the register under section 4(5) or where a property factor is removed from the register under section 8(1). Other cases of refusal under section 4(5) are not covered here as a person setting up business as a property factor after the Act comes into force should not be operating as a property factor prior to being registered, so the actions available under section 9(2) should not be relevant. The refusal of an application for re-registration is instead dealt with by reference to removal from the register under section 4(7).
39. *Section 9(2)* also applies where a property factor is removed from the register under section 4(7). In this case, though, “removed” needs to be read with section 10(1). This reading makes clear that a property factor is not removed from the register if their removed entry is replaced by a new entry following a successful application for re-registration. So removal from the register under section 4(7) only leads to the application of section 9(2) where a re-registration application is refused or where no such application is made.
40. Subsection (2) of section 9 provides for four separate effects to arise from the circumstances listed in subsection (1). The first is that no costs incurred by the property factor in respect of work instructed after the relevant date are recoverable (section 9(2)(a)) and the second is that no charge imposed by the property factor which relates to a period after the relevant date is recoverable (section 9(2)(b)). The third effect is that homeowners become entitled (after the relevant date) to appoint a new property factor (or to decide to manage their properties without appointing a property factor) (section 9(2)(c)). In acting under section 9(2)(c), homeowners must act in accordance with procedures specified in their title deeds, or as the case may be, the Tenement Management Scheme (within the meaning of the Tenements (Scotland) Act 2004). The final effect is that the property factor is prohibited from lodging a notice of potential liability under the Tenements (Scotland) Act 2004 in respect of work instructed after the relevant date. (A notice of potential liability is a notice that can be registered against a property, which has the effect of making certain future owners of the property liable for the costs of maintenance or work to the property that was carried out before they owned it.)
41. The effects provided for in section 9(2) apply only after the “relevant date”, which is defined in section 10(2)(a). Where a person who is operating as a property factor when the Act comes into force is refused entry in the register or a property factor is removed from the register under section 8(1), the “relevant date” is the day after the day on which the period within which any appeal under section 11(2) may be made expires (without

*These notes relate to the Property Factors (Scotland) Act
2011 (asp 8) which received Royal Assent on 7 April 2011*

such an appeal being made) or any such appeal is concluded (without the appeal being successful – as there is no need for section 9(2) to apply if the appeal is successful). Section 10(3) provides additional information on when an appeal is to be regarded as “concluded”. The effect of all of this is that, in these cases, section 9(2) only applies once all of the avenues of appeal provided by the Act have been exhausted – and only if any such appeal has been unsuccessful.

42. Where the removal from the register follows an unsuccessful application for re-registration, the “relevant date” is the day after the day on which the property factor’s entry in the register is removed under section 4(7). In this case, the property factor’s existing registration will already have been extended (if necessary) under section 4(7) (b) until all avenues of appeal have been exhausted, so further delay is unnecessary. If, on the other hand, all appeals are concluded before the property factor’s original 3 year registration expires, then section 9(2) does not apply until the expiry of the original registration period. This is also what happens if no application for re-registration is made.
43. [Section 9\(3\)](#) requires the Scottish Ministers to give public notice of the refusal or removal mentioned in section 9(1) and of the relevant date and the effect of section 9(2) (again, see section 15(3) for further details of how public notice is given).
44. In addition to the effects provided for in section 9(2), of course, the circumstances mentioned in section 9(1) may, if the property factor continues to act as such after the refusal or removal, lead to the property factor committing an offence under section 12(1).