

PROPERTY FACTORS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT

Part 2 – Dispute Resolution

63. The main effects of Part 2 of the Act are to:

- establish a homeowner housing panel and homeowner housing committees similar to the private rented housing panel and private rented housing committees constituted by the Rent (Scotland) Act 1982 and renamed by the Housing (Scotland) Act 2006;
- 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 the property factor's duties or to comply with the property factor code of conduct;
- require a homeowner to notify the property factor in writing of the alleged failure and allow them a reasonable opportunity to resolve the concern before making an application to the panel;
- require the president of the homeowner housing panel to refer accepted applications to a homeowner housing committee;
- require a homeowner housing committee to decide whether a property factor has failed to carry out its duties or to comply with the property factor code of conduct and, if the property factor has so failed, whether to make a property factor enforcement order setting out any work to be executed and any payment to be made to the homeowner;
- make it an offence to fail, without reasonable excuse, to comply with a property factor enforcement order;
- enable the Scottish Ministers to make regulations about the recovery of relevant costs from property factors in cases which are referred to a homeowner housing committee or where a property factor enforcement order has been made against a factor;
- allow an appeal to the sheriff (on a point of law only) in relation to a decision by the president of the homeowner housing panel or a homeowner housing committee; and
- require the president of the homeowner housing panel to prepare an annual report for submission to the Scottish Ministers, who then lay it before the Scottish Parliament.

Section 16 – Naming of panel and re-naming of committees

64. **Section 16** is similar to section 21 of the Housing (Scotland) Act 2006, which deals with the private rented housing panel. Schedule 4 to the Rent (Scotland) Act 1984 requires there to be a panel of people to act as chairmen and members of rent assessment committees. Section 16(1) provides that the panel will have additional functions that

are conferred on them by this Act. Section 16(2) names that panel the “homeowner housing panel” and the committees the “homeowner housing committees” in relation to all applications made under Part 2 of this Act (that is, applications from homeowners in relation to an alleged failure by property factors to carry out the property factor’s duties or to ensure compliance with the property factor code of conduct (see section 14)).

Section 17 – Application to homeowner housing panel

65. Subsection (1) enables a homeowner to apply to the homeowner housing panel for a determination of whether the homeowner’s property factor has failed to comply with the property factor’s duties (defined in subsection (5)) or to ensure compliance with the property factor code of conduct (“the section 14 duty”). Subsection (4) makes clear that a property factor failing to carry out their duties to a reasonable standard counts as a failure to carry out their duties for the purposes of this Part.
66. Under subsection (2), a homeowner must set out in the application his or her reasons for considering that the property factor has failed to comply with the property factor’s duties or with the section 14 duty.
67. Subsection (3) provides that, before making an application under subsection (1), a homeowner must notify the property factor in writing of the reasons why he or she believes that the property factor has failed to comply with the property factor’s duties or with the section 14 duty. It also prohibits the homeowner from making an application to the homeowner housing panel unless the property factor has refused to resolve or unreasonably delayed in attempting to resolve the homeowner’s concern.

Section 18 – Referral to homeowner housing committee

68. Subsection (1) requires the president of the homeowner housing panel to decide whether to refer an application made to the homeowner housing panel to a homeowner housing committee or to reject the application. The circumstances in which the president may reject an application are set out in subsection (2).
69. Subsection (3) requires the president to decide whether to reject an application or refer it to a homeowner housing committee within 14 days of receipt – unless he or she considers that further information is required to enable him or her to make the decision or that there is a reasonable prospect of the dispute being resolved by parties (in which case a decision under subsection (1) must be made by such later date as the president considers reasonable).
70. If the president decides to reject the application, he or she must, as soon as practicable, notify the homeowner (and anyone acting on the homeowner’s behalf whose name and address is known to the president) of that fact (subsection (4)). Under subsection (5), that notification must set out the reasons for the rejection and explain the procedure for appealing against the decision.

Section 19 – Determination by homeowner housing committee

71. Subsection (1)(a) requires a homeowner housing committee, on receipt of an application referred to it by the president, to decide whether the property factor has failed to carry out the property factor’s duties or to comply with the section 14 duty.
72. If a committee decides that a property factor has failed to carry out the property factor’s duties or to comply with the section 14 duty, it must then consider whether to make a “property factor enforcement order” (subsection (1)(b)). If it proposes to make such an order, the committee must give notice of that proposal to the property factor and allow the parties (that is, the property factor and the homeowner) an opportunity to make representations (subsection (2)).
73. Subsection (3) obliges the committee, where it is satisfied (after taking into account any representations received) that the property factor has failed to carry out the

property factor's duties or to comply with the section 14 duty, to make a property factor enforcement order. Subsection (4) states that, subject to the appeals provisions contained in section 22 of the Act, matters considered and decided on by the committee cannot be adjudicated on by any other court or tribunal.

Section 20 – Property factor enforcement orders

74. Subsection (1) defines a property factor enforcement order as an order requiring the property factor to execute such action as the homeowner housing committee considers necessary and, where appropriate, to make such payment to the homeowner as the committee considers reasonable.
75. Subsection (2) requires the order to specify a time period within which any action required must be executed or any payment required must be made, while subsection (3) allows the order to specify particular steps that the property factor must take.

Section 21 – Variation and revocation of property factor enforcement orders

76. Subsection (1) allows the homeowner housing committee that made a property factor enforcement order to vary or revoke it at any time (provided in the latter case that the committee considers that the action required by the order is no longer necessary).
77. Subsection (2) provides that the committee must vary a property factor enforcement order so as to extend the period allowed for the action required by the order to be executed in the circumstances specified in subsection (3) (namely cases where, while the action required has not yet been fully executed, either satisfactory progress is being made or the property factor has given a written undertaking that the action will be executed by a later date that the committee considers satisfactory).

Section 22 – Appeals

78. Subsection (1) provides a right of appeal against a decision of the president of the homeowner housing panel or a homeowner housing committee to the sheriff; however, the appeal must be on a point of law. Any such appeal must be made within the period of 21 days beginning with the day the decision appealed against is made (subsection (2)). There is no further right of appeal (subsection (3)).

Section 23 – Effect of failure to comply with property factor enforcement order

79. Under subsection (1), it is for the homeowner housing committee which made a property factor enforcement order to decide whether the property factor has failed to comply with the order.
80. Subsection (2) requires the homeowner housing committee to serve a notice on the Scottish Ministers in any case where it decides that a property factor has failed to comply with an property factor enforcement order. This will enable this fact to be taken into account, for example, when the Scottish Minister are considering an application from the property factor for re-registration or removal from the register under section 8(1).
81. The homeowner housing committee is prohibited from deciding that a property factor has failed to comply with a property factor enforcement order until the period within which the order requires the work to be completed has ended (subsection (3)(a)). In addition, the committee may not decide that property factor has failed to comply with the order if it is satisfied that the property factor is unable to comply with the order due to having been unable to acquire the rights (for example, access rights) necessary to take the action required (despite having taken reasonable steps to acquire those rights) or that the action required is likely to endanger any person (subsection (3)(b)).
82. Under subsection (4), if the committee would, but for the circumstances in subsection (3)(b), have decided that the property factor had failed to comply with

the property factor enforcement order, the committee must instead notify the Scottish Ministers that the committee considers the property factor to be unable to comply with the property factor enforcement order.

Section 24 – Property factor enforcement order: offences

- 83. Subsection (1) makes it an offence for a person to fail to comply with a property factor enforcement order without reasonable excuse.
- 84. Subsection (2) sets out particular situations where a person will be considered to have a reasonable excuse for the purposes of subsection (1), although this does not prevent other circumstances also being considered to constitute a reasonable excuse (subsection (3)).
- 85. Subsection (4) provides that a property factor may not be found guilty of the offence under subsection (1) unless a homeowner housing committee (which made the property factor enforcement order) has decided that the property factor has failed to comply with it. However, such a decision does not establish any presumption that the property factor has committed an offence. This is because to be found guilty of an offence it would have to be shown, *beyond reasonable doubt*, that the property factor had failed to comply with the property factor enforcement order, whereas the homeowner housing committee would only have to be satisfied *on the balance of probabilities* that the property factor had failed to comply with a property factor enforcement order to make a decision to that effect.
- 86. Under subsection (5), the penalty for the offence under subsection (1) is a fine not exceeding level 3 on the standard scale.

Section 25 – Power to make further provision about applications etc.

- 87. Section 24 allows the Scottish Ministers to make, by way of regulations, further provision about the procedure for making applications under section 17 and for the making of decisions in relation to such applications.

Section 26 – Recovery of costs from property factors in relation to certain applications and orders

- 88. Subsection (1) enables provision to be made by the Scottish Ministers (in regulations approved by the Scottish Parliament) for costs incurred by the homeowner housing panel, president and committee under Part 2 of the Act (except under section 27) to be recouped from a property factor in any case where an application is referred to a homeowner housing committee under section 18(1)(a) or a property factor enforcement order is made against the property factor. Subsection (3) provides additional details on what provision may be made in regulations under subsection (1).
- 89. Subsection (4) ensures that this power can only be exercised to recover costs.

Section 27 – Annual report

- 90. Subsection (1) requires the president of the homeowner housing panel to prepare an annual report on the exercise of the functions of the president and homeowner housing committees under Part 2 of the Act during each reporting year (see subsection (4)).
- 91. Subsection (2) requires the report to be submitted to the Scottish Ministers as soon as possible after the end of the year to which the report relates and, under subsection (3), the Scottish Ministers must then lay a copy of the report before the Scottish Parliament.
- 92. Subsection (4) defines a reporting year as beginning on the day that section 27 comes into force and ending on 31 December that year, then each successive calendar year. For example, if section 27 comes into force on 1 October 2012 (see section 33(2)), the

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

first reporting year would be 1 October 2012 to 31 December 2012, the next reporting year would be 1 January 2013 to 31 December 2013 and so on.