

Scottish Parliamentary Working Group on Tenements: Owners Entity Sub Group

Establishing compulsory owners associations

Introduction

In our previous paper we explored the benefits of, and recommended the use of, the Development Management Scheme (DMS)¹. However we felt unable to recommend that the DMS should be made compulsory for existing tenements as this would require owners to go through the conveyancing process with subsequent costs. This is because the DMS is designed for a wide variety of schemes and estates and therefore requires some key details to be added defining the development geographically, the number of units it contains and what property is to be scheme property. This means using a conveyancing deed.

Alternative approach

An alternative approach would be to introduce, and make compulsory, the Tenement Management Scheme (B) which was set out in the initial Scottish Law Commission Report on the Law of the Tenement laid before the UK Parliament in 1998.² (The Tenements (Scotland) Act 2004 was based on this report.)

The Report on the Law of the Tenement proposed two Tenement Management Schemes (TMS). TMS (A) was introduced on a compulsory (but default) basis as the TMS we now use. TMS (B) included the proposal for Owners Associations as bodies corporate. It is essential for Owners Associations to be bodies corporate so that they can enter into contracts, employing managers, procuring building works etc.

Legislative requirements

Establishing bodies corporate, however, requires legislation in the UK Parliament as the law relating to business associations, even when they are not for profit, is a matter reserved to the UK Parliament³. TMS (B) was subsequently broadened⁴ and became the DMS⁵. However, due to the reservation of business associations, a UK Parliament statutory instrument (the 2009 Order) was needed.

If TMS (B) were now to be made compulsory, on the basis that the Owners Associations introduced matched exactly with the boundaries and number of units in the titles of a single tenement, this could be done in a way such that no conveyancing would be required.

Introducing TMS (B) may require legislation in both the Scottish and UK Parliaments (the latter for aspects relating to business associations, although it is possible to argue that since Owners' Associations have already been invented by the 2009 Order that a further rolling-out of these would be within the Scottish Parliament's powers). Some amendments to TMS (B) (as set out in the Report

¹ provided for by the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729

² [Scot Law Com No 162](#).

³ Scotland Act 1998 Sch 5 Part II Head C1

⁴ Scottish Law Commission Report on Real Burdens in 2000 ([Scot Law Com No 181](#))

⁵ Provision for this was made the Title Conditions (Scotland) Act 2003 Part 6

on the Law of the Tenement) would be required eg to exclude the smallest tenements (say those with fewer than 4 or 6 properties) and to clarify the position vis-à-vis title deed provisions where they are different to those set out in TMS (B).

The manager of an Owners Association should be a registered Factor. Where an Owners Association is self managing, then we would recommend that they also register as a factor (with a fee exemption) as this would allow monitoring and give a means of recourse through the First Tier Tribunal. This would require amendment to the Property Factors (Scotland) Act 2011.

Enforcement

No programme of enforcement is envisaged however the Home Report should be amended such that the absence of an Owners Association is shown as a “black mark”.

Where a tenement is factored, it is in the Factor’s interest to ensure Associations are set up as these will allow them to be more proactive (whilst at the same time giving owners greater collective control over their actions). However, if progress in establishing Owners Associations is slow then it would be possible in due course to task Factors with this responsibility through amendments to the Code of Conduct.

In addition, LAs should be given power to enforce the setting up of Associations in the same way that they currently have powers to impose Maintenance Plans under the Housing Scotland Act 2006.

Recommendation

We recommend that the cross-party group’s forthcoming paper should consult on:

- Making TMS (B), as set out in the Scottish Law Commission Report on the Law of the Tenement ([Scot Law Com No 162](#)), apply to existing tenements over a specified number of units. The result would be that it, rather than the current TMS, would then apply. Consideration would be need to be given to the inter-relationship with the titles, as unlike the current TMS, TMS (B) is designed as a comprehensive code rather than as a default scheme.
- An alternative possibility of amending the current TMS to allow the introduction of an Owners’ Association by majority decision of owners could also be examined. This would be a less radical approach. But any proposal involving Owners’ Associations may need the involvement of the UK Parliament.
- The DMS should be made compulsory for all *new* tenements over the same specified number of units, but it should be possible for a single DMS to apply to a development consisting of several tenements/tenements and houses.