

Avoiding PFEOs - Initial Lessons



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It has been 18 months since the Property Factors (Scotland) Act 2011 came into force. Within this time 33 applications have proceeded to a full hearing before a Homeowner Housing Committee.

14 of these cases resulted in the Committee making a Property Factor Enforcement Order ("PFEO"). Of those 14 PFEOs, the Committee have subsequently issued a Notice of Failure to Comply in only 2 cases.

The failure of a property factor without reasonable excuse to comply with a PFEO is a criminal offence, for which they may be fined up to £1000. The responsibility for taking criminal proceedings against the property factor is at the discretion of Scottish Ministers. At this time, it would seem that no further action has been taken against the property factors that have been served with Notices of Failure to Comply. It may well be the case that there is little desire to pursue such prosecutions and even then, a prosecution will probably only be pursued in the most serious of cases.

It remains to be seen whether the failure to comply with a PFEO affects a property factor's registration. There is provision in the 2011 Act for the removal of a property factor from the Register in such circumstances and it will be considered when the property factor re-registers every 3 years. As yet, we are unaware of any intention to remove a property factor from the Register and given the ability of a property factor to challenge the Scottish Ministers' decision to remove or refuse registration, it is likely that removal or refusal to register will again only occur in the most serious of cases. From the perspective of a homeowner and to achieve best practice across the sector, it might have been advantageous to legislate for a PFEO to be given the same status as a court decree. This could then be directly

enforced by the homeowner as is the case for decisions of the Employment Tribunal.

On reviewing the decisions of the Homeowner Housing Committee, there are a number of instances where a property factor has been held to have failed to arrange repairs timeously or to pursue contractors to remedy defective works. In some circumstances, this has resulted in the Committee making a PFEO requiring the property factor to arrange remedial works and bear the cost of such works. To avoid such situations arising, property factors should ensure that they have in place procedures for the inspection of factored properties, that they deal with any repair notifications timeously and that they inspect the works of 3rd parties and take appropriate action. Albeit, certain works might not proceed or a contractor not be pursued due to lack of funding; as long as the homeowners have been given notification of their rights and an opportunity to decide on how the property factor proceeds, then this would be a stateable defence to a claim that no repairs have been effected or contractors pursued. For the Committee to decide otherwise would be to have the property factor fund works regardless of funding and to guarantee the works of contractors which exceeds a property factor's obligations.

Given that a PFEO has not been made in the majority of cases that have proceeded to a hearing, it remains a frustration for property factors that there is no provision for an award of expenses in their favour, should they have been successful in their defence to a complaint. Certainly, it would appear that some cases seem to have been raised by homeowners in response simply to property factors increasing their management fee or pursuing the homeowner for unpaid bills. **bto** is currently seeking through court action to recover legal expenses incurred to a property factor through a homeowner's title deeds on the basis that the Homeowner Housing Committee dismissed the homeowner's complaint in its entirety and the application only appeared to be an attempt to avoid paying unpaid factoring charges.

In this edition

Avoiding PFEOs - Initial Lessons

Some initial thoughts on the decisions of the Homeowner Housing Committee.

Planning a Staff Structure Review

A review of important restructuring guidelines to be considered by RSLs.

Watch out for...

What's on the horizon for the Social Housing sector?

Planning a Staff Structure Review



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Management teams and Management Committee members of RSLs are acutely aware of the increased financial pressures affecting the sector. They are aware the Scottish Housing Regulator expects them to take steps to ensure they are running efficient organisations, delivering value for money - to have "lean and keen" management structures is not necessarily new, but it has now become a necessity.

We have been consulted by various RSLs seeking to review staff structures with a view to ensuring efficiency and cost savings, so it is essential that such an exercise be carried out from time to time to ensure that the organisation's structure is fit for purpose whilst meeting the SHR's expectations.

Where a review identifies a need for changes, with a restructure and/or possible redundancies, a host of issues for RSLs need to be considered. This can make the process seem daunting. **bto** is well experienced in assisting with these matters and can help prepare a "road map" to guide RSLs through the numerous hurdles which inevitably spring up. We have successfully navigated various RSLs through successful restructures and employment law issues.

Some issues which may need to be considered and addressed are:

1. Considering whether the proposed restructure will be a notifiable event which will require to be intimated to the Regulator – is it a "major" organisational change?
2. In some circumstances, for example where the RSL provides supported living services, consultation with the Care Inspectorate may be necessary before any changes are finalised.
3. Consider the intended implementation date of the new structure. An RSL can then factor in potential periods of notice for any employee issues, and work out the time scale within which the consultation process requires to be carried out.
4. Full awareness at all times of the terms of the RSL's own redundancy policy/terms and conditions of employment. Generally, this will set out detailed guidelines as how to deal with a restructuring/redundancy exercise, and these must be carefully observed.

5. As well as individual consultation with the employees concerned, the relevant trade unions will have to be advised and consulted.

6. Seeking volunteers, who may wish to take a voluntary severance package and leave, may assist the process.

7. Will employees be offered any enhanced entitlement (over and above the terms and conditions of the employment contract) in exchange for a Settlement Agreement? This might be attractive to discharge any potential employment claims against the organisation. RSLs need to consider whether such ex gratia payments are in the organisation's interests. If the organisation is a charity, it will need to be satisfied that the charity has the power to make ex gratia payments to employees and, again, that it is in the interests of the charity to do so.

8. If ex gratia payments are to be offered in exchange for a Settlement Agreement, the Settlement Agreement will need to be drafted and issued to the employees/their advisor for consideration.

9. Where selection is required between a number of different employees in the same job, what criteria will be used? How does the RSL ensure that the criteria will be fair and non-discriminatory?

10. Displaced employees will often have to be considered for new vacancies being created in the organisation, and the RSL may need to consider the applicability of preservation of salary. For how long should the salary be preserved?

11. Creative use of the "protected conversations" or "pre-termination negotiations" regime (which arrived in summer 2013) can also be of assistance in any restructure process.

bto's employment team has a proven track record in this field. We have worked tirelessly with RSLs who have successfully carried out restructuring exercises, relying on **bto's** carefully scripted road maps, giving the RSL the desired outcomes whilst avoiding employment tribunal claims. With the potential for sizeable awards of compensation being made to employees pursuing claims, it pays to take expert advice at the outset.

Managing restructuring exercises, in the context of complex employment legislation, can feel like being in a maze, walking on a minefield. However, with expert advice from **bto**, negotiating your way out the maze unscathed can hopefully become a walk in the park.

Caroline Carr and **Douglas Strang** are happy to meet to discuss how we can work with you to guide you through this process for your organisation.

Watch out for...

- The Immigration Bill (just passed from the Commons to the Lords) may bring in obligations on landlords to only rent to those with a legitimate right to enter or remain in the country, other than when complying with a homeless referral from a local authority.
- Financial reporting standard, FRS102, is due to change the way Associations' accounts are drawn from 2015 onwards and significant planning is required where implementation of FRS102 may erode apparent reserves.
- The Co-operative and Community Benefit Societies Bill was introduced in the Lords in December with the intention of consolidating the law for industrial and provident societies and introducing some reform also.

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