

Response ID ANON-TKU7-AF3K-G

Submitted to **Tenements (Scotland) Act 2004 (Heating Services) Regulations**

Submitted on **2016-04-14 15:20:10**

Introduction

1 Are you responding as an individual or an organisation?

Individual

2 What is your name or your organisation's name?

Name/orgname:

Dr Frankie McCarthy

3 What is your email address?

Email:

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4 The Scottish Government generally seeks to publish responses to a consultation, in summary and where possible in detail. We would like your permission to publish:

Your response along with your full name

5 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

Page One

1 Should the proposed Regulations be made?

Yes

Comments::

The proposed Regulations are made using the powers contained in section 19 of the 2004 Act. The Scottish Law Commission Report on the Law of the Tenement (Scot Law Com No 162, 1998) sets out the reasons why those powers were considered necessary.

Certain areas of tenement buildings, such as the walls of the close or stairwell, are owned in common by the owners of all the flats in the building. The rules of common ownership require unanimous agreement of all common owners to any changes being made to those areas of the building. Accordingly, if one flat owner refuses to allow a fellow common owner to make a certain change, the change cannot happen. However, the Report notes, at paras 10.6 - 10.9, that certain services may require the use of common parts - for example, water pipes may need to be lead through common walls to provide water to an individual flat. Where the services involved are the supply of water, drainage, electricity or telecommunications, specific statutes enable a court to override objections of common owners to the use of common areas for this purpose where it is reasonable to do so. These statutory overrides were introduced to cover services that had come to be seen as essential to a basic standard of living. (See, for example, the power to power to dispense with the needed agreement contained in Schedule 2, para 5 of the Telecommunications Act 1984, which directs the court to consider "the principle that no person should unreasonably be denied access to an electronic communications network or electronic communications services.")

The Report goes on to note that new technology is likely to result in further services being created. Accordingly, the powers contained in section 19 were considered necessary to ensure that further overrides could be put in place. Although this is not explicitly stated in the Report, the implication to be drawn is that such overrides would be put in place where services had become essential to the standard of living, in the way that electricity and water were already considered essential.

The use of the section 19 powers to introduce an override for district and communal heating systems is entirely justified against that background. It seems reasonable to argue that heating is essential to a basic standard of living in present day Scotland. The Energy Efficiency Standard for Social Housing suggests climate friendly heating is rapidly becoming essential, as it arguably must do in line with Scottish Government carbon emissions targets. In short, I consider the Regulations proposed to be an appropriate and justifiable use of section 19.

2 Do you have any comments on the draft Regulations, including on the proposed procedure for the installing owner to follow?

Yes

Comments:

Regulation 3(2)

Regulation 3(2) provides that section 19 will not apply to district/communal heating "to the extent that a title condition enables an owner to instruct or carry out an

installation.”

From paragraph 2.03 of the consultation document, I understand regulation 3(2) to be giving effect to the policy that existing rights should not be removed, and is in keeping with the general nature of the TMS as providing default rules where no specific provision is made in the title deeds. In other words, I understand the policy to be that the Regulations should apply where the title deeds are silent on the issue of installation, but should not apply where the title deeds make provision about installation.

I do not think the wording of regulation 3(2) gives effect to that policy. An improved wording would be “to the extent that a title condition regulates an owner instructing or carrying out an installation.”

If the intention of the Regulations is to ensure existing title conditions are respected, it should be kept in mind that title conditions might prevent the owner making any such installation, or might give a common owner the right to veto an installation by another owner in particular circumstances. A title condition like this does not “enable an owner to carry out an installation.” However, it does give an owner a right which would be removed, and it does make specific provision for how the situation is to be dealt with rather than relying on the common law. The word “regulate” would better encompass the rights of an owner in this position than the word “enable.”

Regulation 4

To avoid any confusion, I think it would be helpful for the notice to include a statement about liability for the costs of the installation. This is likely to be of particular use in reassuring a non-applicant owner that she will not incur any costs as a result of the installation works. Such a statement may prevent unnecessary objections being raised.

Regulation 6(2)

Regulation 6(2) provides that where another owner has objected to a proposed installation and agreement between her and the applicant owner cannot be reached, the applicant owner can apply to the sheriff to resolve the dispute under section 6(1)(b) of the 2004 Act. Section 6(1)(b) allows (but does not compel) the sheriff, on receipt of an application, to grant the order craved or make any such other order as the sheriff considers necessary or expedient.

Neither the regulation nor section 6(1)(b) sets out the test the sheriff should apply when determining whether to grant an application. A test is needed. Without a test, the sheriff has no basis on which to determine whether the application should be granted or not. He knows that he has the power to grant the order, but has no guidance on when that power should be used.

The most appropriate test, in my view, is that the sheriff will grant the application if he considers it reasonable in the circumstances. This test is in keeping with the approach of the statutory overrides to the common ownership rules in respect of electricity, water and so on discussed above. An alternative test, which would also make sense in this context, is that in section 5(5) of the 2004 Act, by which the sheriff may annul a decision made by a majority of owners if (a) it is not in the best interests of all the owners, or (b) it is unfairly prejudicial to one or more of the owners.

(For completeness: I think the reason no test is included in section 6(1)(b) is because the disputes which arise under it are purely factual in nature. For example: does this wall provide support or not? Will the proposed alteration remove that support or not? Has this person paid their share of the costs or not? The sheriff will grant or refuse the order based on what the evidence shows the truth of the matter to be. However, the Regulations do not simply ask the sheriff to determine a factual situation. They ask him to choose between two competing interests. For that reason, guidance as to the appropriate exercise of his discretion is required.)

3 Do you have any comments on the proposal that if objections are received, the installing owner must propose an alternative dispute resolution process unless this is not suitable?

No

Please give reasons for your answer:

4 The draft Regulations provide a default scheme in order to protect existing title conditions which may be contained within individual homeowners' title deeds. Is this the correct approach?

Yes

Please give reasons for your answer:

I would consider this the correct approach in these Regulations, but I would urge the Government to give closer consideration to this issue as part of their ongoing housing policy programme.

The 2004 Act was designed as a default scheme due to concerns that removing or altering existing title conditions might violate the rights of owners under Article 1 of the First Protocol to the European Convention on Human Rights (see Scottish Law Commission Report on the Law of the Tenement (Scot Law Com No 162, 1998), para 3.3). Article 1 provides an owner of property the right to peaceful enjoyment of that possession. Where the state deprives a person of their ownership, or controls the use that can be made of the possession, the state's action will violate the owner's right under article 1, unless the state's action is lawful, pursues a legitimate aim in the public interest and represents a proportionate interference with the right. To deprive an owner of his possession will only be proportionate where compensation is paid for that loss, other than in exceptional circumstances not relevant here. Controlling the use of a possession may be proportionate without payment of compensation, depending on the other circumstances of the case.

The application of article 1 to title conditions in tenements is unclear. It is not obvious whether a regulation like the one proposed in this consultation which overrules a title condition would amount to a deprivation of possessions (since the right contained in the title condition is lost entirely) or not (since ownership of the flat itself is not lost, only one right attaching to ownership of that flat.) That uncertainty means it is unclear whether compensation would be required to ensure that a regulation like this one would be proportionate.

In my view, there is a strong argument here that such a regulation would qualify only as a control of the use of possessions. The regulation is clearly lawful and

pursues numerous legitimate aims in the public interest (reducing fuel poverty and reducing carbon emissions, for example). The proportionality of the control in respect of any individual owner's possessions could be taken into account by way of notification and appeal procedures of the type proposed in these Regulations. In particular, a sheriff could look at the facts of a particular case and determine whether overriding a title condition was a proportionate interference given the aims pursued.

These questions are difficult. If the government wishes to tackle the human rights implications of overriding title conditions in tenements – which I believe they should – it would be appropriate to do so by way of a full investigation into the issue with scope for (a) legal advice and (b) consultation. In addition, I believe it would be inconsistent with the overall approach of the 2004 Act to allow these Regulations to override title conditions, and that inconsistency would undermine legal certainty and could lead to confusion. For those pragmatic reasons, I consider it appropriate for these Regulations to provide a default scheme which protects existing title conditions. For the reasons of principle I outline above, however, I would urge the government to reconsider this issue more broadly.

5 If a section 104 Order under the Scotland Act 1998 is made in relation to the installation of gas pipes in common parts of tenements, should the same procedures as outlined in the draft Regulations for heating services apply?

Yes

Please give reasons for your answer:

For reasons of consistency and simplicity, the same procedure should apply.

6 Do you have any other comments you would wish to make?

No

Comments:

Evaluation

1 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Slightly dissatisfied

Please enter comments here.:

In a word document, I can format my answers to make the information easier to read. The online portal does not allow me to, for example, bold or underline headings. I would rather submit a word or pdf version of my answer via email for that reason.