bto eUpdate

What happened to Housing Associations?

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Tenants and beneficiaries

The debate about whether tenants should have the right to vote on RSLs' proposals regarding group structures is over. That right is now enshrined in the Housing (Scotland) Act 2014 (the 2014 Act) soon to come into force. The debate reached its high water mark in David Bookbinder's letter (Inside Housing, 20 June 2014, page 21), on behalf of the Glasgow and West of Scotland Forum of Housing Associations (the Forum) where David defends tenants' right to vote on RSLs' group structure proposals by reason that they already have a vote when RSLs propose merging.

The fact that tenants could obtain such rights by becoming members of their landlord RSLs was not persuasive enough to convince the Scottish Government to reject the proposal. With perhaps one exception, this is notwithstanding the fact that being a tenant of an RSL almost certainly ensures instant membership – and it is inexpensive (£1). Neither did the fact that an RSL's governing committee emerges from the members voting – even though it does not get more empowering and democratic than that.

Additionally, it is worth noting that over 90% of RSLs are charities, and as such must further their charitable purposes by serving all their beneficiaries, tenants and others. It begs the question, therefore, why non-tenant beneficiaries of RSLs (whether charitable or not) do not feature in the 2014 Act. Is it because legislators took the view that their interests (the right to vote on mergers and group structure proposals) were unimportant, or at least not as important as RSLs' tenants?

Certainly, at no point has the Office of the Scottish Charity Regulator taken the view that the beneficiaries of non-RSL charities should have the right to vote on group structures and mergers, leaving these matters instead to charity trustees and their governing constitutions. The result, in effect, is that charitable RSLs have two classes of beneficiaries, some with greater rights than others, thanks to two separate legal regimes, housing law and charity law.

One should also not lose sight of the fact that tenants' interests (and rights) are safeguarded by existing readily available legal remedies – the Scottish Secure Tenancy Agreement, the Human Rights Act in some circumstances, to name but two, and quasi legal remedies, such as the Scottish Public Services Ombudsman and MSPs.

Housing Legislation

What we are witnessing, through successive Scottish housing acts, is a slow but certain erosion of rights affecting those who own and run RSLs – the members and committees. The result could have, and probably already has had, unintended and adverse consequences for RSLs.

Cumulatively, housing legislation, housing regulators' pronouncements over the years, and case law (the Human Rights Act (in certain circumstances), EU Procurement and more recently the Dunbritton Housing Association case in connection with the Environmental Information (Scotland) Regulations 2004), have not helped in that RSLs are now, for all intent and purposes, treated like public bodies - in the Dunbritton case, the Commissioner was "satisfied that Dunbritton is under the control of SHR" (something the Scottish Housing Regulator (SHR) and Dunbritton would almost certainly deny) thereby satisfying the legal test that resulted in classifying RSLs as public bodies for the purposes of the environmental regulations.

How did that happen?

If you cast your mind back, housing associations were just that, Housing Associations (HAs) – stand-alone private legal entities, owned, controlled, directed and run by their members and a committee of management, the latter drawn from the members through elections. Indeed, the SFHA still describes itself as "the Scottish Federation of *Housing Associations*" and so does David's more recent organisation, "Glasgow and West of Scotland Forum of *Housing Associations"*. To pursue this theme, should these organisations not re-label themselves respectively as "the Scottish Federation of *Registered Social Landlords"* and "the Glasgow and West of Scotland Forum of *Registered Social Landlords"*? Put differently, how many HAs do the SFHA and the Forum represent? For let us be clear – HAs are not the same legal creatures as RSLs, even though they may both perform housing functions.

Also, initially members and committees were tenants, often resting control of their housing from local authority landlords, but seeing their role as community-based and focussed on their community, not just tenants.

The "mistake" HAs made was to seek funding from the state, as that gave the state the opportunity to impose certain criteria to protect the public purse. That regime was benign to start with, but over time HAs have been "hijacked" by other third parties' interference, own interests and agendas – successive national governments, housing regulators, statutory agencies, and now tenants – to the extent that they are now RSLs, not HAs.

In this sense also the legal regime that once governed HAs (the Housing Associations Act 1985) is now largely irrelevant to RSLs. Instead, if one wishes to ascertain how HAs are governed and regulated, one needs to refer to relatively recent Scottish housing acts – a remarkable development in itself, to the extent that one wonders whether HAs exist at all in the affordable housing sector as we know it.

Given the discernible trend highlighted above, and if this trend continues, which is likely (witness the SHR's involvement in RSLs' affairs verging on acting like shadow directors or shadow trustees) committees should ask themselves who truly owns and runs RSLs and to whom are they truly answerable – Members or Tenants? The community they serve or the Scottish Government? The SHR? Anyone else?

As regards housing regulators, gone are the days when they focussed on RSLs, or their predecessors, through housing legislation. The SHR's interventionist agenda, to protect and promote tenants' interests, is now further enhanced and clearly mapped out in the 2014 Act – resulting in HAs losing their identity and status and illustrating again the pernicious and corroding effect housing legislation has had on HAs.

David's letter states that "there is no logic to tenants having the right to vote on a merger proposal – as they already have – but being denied a vote on a group structure move".

The only illogical reasoning is tenants having the right to vote on mergers – that right, and the new right to vote on proposed group structures, illustrate the invidious enhanced rights of third parties creeping into and over organisations who should have the absolute rights (subject to the applicable laws), through their members and committees, to be the masters of their own affairs. Social enterprises and charities should beware, as they may be next!

Contrast that with consumers who have remedies (through the Consumer Credit Legislation for example) which do not encroach on private companies' rights to determine whether they should merge or set up group structures – only shareholders (i.e. members), not their customers, or clients, can decide whether to merge or not, or contemplate entering into a group structure.

Why should RSLs be treated any differently? Is it because the vast majority of RSLs are Industrial and Provident Societies (ironically soon to be called Community Benefit Societies)? Or is it because they operate in what is perceived, rightly or wrongly, as the voluntary sector?

If the powers that be want the affordable housing sector to be "controlled", "monitored", "directed" etc (by regulators, customers or others) to promote and protect third party rights, (tenants amongst others) then the sector should be subsumed into government departments – rather than force national housing policies and political agendas on RSLs through third party rights – especially given the narrow base of the third party in question.

David also states that the Forum "welcomes the Scottish Government's move to give tenants – rather than just the much smaller number of members – the right to vote on a group structure proposal".

If tenants do not wish to become members of their landlords, why should rights, which distort and encroach on RSLs' legal rights to govern themselves without third party interference, be granted?

As it is, the rights in question do not amount to much more than being able to say yes or no – they will almost certainly do nothing to encourage individuals and communities to become more involved in a meaningful manner and on a more permanent basis in the management of their RSLs. The rights granted will promote particular agendas, rather than promote the interests of communities. In some ways it is reminiscent of the right to buy (soon to be abolished in Scotland) where individuals' rights to purchase passed for a national housing policy for all. Ultimately, as with the right to buy, in the long term all these discrete rights, "dipping in and out" as it were, offer only occasional involvement and cause division and create friction.

Lastly, we are told that the Forum "believes that, over time, independence is invariably compromised". Whose independence? If it is RSLs' independence, then is this not what housing legislation, as we have witnessed its evolution, with its ever-encroaching remit, is doing – eroding and compromising the independence of RSLs that the Forum values so much?

Where to now?

The raft of laws (public and private), rules and regulations HAs would have never dreamt of would affect them 30 years or so ago, are unlikely to be undone. However, perhaps part of the answer lies in re-assessing which organisations should remain RSLs and which should become again what they once were, HAs. And if it means the SHR letting go of some RSLs, then so be it – charity law and other appropriate legal regimes can take over and deal with them.

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