

June 2009. New legislation affecting owners in Scotland since the Tenement Handbook published in 1993.

This update gives you a brief introduction 3 major Acts passed by the Scottish Parliament that have clarified the Law of the Tenement. These Acts are:

- **The Title Conditions Act 2003** – allowing changes to Title Deeds.
- **The Tenements Act 2004** – placing a duty on every tenement owner to maintain their building to provide support and shelter and giving powers to co-owners to ensure that they do so.
- **The Housing Scotland Act 2006** introducing a new culture of preventative maintenance and owner responsibility with new council powers to make owners carry out regular maintenance.

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1 How can I change conditions in my title deeds?

The process for changing any of the conditions in your title deeds depends on how many of the owners in a tenement agree to the change:

- If **all** of you agree, then it is relatively straightforward. A solicitor will be able to draw up the required deed and the Lands Tribunal will certify the change.
- If the **majority** of you agree, again the deed is drawn up and sent to the Lands Tribunal for consideration but those against the change can formally object to the Lands Tribunal if they wish.
- If **25%** of the owners wish to make a change, they can apply to the Lands Tribunal for a decision.

2 What the Tenements Act says about owner’s responsibilities

Responsibilities of all tenement owners
Regardless of what your title deeds say, all owners must:

- have building insurance
- maintain important parts of the tenement
- not interfere with parts of the building if that reduces the support or shelter offered

Other rules and procedures in the Tenements Act that apply to all owners, regardless of what their title deeds say are:

- What happens where flats are in joint ownership
- Dispute resolution
- What happens to repairs in progress when a flat is sold
- Maintenance accounts
- How repairs should be commissioned

The Tenement Management Scheme (TMS)

The Tenement Management Scheme(TMS) is a default scheme that can be used where your title deeds have gaps or defects. You and your fellow owners can use the different sections of the scheme to make up for gaps (such as the deeds not saying how decisions should be taken or not describing all the common parts) or defects (such as allocating shares of costs that do not add up to 100%) but otherwise you must follow your title deeds. If your title deeds have procedures for taking decisions and the same procedures apply to each flat, then the title provisions apply, even if you do not like what they say.

The TMS covers:

- scheme property – the parts that everyone is required to maintain
- parts that are the responsibility of only those who have use of them;
- how the costs of repairs and maintenance are to be shared;
- what is maintenance;
- shared management costs;
- access to carry out repairs and

- how to make 'Scheme decisions' – that is any decision taken by owners as a group about scheme property

Scheme property

Scheme property is:

- any part of the tenement that is the common property of two or more owners, eg, the close or stair;
- any other parts of the tenement that the title deeds say must be maintained by two or more owners, for example, the gutters and downpipes;
- the ground (or solum) on which your tenement is built (but not the back court or front garden);
- the foundations;
- the external walls;
- the roof, including the rafters and any structure supporting the roof
- the part of a gable wall that is part of the tenement building;
- any wall, beam or column that is load-bearing.

Parts that serve only one flat are the property of individual owners. Examples include doors and windows; skylights; vents; any chimney stack or flue that serves only one flat; any extension that serves only one flat. Some parts are the common property of only those who have use of them, for example drainpipes serving flats on one side of the building only.

Sharing the costs of repairs and maintenance

Your title deeds usually tell you how costs are to be shared between owners. If your title deeds have gaps or defects then you should follow the Tenement Management Scheme. Under the TMS

Under the TMS, costs are shared equally between the responsible owners. This includes the cost of inspections, running costs (eg to pay for stair lighting), cost of installing door entry systems, management fees, common insurance premiums etc. However where the floor area of the largest flat is more than one and a half times that of the smallest flat, repair costs are determined by the floor area of each flat.

Flats with two or more owners

Unless Title Deeds say otherwise, there is one vote per flat. If a flat is jointly owned then the owners have to agree how to vote. If you share ownership of your flat with one or more people, then any of you can, without the agreement of the others, do whatever is necessary to fulfil your responsibilities for tenement maintenance. Fellow owners can also ask just one of the joint owners

to pay for repairs. That owner would then need to recover costs from the other joint owners.

What happens to repairs when a flat is sold?

An owner becomes responsible for paying for repairs on the day on which a decision is made or the day on which they were notified of a decision if they weren't at the meeting. That owner remains responsible for paying for the repair, even if they sell their flat. However, as it can be difficult for co-owners to trace someone who has moved, the Act gives an option for co-owners to lodge a "Section 13" notice with the Land Register. If that is done, then, if the an owner sells, the new owner also becomes liable to pay for repairs agreed to up to 5 years previously. The new owner will be alerted through standard property conveyance searches that repairs are required and can factor the cost of the work into the purchase price of the house.

What is maintenance?

Maintenance is legally defined as:

- repairs and replacement;
- cleaning;
- painting and other routine works;
- gardening;
- the day-to-day running of the tenement; and
- the reinstatement of part of the tenement building.

Maintenance does not include alteration, demolition or improvement, unless the improvement is inherently part of maintenance work.

Taking Scheme Decisions

The provisions of the Tenement Management Scheme apply unless your title deeds do not say how you should take decisions, or they are inconsistent, e.g. between the title deeds of different owners.

What matters need scheme decisions?

- Carrying out maintenance to scheme property.
- Property inspections.
- Appointing or dismissing the factor / property manager.
- Authorising the factor to carry out inspections and arrange maintenance.
- Arranging common insurance policies.
- Deciding that an owner does not have to pay his or her share of a scheme cost.
- Authorising any maintenance of scheme property already carried out by one owner.
- Installing or replacing a door-entry system.

- Changing or cancelling any previous decision.

How are group or scheme decisions made?

If your deeds set out procedures for voting, then you must follow your deeds. Otherwise:

- Each flat has one vote.
- A decision can be passed by a simple majority of owners
- Decisions about improvements must be unanimous.
- An owner can appoint someone else to make decisions on his or her behalf.
- A properly made decision is binding on all owners (but there are some exceptions – see below).
- Decisions can be made either at a meeting called with 48 hours notice or by calling door to door or writing, faxing or emailing all the individual owners that can practically be contacted.
- Owners must be properly notified. . If an owner is not contactable or not known, then the notice can be posted through the door of the flat, addressed to 'The Owner'.
- Scheme decisions are binding on all owners (even if they did not agree) and their successors.
- Scheme decisions can be enforced through the Sheriff Court
- An owner who did not agree has 28 days to appeal through the sheriff court.

Access for repairs and inspections

Owners have to give access to their flats on reasonable terms to allow maintenance work to be carried out or to check that an owner is carrying out their maintenance responsibilities. If as a result of granting access, a flat is damaged, then other owners must pay for the flat to be put back into "no worse condition" than it was.

3 Dealing with disagreements and non-co-operative owners

Where an owner is not informed about decisions

If a decision under the Tenement Management Scheme or the title deeds is taken irregularly (that is, the correct procedures were not followed), then owners are not liable to pay their share of the costs if they were not aware that the decision incurred costs and, on becoming aware, they immediately objected to the costs being incurred. The procedural irregularity does not otherwise affect the validity of the decision but it does mean that the remaining owners will need to cover that owner's share.

Appealing against a decision

An owner unhappy about a decision they did not vote for, or a decision taken before they purchased their flat, can apply to the sheriff court to have the decision cancelled. However, the sheriff will only cancel a decision made by the majority of owners if it is not in the best interests of the owners as a group or if it is unfair to one or more of them. An owner cannot appeal against a decision they have voted for. Owners should take legal advice about going to the sheriff court. Owners must apply to the court within 28 days if the decision was made at a meeting they attended, or from when they were told about the decision. During that time, the decision cannot be implemented.

Where an owner has majority ownership

If an owner is liable for 75% or more of the costs and did not vote for a decision that was about maintenance, they can cancel that decision by sending the other owners or their agents (that is persons or firms authorised to act of their behalf), a written notice.

Essential works where other owners will not take action

Under the Tenements Act, every owner has a positive duty to maintain any part of the tenement that provides support or shelter. Where this affects a part of the building that is scheme property or in common ownership, any one of the common owners may take action to comply with this duty, without having to get the agreement of the other owners. That owner may then recover costs that would have been required to be paid if the work had been undertaken under the Tenement Management Scheme.

The work undertaken must be reasonable taking into account considerations of the age of the building, its condition and the costs of the work so this provision cannot be used to force owners into non-essential or expensive repairs – there must be an affect on the condition of the property as far as support and shelter is concerned. This could include preventing water coming in that could cause rot.

You would be advised to write to the owner(s) concerned first of all and tell them that you plan to do this.

Emergencies

Owners also have powers to deal with emergencies under the Tenements Act. Emergency work is anything that would prevent damage to any part of the tenement, or work required in the interests of health and safety, that cannot wait for a scheme decision to be taken. In these cases, any owner can instruct work without a scheme decision and owners are liable for the costs in the same way as for maintenance costs

Owners unwilling to pay

If any owner refuses to pay their share of a scheme cost, the obligation to pay can be enforced in the sheriff court by any owner or anyone authorised by an owner or owners.

To obtain payment from an uncooperative owner, the other owners will need to do the following.

- Write (or ask a solicitor to write) to the owner, pointing out his or her obligations under the title deeds or the Tenement Management Scheme. This can often be enough to resolve the problem.
- Lodge a "Section 13 Notice" with the Land Register (see 0)
- Commission the repair and be prepared to pay the bill themselves.
- Send the uncooperative owner a bill for their share with a stated time in which to pay.
- If no payment is received, obtain a decree by raising an action in the sheriff court for payment against the person owing the money.

Your solicitor will also be able to advise you how to enforce the decree and get the money owed to you. Going to court should be your last resort and you could also consider mediation. Get a solicitor to advise you on the strength of your action. Some home insurance policies may assist with the costs of legal action..

Work notices under the Housing Scotland Act 2006

A work notice is a compulsory repair order. The council may serve it when owners cannot agree among themselves or because they themselves have identified a need for repair. Owners get no more help to carry out the repair than if they had started work voluntarily and the council is not obliged to carry out work on the owners' behalf. However, if the owners do not comply with the notice, the council can carry out the work itself and reclaim the cost from the owner. Work notices can also be served on offices, shops or pubs at the bottom of tenements. Owners have 21 days to appeal against a works order to the sheriff court.

Maintenance orders under the Housing Scotland Act 2006

While a work order is a 'one-off' intervention, a maintenance order will allow councils to take a longer-term approach to the maintenance of properties. These orders can be served where a property has not been maintained to a reasonable standard or to ensure maintenance is carried out following the serving of a work notice. Owners who are served such a notice are required to draw up a maintenance plan for a

period up to 5 years – something that we would recommend all homeowners to do!

Maintenance plans under the Housing Scotland Act 2006

A maintenance plan sets out a programme of regular inspection and maintenance works. The plan will also set out the owners' share of costs for implementing the works and allow owners to budget.

The maintenance plan must set out:

- what maintenance is needed;
- how it will be arranged;
- when these steps are to happen;
- an estimate of the costs.

If the majority of owners cannot agree to the plan, or do not respond within time limits the council can draw up the plan instead. You may be required to submit a report on progress on the plan every year. If there is a continual lack of action, the council may step in to do the work and then charge you. Councils can also recover the costs of enforcing the maintenance plan.

4 Paying for repairs

Paying into a maintenance account

Owners can set up a maintenance account to pay for repairs. Sometimes, an account may be required to be set up to take payments for particular repairs. Where owners deposit more than £100 for one repair or £200 over 12 months, then an interest bearing maintenance account requiring two signatures (or the signature of the property manager) must be set up.

When a maintenance account is required, you and your fellow owners must be told about it in writing by whoever is nominated to hold deposits. You must also be given a note that summarises the work to be carried out and details of:

- the estimated cost of the repair and why it is considered necessary;
- how all owners shares have been worked out;
- the date the decision was made and the names of those who agreed to the work;
- the timetable for the work, including the start and finish dates;
- the number and location of the maintenance account and the names and addresses of those authorised to operate it;
- the last date for owners to pay their shares into the maintenance account; and
- a refund date on which you can reclaim your deposit if the work is not started by the start date.

If you are not given a refund date, you can reclaim your deposit if the work has not started 28 days after the start date. Any money left in the account after the work has been paid for must be shared among the depositors in proportion to the shares they deposited.

Help from your local council

The Housing (Scotland) Act 2006 introduced changes to the public funding of repairs. The Act makes it clear that owners are responsible for the costs of maintaining their properties and the main source of finance for repairs will, in future, be owners' savings and loans rather than grants. The council will offer more advice and assistance to owners such as leaflets, web sites, perhaps even training courses and special advisers such as mortgage brokers, who will be able to help you find loan finance. However, each council will publish its own scheme of assistance that will say how it plans to help owners maintain their homes.

While some Councils may be more sympathetic to the particular needs of tenements owners, it is unlikely that you will automatically get a grant and a subsidised loan is more likely.

Where help is available on hardship grounds, this is likely in future to be assessed on both income and what can be raised against the value of the property. Each council will set its own criteria. The Scottish Government is planning to provide subsidised loans and new lending products such as equity loans where you will pay back a percentage of the value of your house when it is sold rather than make monthly payments.

Help from the council where one owner can't pay – 'missing shares'

This provision covers the situation where owners have agreed to carry out repairs but one or more owners cannot pay. A council can only pay in the missing share where:

- the owner is unable to pay in the funds;
- or it is unreasonable to ask them to do so; or
- the owner cannot be identified or found by reasonable inquiry.

Owners will need to prove that they have followed all the proper procedures to commission repairs and prove that the missing share is for reasonable repairs and the costs are fairly allocated. You should note that the missing shares provision does not cover the case of someone who simply and unreasonably refuses to pay. Fellow owners will need to use the Tenements (Scotland) Act to 2004 pursue these owners through the court. There is no obligation

for the council to pay a missing share. However, if it does, the council can recover its costs. These can include the share itself, any administrative expenses and interest.

What if the council won't help with missing shares?

If the council will not help by paying missing shares, then the other owners must split the outstanding costs equally or by flat area (whichever applies). Unless other owners agree to let somebody off paying their share, the unpaid share remains a debt and can ultimately be recovered from the value of the owner's property. This would require court action.

How will the council get its money back from owners?

If a council has to enforce a work notice or maintenance plan, it can recover the costs from owners, including interest and administrative charges. The council will serve a notice setting out the costs and whether the sum can be paid by instalments. The instalments will be set to include interest. If owners do not pay then the council can issue a repayment charge. This charge is registered against the title of the property concerned so that anyone buying the house can see that the charge is there. The charge must be paid in instalments over 30 years and paid off completely before the property is sold. If there is a mortgage or other loan secured on the property, the lender may consider that the owner has defaulted on the terms of the loan agreement and it might even ask for repayment of the mortgage or loan.

Dealing with neighbourhood housing problems

Sometimes it's not enough to repair and improve just one tenement – the whole street or area needs improvement. Councils can now declare Housing Renewal Areas or HRAs where there are significant numbers of sub-standard houses or the appearance or state of repair of any houses is affecting the amenity of the area. In an HRA the council will have powers to serve work notices not just for repairs but also to make owners improve the amenity of the area – eg dealing with back courts or bin stores. This could include dealing with front gardens and back courts or other works to improve the appearance of the area. Declaring an HRA also gives the council additional powers to demolish houses where they are in serious disrepair.

Owners can ask the council to declare an HRA. The HRA can be of any size – even just two or three closes in a row of tenements where it might

be more economical to scaffold the whole building so that works can be undertaken more economically or so that a back court scheme can be undertaken.

5 Appointing or dismissing a manager or factor.

If your title deeds contain procedures for appointing or dismissing a property manager or factor, these conditions can be over-riden as long as a majority of two-thirds of the owners agree. If your title deeds say nothing about appointing or dismissing a factor, a simple majority of owners can make a decision. There are however two exceptions.

Firstly, if your flat is in a new development, the developer may retain the right to appoint a manager for up to five years after the property is built or until the last property in the development is sold, whichever is the sooner. In the case of sheltered and retirement housing, a developer can retain this right for three years.

Secondly, in the case of local authority housing bought through the right to buy, the local authority has the right to appoint a manager (often themselves) for 30 years or until two-thirds of the properties have been sold by the council. At this point, owners can dismiss the manager appointed by the local authority.

6 Further information

“Common Repairs Common Sense” from Consumer Focus Scotland
http://scotcons.demonweb.co.uk/publications/book_guid/documents/hmcs_006465.pdf

Check for updates covering the impact of the Housing Scotland Act 2006 on:
<http://www.consumerfocus.org.uk/en/content/cms/Scotland/Housing/Publications/Publications.aspx>

7 Note of caution and disclaimer

This note is intended to provide broad information to owners on the key provisions of the Tenements Act and the Housing Scotland Act 2006 . It cannot hope to cover individual situations. The interplay between the Acts and how different Council s will interpret legislation and individual Title Deeds is very complex and common repairs can be very expensive. If you think that you may be affected, you are strongly advised to take further advice and to consult a solicitor, particularly before embarking on expensive repairs.

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