

A ROUGH GUIDE TO THE TENEMENTS (SCOTLAND) ACT 2004

INTRODUCTION

Many people will be surprised to find their property described as a tenement: modern blocks of flats, cottage flats, converted homes and even office blocks are covered under this Act. In fact, the provisions of the Act will affect almost 575,000 owners of private flats in Scotland, which is over a quarter of all households.

The Tenements Act clearly sets out your responsibilities as an owner for repair and has a good balance between the rights of the owners as a group and the rights of individuals. This is going to be key to maintaining common property and our tenemental heritage. The legislators didn't want to intervene too much though so any provisions in your Title Deeds will still take precedence. This will be confusing to many owners who will still need to get to grips with both their Title Deed and the new law to see what applies to them. Perhaps the most confusing aspect is that, while a part of the building may be owned by one owner (such as the top flat owner owning the roof), all owners will be responsible for paying for repairs.

The Act covers a number of situations which have prevented repairs proceeding in the past e.g. the joint owner who says it's up to the other joint owner to pay or the situation of the property manager who is not currently able to take a non-payer of common repair costs to court and the common repair schemes that have taken ages to develop but then fall through because one owner sells.

The Tenement Management Scheme is very workable but unfortunately, you cannot just 'opt-in' if for instance, think that this is a better management scheme than the one set out in the Title Deeds.

One of the most useful provisions may be the explicit statement of an owner's duty to maintain their property to provide support and shelter. This was always covered by 'common interest' but, because it wasn't explicit, left owners unclear of their rights and responsibilities. For instance, if an owner neglects to repair the mastic around their windows then other owners will be able to ask them to repair it in order to stop rain seeping in and causing rot.

Carrying adequate rebuilding insurance has become compulsory for all owners and the insurance

provisions in the Act will over-ride anything in the Title Deeds. So one immediate effect will be that all owners will need to check their buildings insurance to make sure they are covered for current re-instatement value. With all owners having to carry this level of insurance, common insurance policies are more likely to better value for money.

WHEN DOES THE ACT APPLY?

The Tenements Act will affect every flat owner in Scotland to some extent – any building that is divided into two or more flats horizontally falls under this

legislation. This will cover cottage flats, converted houses, shops with flats above, modern apartment blocks and even offices as well as the traditional Victorian sandstone tenement. The extent to which flat owners are affected will depend on how workable their Title Deeds and Deeds of Condition are. In almost all cases, the Title Deeds will take precedence so owners will first need to understand what their Title Deeds say. Only if the Title Deeds are silent on a particular aspect, or are unworkable in certain respects will owners be able to draw on the provisions of the Tenements Act, but only for that particular situation where the Title Deeds are defective. So to organise a common repair scheme, tenement owners may need to be familiar with both what their Title Deeds say and what the Tenements Act says.

APPLYING TO EVERYBODY

The following apply to all flats, regardless of what the Title Deeds say:

- Requirement to have adequate buildings insurance
- Obligation to maintain
- What happens with paying for common repairs when someone sells
- Obligation to allow access
- Disputes and appeals in the Sheriff Court

UPDATE: This is an update to the Tenement Handbook by Ann Flint and John Gilbert. More information from www.thetenement.co.uk.

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DISCLAIMER: This leaflet can only give general information and cannot be an authoritative statement of the law. Specific advice should be sought in individual cases.

WHO OWNS WHAT?

Each part or “sector” of the building will be individually or commonly owned as shown below. (Of course, if the titles say otherwise, that definition will be what counts.) Importantly, but confusing to owners, the law makers considered some aspects of the building e.g the roof and structure, so important that they said that the cost of maintenance should be paid by all owners, even if these parts are individually owned. These parts are known as “scheme property”

DEFINITIONS OF OWNERSHIP

INDIVIDUAL OWNERSHIP

- Anything serving only 1 flat – e.g. door from close to flat, windows in flat, skylights
- Solum (the ground under a flat) and garden belongs to bottom floor flat
- Airspace above – belongs to whoever owns the solum
- Walls, floors and ceilings around a flat (owned to the midpoint with any other sector if they are not external walls)
- Land - owned by nearest bottom flat
- Roof over a flat

COMMON OWNERSHIP

Anything owned by 2 or more flats or set out in Title Deeds as belonging to 2 or more owners.

- Lift
- Close and stairs
- Close and stair head windows
- Chimney stacks (count the number of flues)
- Cables/pipes etc
- The land under the close,
- Roof above the close and the airspace above
- Access paths

Repairs will be paid for equally by those who have use e.g. repairs to a down pipe serving bathrooms to be paid for equally by those owners on that side of the tenement. Main door flats will not pay a share of the cost of maintaining the close if they have no access to it (except in so far as it is “scheme property”).

“SCHEME PROPERTY”

These parts of the tenement may be individually, mutually or commonly owned but maintenance is paid for by all owners

- Roof (and supporting structure except for individually owned skylights etc)
- Ground
- Foundations
- External walls (except for individually owned windows, doors etc)
- Gable wall with next tenement
- Any load bearing wall or beam

THE TENEMENT MANAGEMENT SCHEME (TMS)

This covers how the “scheme property” in the tenement will be managed and maintained and how decisions will be made. It will apply to all tenements unless they are covered by the Development Management Scheme introduced by the Title Conditions Act for large estates. However, if there is something in the Titles for the property that covers management, these provisions will override the TMS.

DECISION MAKING

- Majority voting will apply with one vote per flat involved
- 48 hours notice of a meeting must be given but voters may also be canvassed by post or door-to-door calling
- Decisions are binding on all owners including new owners and can be enforced by one owner or the owners agent / property manager on their behalf.
- The vote of the majority is binding on all other owners but those who have voted against can appeal so, if a decision was not taken unanimously, action cannot be taken for 28 days to allow time for appeal.

MATTERS COVERED BY THE TMS

- Maintenance and related matters such as deciding what should be done, appointing agents/contractors, advance payments, inspections/surveys
- Appointment of managers
- Delegations to managers
- Arranging common insurance policies

MAINTENANCE ACCOUNT

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.

OTHER PROVISIONS

APPEALS

Owners can appeal to the Sheriff Court within 28 days if they do not agree with a decision made by the majority of owners. The Sheriff can overturn decisions that he/she feels are not in the interests of all the owners as a group or is unfairly prejudicial to one or more of the owners.

The Sheriff Court will also be where disputes are settled.

DUTY TO MAINTAIN

The owner of any part of a tenement that provides support or shelter is obliged to maintain that part and can be prevented from interfering with it if that would reduce support/shelter given by that part or would affect the natural light enjoyed by any other part of the building.

CHANGE OF OWNERSHIP AND REPAIRS

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 other owners to trace someone who has moved, the Act gives an option for the other owners to lodge a notice with the Land Register. If that is done, then, if the other owner sells, the new owner also becomes liable to pay for repairs agreed to up to 5 years previously. The new owner can recover the cost from the previous owner (providing they can find them).

Serving this notice means that other owners in the tenement can choose whether they ask the previous owner or the new owner to pay for a repair agreed before a sale takes place. New owners, and their solicitors though, will need to make sure they know what repairs are in the pipeline before they buy.

ACCESS

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.

INSURANCE

There will be an obligation for owners to carry building insurance up to reinstatement value (this is one provision that is not overridden by what the Title Deeds say). Owners will be entitled to ask their neighbours for evidence of a paid up policy.

JOINT OWNERS

When a flat has more than 1 owner, any of those owners can be required to pay individually. It will be up to that owner to recover the other owners' share of costs.

DIVISION OF COSTS BETWEEN FLATS

Costs are divided equally between flats unless 1 flat has more than 1½ times the floor area of the smallest, in which case some costs (generally those relating to repairs rather than management) are divided according to floor area. The definition of floor area in this case is the total floor area bounded by the flat walls excluding any basement or loft used only for storage).

The costs, which are divided pro rata by floor area, are:

- Costs relating to scheme property
- Costs of demolition
- Non recoverable costs

Management costs and the costs of maintaining mutual property will be paid for equally by all owners.

GIVING NOTICE

Notices can be posted, faxed or emailed.

IF ONE OWNER CANNOT/DOES NOT PAY

If an owner is bankrupt, cannot be found or is let off paying by the other owners then the costs are shared equally amongst the other owners (or by floor area if relevant).

Where the owner is bankrupt or can't be found, they are still liable to repay their share of the cost to the other owners, even if those owners have since moved on.

DEFINITION OF MAINTENANCE

This is widely drawn to include cleaning, gardening, repairs and 'incidental improvement' (e.g. if a close door has to be replaced, it can be replaced by one of a higher specification). It also includes provision of a door entry system. Improvements, e.g. deciding to insulate the close, are not included in the provisions of the Tenements Act.

Majority decision making will become the rule (unless Title Deeds say otherwise). One of the consequences of

this is that no individual owner will be able to carry out repairs and then demand others pay their share (unless the work is an emergency).

EMERGENCY WORKS

Provision is made for emergency works to be carried out and costs recovered from owners.

DEMOLITION AND ABANDONMENT

Costs of demolition will be shared equally amongst all owners whose flats are demolished. If the tenement is not being rebuilt, any one owner can require that the site is sold. Proceeds of the site sale will be shared equally amongst all flat owners (except where flats are of different sizes in which case the costs will be divided pro rata.)

Where the building has not been occupied by any authorised persons for 6 months or more, any 1 owner can require that the building is sold with proceeds shared as if tenement demolished.

NOTE OF CAUTION AND DISCLAIMER

This note is intended to provide broad information to owners on the key provisions of the Tenements Act. It cannot hope to cover individual situations. The interplay between the Act and your own 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.