

TENEMENTS (SCOTLAND) ACT 2004

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Act forms the third and final part of the Executive's current programme of property law reform and follows on from the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) and the Title Conditions (Scotland) Act 2003 (asp 9). Both these Acts, other than Part 6 of the Title Conditions (Scotland) Act 2003, have been fully in force since 28 November 2004. The Tenements (Scotland) Act 2004, with the exception of *section 18*, has also been in force since 28 November 2004.
4. Tenements form over a quarter of the housing stock in Scotland and come in all shapes and sizes. Most tenements are residential blocks, but office blocks also fall within the definition. So do large houses which have been divided into flats. This captures a much wider range of properties than is commonly imagined.
5. Common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement.
6. But not all title deeds are comprehensive and they do not always provide burdens to specify how the owners are to decide on matters of mutual interest. If title deeds make no provision on one matter, the common law will apply on that one matter. The common law acts as a background or default law and most tenements, particularly new tenements, will have a detailed system of management provided by the title deeds to the property. The common law will only apply where there is a gap in the title deeds.

THE ACT

7. The Act will largely implement the recommendations of the Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on 29 March 1998. The Act is intended to produce greater clarity in the law on tenements. The existing common law rules which demarcate ownership within a tenement are restated. The common law doctrine of common interest is codified by a restatement of the law. There is provision for a statutory right of access and for compulsory insurance.

8. The Act introduces a statutory management scheme called the Tenement Management Scheme which will act as a default management scheme for all tenements in Scotland (this is set out in schedule 1 to the Act). It will provide a structure for the maintenance and management of tenements if this is not provided for in the title deeds. Where the title deeds are silent on matters of decision making the Scheme will allow the owners in a tenement to make decisions by majority vote. The Tenement Management Scheme also introduces the new concept of scheme property. This comprises the main parts of a tenement that are so fundamental to the building as a whole that they should be managed and maintained in accordance with the management scheme of the tenement. This will not, however, affect the ownership of the different parts of the building which remains unchanged. The Tenement Management Scheme also contains default provisions on emergency repairs and the apportionment of costs.

COMMENTARY ON SECTIONS

BOUNDARIES AND PERTINENTS

Section 1 – Determination of Boundaries and Pertinents

9. *Section 1* provides that where neither the title nor other legislation sets out the boundaries of a flat or another sector of a tenement or which parts of a tenement are pertinents of a sector then *sections 2* and *3* will apply to determine the boundaries and pertinents of a sector of a tenement. These provisions will apply to all tenements, whether existing or new. The other legislation that will most commonly apply for these purposes is the Prescription and Limitation (Scotland) Act 1973.

10. “Tenement” is defined in *section 26* and “flat” and “sector” are defined in *section 29*. A sector can be a flat or some other separate part of a tenement such as the close or the roofspace. The use of the term “sector” is a convenient way of describing the different areas which go to make up a tenement building.

11. *Subsection (2)* explains that the “title to the tenement” means any conveyance or reservation of property, or any title sheet comprised in the Land Register of Scotland which affects the tenement or any sector of the tenement. Paragraph (b) is included because under section 3 of the Land Registration (Scotland) Act 1979, title to registered property is vested by registration and not by the conveyance or other deeds that gave rise to the registration.

Section 2 - Tenement Boundaries

12. *Section 2* is concerned with the boundary features in tenement buildings and restates the common law rules of ownership of parts within a tenement. These rules will apply only where the title deeds to the property or any other enactment do not make different provision.

13. *Subsection (1)* describes the boundary between sectors as the middle of the structure which separates them. If a sector is not adjacent to another sector, it extends to and includes the solum or any structure which is the outer surface of the tenement building; or it extends to the boundary that separates the tenement from another building. “Solum” is defined in *section 29* as the ground on which a building is erected.

14. *Subsection (2)* states that a structure which wholly or mainly serves one sector will be considered as belonging to that sector only. This means that, for example, the front door of a flat leading to the close is part of the flat and not of the close.

15. *Subsections (3)* and *(4)* restate the special rules of the common law in relation to the top and bottom flats in a tenement. The boundary of a top flat extends to include the roof over that

flat (*subsection (3)*) while *subsection (4)* provides that the boundary of the bottom flat extends to and includes the solum under that flat. *Subsection (5)* sets out that the boundary of a close extends to and includes the roof over, and the solum under, the close. The “close” includes, under *section 29*, the passage, stairs and landings in a tenement where they provide common access to two or more flats.

16. *Subsection (6)* restates the common law rule that ownership of the airspace above the building goes with ownership of the solum. If a sector of the tenement includes the solum of the building, or a part of it, then that sector will also have within its boundaries the airspace above the building and that directly over the solum (or the part of the solum that is included in the sector). Where, under the titles, the solum is the common property of all of the owners in the tenement, the airspace is likewise common property.

17. *Subsection (6)* is qualified by *subsection (7)*. If the roof of the building slopes, ownership of the triangle of airspace lying between the surface of a sloping roof and an imaginary horizontal plane passing through the highest point of the roof, goes with the ownership of the roof and not with the ownership of the solum. This is important where the top floor flat wishes to build a dormer window into the airspace. Where the title deeds provide that the roof is common property, then the triangle of airspace is also common property.

Section 3 – Pertinents

18. *Section 3* deals with the pertinents to tenement buildings. These are the parts of the tenement building which are not within the boundaries of individual flats. The ownership of these parts of the building requires to be apportioned among the various flats. The rules in *section 3* will only apply where provision for ownership is not made in the title deeds or in any other enactment.

19. Under *subsections (1)* and *(2)* the owners of all the flats which obtain access by way of a close or a lift (where the lift allows access to more than one flat) will have a right of common property in the close and lift. Both “close” and “lift” are defined in *section 29(1)*. *Subsection (5)* explains that the rights of common property are held in equal shares.

20. *Subsection (3)* provides for the ownership of land adjoining the tenement building. It sets out that any land pertaining to a tenement building will be owned by the flat or flats nearest to that land or piece of land. This rule does not apply to a path, outside stair or other piece of land that acts as a means of access.

21. *Subsection (4)* deals with any other part of the tenement which is not provided for in *subsections (1) to (3)*. Examples given are a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack.

22. Ownership of these residual parts is allocated according to a service test. Where a part of a tenement serves one flat, under *subsection (4)(a)*, it will be a pertinent of that flat only. Where two or more flats are served by a part, a right of common property in that part will attach as a pertinent to those flats. The shares of common property amongst those owners whose flats are served by the pertinent will be equal, regardless of the extent of service.

23. *Subsection (5)* apportions rights of common property into equal shares, except in the case of a chimney stack. If a chimney stack is considered common property under the provisions of the Act, then shares will be apportioned according to the ratio which the number of flues serving a flat bears to the total number of flues in the stack. “Chimney stack” is defined in *section 29(1)*.

TENEMENT MANAGEMENT SCHEME

Section 4 – Application of the Tenement Management Scheme

24. *Section 4* deals with the application of the Tenement Management Scheme which is found in the schedule to the Act. The Tenement Management Scheme contains 9 rules which provide a system of management and maintenance in tenements.

25. The rules of the Tenement Management Scheme will apply only where the tenement burdens, as defined in *section 29(1)*, do not make provision in respect of the subject matter of the individual rules in the Scheme. *Section 4* and the Scheme together provide a default management regime for tenemental property. *Section 4* sets out how each of the rules in the Scheme are to apply.

26. *Subsection (2)* provides that the Scheme will not apply where the development management scheme (defined in *section 29(1)*) as the scheme under section 71 of the Title Conditions Act has been applied to the tenement.

27. Under *subsection (3)* the provisions of rule 1 may, where it is relevant, be used to interpret other provisions of the Scheme.

28. Where the tenement burdens provide a procedure for making decisions and that procedure applies to all flats in the building, then the procedure in the title should be used (under *subsection (4)*). In this case rule 2 would not apply. Where there is no procedure in the tenement burdens or the procedure does not apply to all the flats, then rule 2 of the Tenement Management Scheme will apply.

29. Under *subsection (5)*, rule 3 of the Scheme, which deals with what may be covered by basic scheme decisions and decisions relating to maintenance, will apply where there is no alternative provision made by the tenement burdens.

30. If an owner or owners are not liable for the entire liability (i.e. 100%) of scheme costs under the provisions in the tenement burdens, then rule 4 of the Scheme, which allocates liability and apportionment of costs, will apply under *subsection (6)*. The reference is to “liability” rather than amounts because burdens in title deeds are unlikely to provide for actual amounts and if they did so, the amounts specified would quite quickly bear little relationship to the actual cost of work to scheme property due to cost of living increases. In considering whether the entire liability of a scheme cost has been apportioned among the owners, account is also taken of any liability to be met by someone other than an owner.

31. Rule 5 of the Scheme deals with special cases in relation to scheme costs and *subsection (7)* provides that rule 5 will apply where the burdens in the title deeds do not make equivalent provisions. If, however, the title deeds contain equivalent provisions to those set out in rule 5, they would prevail. Similarly where any provision of the Scheme applies, rules 8 and 9, which deal with the enforcement of scheme decisions and notification requirements, will apply to supplement the provision (under *subsection (10)*). While the enforcement measures under rule 8 will always apply where a Scheme rule has been applied, the application of rule 9 is subject to any alternative provision in the tenement burdens under *subsection (11)*.

32. *Subsection (8)* makes it clear that rule 6 will ensure that a procedural error will not invalidate any decision made for a tenement unless the title deeds for the tenement provide for how irregularities are to be treated.

33. *Subsection (9)* provides that the provisions in the Scheme for emergency work found in rule 7 will not apply where there is an alternative provision in the tenement burdens.

Paragraph (b) makes sure that any existing provision on apportioning liability will not be overridden.

34. Rule 3.3 sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. These figures will need to be updated from time to time to take account of inflation. *Subsection (12)* accordingly gives Scottish Ministers the power to substitute new sums by order made by statutory instrument (*section 32*).

RESOLUTION OF DISPUTES

Section 5 – Application to sheriff for annulment of certain decisions

35. This section provides a means by which a decision made by the owners according to the procedures of the particular management scheme applying to the tenement can be challenged. The management scheme could be set out in the burdens in the title deeds, the Tenement Management Scheme or a combination of the burdens and the individual rules of the Tenement Management Scheme (see *section 27*). *Section 5* will not apply, however, where the development management scheme operates within a tenement. An owner has the right, under *subsection (1)*, to make a summary application to the sheriff court for the annulment of that decision.

36. Under *subsection (2)*, the owners who can seek to have a majority decision overturned are, first, the owner of a flat who, at the time the decision was made, was not in favour, and, second, a new owner. The owner at the time the decision was made may not have been in favour of the decision or perhaps expressed no view, perhaps because they were not present at the meeting at which the decision was taken. A person who was not the owner at the time the decision was made must also be included to deal with the situation where ownership changes and the incoming owner may severally liable with the former owner under *section 12*.

37. *Subsection (3)* provides that the defender for the purposes of such an application is all the other owners.

38. *Subsection (4)* sets out the time limit for making an application. If an owner making the application attended the meeting where the decision was made, then he or she must apply to the court within 28 days of that meeting. In any other case, owners must apply for annulment of the decision no later than 28 days after the notice informing them of the decision was given to them. Where two (or more) persons own a flat, either (or any) of them may raise an action under *section 5*. The 28 day period within which an application to the sheriff may be made cannot be started for all owners by service of notice of a decision on just one of them. Each owner has 28 days from the date on which they are given notice. *Section 30* makes provision about the giving of notice.

39. *Subsection (1)* should be read with *subsection (10)* which provides that decisions must not be implemented, except when relating to urgently required work, until it is known whether an application to the sheriff court is to be made, and if made, until the application has been disposed of or abandoned. This in effect means that where decisions are not unanimous that notice of the decision must be given to owners even if the tenement burdens do not make provision for notification in any decision making procedure.

40. *Subsection (5)* deals with the powers of the sheriff, who may make an order annulling the decision, in whole or in part. A sheriff may make such an order if satisfied that the scheme decision was not in the best interests of all the owners, or that it was unfairly prejudicial to one

or more of the owners. When the sheriff is examining the best interests of the owners, they are to be considered as a whole group.

41. *Subsection (6)* only applies in cases where the decision concerned relates to maintenance, improvements or alterations. When deciding whether to grant an order annulling such a decision, the sheriff must have regard to the age and condition of the property, the likely cost of any maintenance, improvements or alterations and the reasonableness of that cost. These circumstances are also found in *section 8* which deals with the duty to maintain support and shelter.

42. When a sheriff has made an order annulling a decision, *subsection (7)* provides that the sheriff may make another consequential order if it is thought appropriate in the circumstances. For example, in some cases (and despite *subsection (10)*), costs may be incurred before the application was disposed of by the sheriff. This subsection would enable the sheriff, where a decision has been annulled, to deal with the question of liability of the owners for costs already incurred in relation to that decision.

43. Under *subsection (8)* any party to an application made to the sheriff court under this section may appeal to the Court of Session on a point of law. The Appeal must be made within 14 days of the sheriff making an order under this section or an interlocutor dismissing the application. *Subsection (9)* provides that a decision of the Court of Session will be final.

44. A decision cannot be implemented under *subsection (10)*, during the 28 day period in which an application can be made to the sheriff court for an annulment of the decision. If an application is made, the owners must not implement the decision until the court has dealt with the case and the 14 days allowed for appealing against the decision has passed and no appeal has been made (or the appeal has been dealt with by the court or the application has been abandoned).

45. There is, however, an exception to *subsection (10)*. *Subsection (11)* excludes a decision that concerns work which has to be carried out urgently (see rule 7 of the Tenement Management Scheme).

Section 6 – Application to sheriff for order resolving certain disputes

46. This section gives the sheriff powers to make orders relating to the proper operation of the particular management scheme affecting a tenement or the provisions of the Act. *Section 27* defines “management scheme”. This could be the burdens in the title deeds, the Tenement Management Scheme or a combination of the burdens and the individual rules of the Tenement Management Scheme. The provisions of *section 6* will not apply, however, where the development management scheme has been applied to a tenement under the Title Conditions Act. *Subsection (1)* provides that an owner may (by summary application) apply to the sheriff court for an order concerning any matter relating to the operation of the management scheme applying to a particular tenement, or any provision in the Act as it applies in relation to the tenement.

47. Under *subsection (2)* the sheriff may grant the order sought or any other order as the sheriff may think necessary or expedient.

48. *Subsection (3)* explains that any party to a dispute may appeal to the Court of Session on a point of law. They must do so within 14 days of the date of an order made under *subsection (3)* or within 14 days of the date of an interlocutor dismissing an application. The decision of the Court of Session will be final under *subsection (4)*.

SUPPORT AND SHELTER

Section 7 – Abolition as respects tenements of common law rules of common interest

49. *Section 7* abolishes the common law rules of common interest as they apply to tenements. This section should be read with *sections 8* and *9* which restate the common law in statutory form.

50. Although the doctrine of common interest will no longer apply to tenements, it will still be applicable in any dispute involving a tenement building and any other building (whether a tenement or not) or any land not pertaining to the tenement.

Section 8 – Duty to maintain so as to provide support and shelter etc.

51. This section imposes a positive obligation on an owner of any part of a tenement building to maintain that part so as to ensure that it provides support and shelter (*subsection (1)*). The positive obligation is confined to the “tenement building” itself and does not extend to the solum or to any land which forms part of the tenement (see *section 26*).

52. *Subsection (2)* makes clear that an owner will not be obliged to maintain a part of the building if it would not be reasonable where the building has ceased to be worth repairing. The circumstances to be taken into account include, in particular, the age of the building, its condition and the likely cost of any maintenance. These particular circumstances are also found in *section 5*, when a sheriff is considering an application for the annulment of a scheme decision.

53. Enforcement is dealt with in *subsection (3)*. An owner can enforce the duty under *subsection (1)* if he or she is, or would be, directly affected by breach of the duty. Where a flat is owned in common, any of the owners may enforce this duty under *section 28(5)*.

54. *Subsection (4)* makes it clear that a *pro indiviso* owner of a part of a tenement can maintain that part without the need for the consent of co-owners in order to fulfil the obligation under *section 8(1)*. In other words, where a part of a tenement is owned in common any owner will be able to carry out such work without the consent of the other owners.

Section 9 – Prohibition on interference with support or shelter etc.

55. This section deals with the negative obligation to refrain from any alterations or work which might interfere with the support and shelter of the building. It also covers the rule of common interest relating to the right to light. Unlike *section 8*, this section applies to occupiers of flats (such as tenants) as well as to owners.

56. The prohibition imposed under this section applies to the whole tenement, including the surrounding ground (see the definition of “tenement” in *section 26*). This contrasts again with *Section 8* which only applies to the tenement building.

57. Any owner who is or would be affected by breach of the prohibition may enforce the prohibition under *subsection (2)*. An occupier, though bound by the prohibition, has no right to enforce. As with *section 8*, where a flat is owned in common any of the owners has the right to enforce under *section 28(5)*.

Section 10 – Recovery of costs incurred by virtue of section 8

58. The duty to maintain support and shelter falls to the person who owns that part of the tenement. Where property is owned solely by one owner, there is a danger that a scheme decision to carry out repairs could be blocked by the other owners in the knowledge that the same repair could be insisted upon under *section 8*. This section seeks to prevent this. *Section 10* also operates to enable a minority (even one co-owner) to carry out works for support

or shelter where a majority cannot be assembled and to treat it as a scheme cost in the same way as if authorised by a scheme decision.

59. This section provides that the cost of a repair which is carried out under *section 8* of this Act could be recovered from the other owners as if the repair had been carried out as part of a management scheme decision. The costs recovered would be equal to the amount that the owners would be liable for under the management scheme.

REPAIRS: COSTS AND ACCESS

Section 11 – Determination of when an owner’s liability for certain costs arises

60. *Section 11* is intended to ensure that there is a set of rules which will determine when liability for certain costs (“relevant costs”) arises, and that these rules will apply irrespective of whether the liability for that expenditure arises under the burdens in the title deeds, rule 4 of the Tenement Management Scheme or under the general provisions of the Act itself.

61. *Subsection (1)* makes it clear that an owner is liable for any relevant costs arising from a scheme decision from the date on which the scheme decision is made. *Subsection (5)* makes alternative provision for accumulating relevant costs. “Relevant costs” is defined in *subsection (9)*. It is wider than scheme costs. This is necessary because relevant costs for which an owner is liable by virtue of the management scheme in force for a particular tenement may not be restricted to “scheme costs”. Rule 4 of the Tenement Management Scheme applies only to “scheme costs”. But where the management scheme in operation for a particular tenement is wholly or partly made up of burdens contained in the title deeds, it may go much further than the Tenement Management Scheme. Where burdens do so, then the liability imposed would not come within the scope of “scheme costs”. The reference to “relevant costs” ensures that *section 11* provides one set of rules to determine when liability for costs arises, whether this arises under the Tenement Management Scheme, the burdens in title deeds or a combination of both.

62. *Subsection (2)* determines when a scheme decision is taken to be made in order to determine when an owner’s liability for certain costs arises. Under paragraph (a), this could be where the decision is taken at a meeting. It could happen that two people own a flat, but only one attends the meeting. It is preferable that liability for both arises on the same day, and even where a decision is taken by a majority at a meeting, the non-attending owners should be liable from that date even if they did not attend. Under paragraph (b), liability will arise in any other case on the date on which notice of the making of the decision is given to the owner. The decision could have been made by means of one owner going round the doors seeking the consent of enough owners to comprise a majority of the flats.

63. The rule in *subsection (3)* provides that an owner becomes liable for any relevant costs arising from emergency work from the date on which the work is instructed. *Subsection (4)* covers relevant costs which are recoverable by a local authority as a result of a statutory notice requiring the carrying out of the work to which those costs relate and liability will arise from the date of the notice. *Subsection (5)* does not deal with situations when liability arises under the statutory notice in a question with a local authority and deals only with “relevant costs” and therefore liability in questions arising under the management scheme for the tenement. *Subsection (5)* makes it clear that liability for any accumulating relevant costs such as the cost of an insurance premium will arise on a daily basis.

64. Under *subsection (6)*, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed. Again this does not

determine the date of liability in questions with the manager, which may for example arise in a question of contract law rather than under the management scheme. *Subsection (1)* relates to work (or other costs) arising from a scheme decision. These are not mutually exclusive. A scheme decision might quite often be taken to carry out works and then a manager is given the task of instructing the work. Where both apply, the rule on determining the date of liability in *section 11(1)* will prevail.

65. *Subsection (7)* provides that where an owner is liable under *section 10* for any relevant costs arising from maintenance carried out by virtue of *section 8*, liability arises on the date on which the maintenance is completed.

66. *Subsection (8)* is a catch all provision to cover all relevant costs which fall within the scope of *section 11* but for which there is no specific rule provided. It is an equivalent provision to that in *section 10(4)(b)* of the Title Conditions Act for those cases where the cost arises from an obligation set out in burdens in title deeds. *Subsection (9)* explains that “relevant costs” means a share of any costs for which an owner is liable by virtue of the management scheme in operation for the particular tenement (under the burdens in the title deeds, the Tenement Management Scheme or a combination of both), but not under the development management scheme if that has been adopted by the owners. Relevant costs also cover costs which arise because of the Act itself.

Section 12 – Liability of owner and successors for certain costs

67. This section deals with the apportionment of liability for repair and other costs when a flat is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a flat. *Subsection (1)* provides that an owner will remain liable for relevant costs after the property has been sold. This restates in statutory form the principle of the existing law by which liability which has crystallised cannot be avoided by disposing of the property. Relevant costs could arise by virtue of any tenement burden, the Tenement Management Scheme or under a provision of the Act.

68. *Subsection (2)* deals with the liability of an incoming or “new” owner of a flat. A new owner is severally liable with the outgoing owner. If there are two or more new owners, both or all are bound. This is, however, subject to the provisions of *subsection (3)* which provides that an incoming owner will be liable for the cost of maintenance which has been carried out prior to the date on which the new owner becomes the owner of the flat only if a notice of potential liability for costs in a form prescribed in schedule 2 has been registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner). Liability for the cost of completed maintenance where no notice has been registered is thus excluded. In other words, if no notice is registered, the purchaser is not liable. Where a notice is registered, then a new owner would be liable for the full amount of the maintenance costs in respect of the work described in the notice. This notice procedure does not apply to work carried out as a result of a statutory notice imposed by a local authority. Such notices will have effect for three years and will only bite against the new owner if they have not expired before the acquisition date.

69. *Subsection (4)* defines “acquisition date” and “local authority work”. The phrase “acquisition date” is tied to the date on which the purchaser acquires right to the flat. This wording has been generally used in recent legislation and is used in connection with the definition of owner in *section 28* of the Act. In the case of a typical purchase, a person has right to a flat once that person has received a disposition or another form of conveyance of the flat – this will be delivered along with the keys in return for payment of the purchase price. In other words, the date of acquisition is the date on which the person becomes owner.

70. Where the new owner pays any relevant costs, under *subsection (5)* they may recover the amount paid from the former owner, if the former owner is liable.

71. *Subsection (6)* is a transitional provision, explaining that *section 12* will apply in relation to any relevant costs that the owner becomes liable for on or after the day on which the section came into force (28 November 2004).

Section 13 – Notice of potential liability for costs: further provision

72. *Section 13(1)* sets out who may register a notice of potential liability for costs which must be signed by or on behalf of the applicant. *Subsection (2)* makes it clear that a notice may be registered in relation to more than one flat or in relation to more than one piece of work. A notice will expire after three years under *subsection (3)* to remove the need for a discharge, though it may be renewed. Under *subsection (4)*, the rules in *section 13* apply to a renewed notice of potential liability as they apply to any other such notice.

73. *Subsection (5)* provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for costs is accurate and *subsection (7)* makes it clear that there will be no entitlement to be indemnified by the Keeper for any loss which arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered under the Tenements Act or the Title Conditions Act.

Section 14 – Former owner’s right to recover costs

74. This section will allow the former owners of flats in a tenement to recover certain costs owed to them under provisions of the Act or rules of the Tenement Management Scheme.

75. Rule 8.3 of the Tenement Management Scheme enables “any owner” to enforce any obligation arising from a scheme decision. This may include cases where the obligation is an obligation to contribute towards payment and an owner seeks to recover shares of a scheme cost from the other owners. A former owner may still be seeking to recover sums due arising from the operation of the following: rule 4, which deals with liability and apportionment of scheme costs, rule 5, dealing with special cases of scheme costs, and rule 7, concerned with emergency work. In such cases, an owner will be able to recover any money owed to him or her even if he or she has ceased to be an owner of a flat.

76. Under *section 10* of the Act an owner is entitled to recover a share of the cost of maintenance carried out by virtue of *section 8* as if the maintenance had been carried out by virtue of the management scheme in question. Without the provisions of *section 14*, *section 10* would limit the right of recovery to a current owner and so a former owner would lose out. Similarly an owner would lose his right to recovery when selling his flat under *section 17(9)* which allows an owner to instruct works and recover the costs of them, where there has been a failure to reinstate his property to or through which access has been taken. This does not seem fair and *section 14* therefore provides that a former owner should also be able to recover those costs.

77. This section only deals with costs arising under the Tenement Management Scheme or the Act and not under burdens in title deeds as *section 8(2)(c)* of the Title Conditions Act already makes provision for these cases.

Section 15 – Prescriptive period for costs to which section 11 relates

78. *Section 15* amends the Prescription and Limitation (Scotland) Act 1973. It provides that an obligation to pay costs under *section 12* of the Act will expire after five years as opposed to 20 years.

Section 16 – Common property: disapplication of common law right of recovery

79. This provision makes clear that where a management scheme is in place and provides for the maintenance of common property, the common law recovery of costs for necessary repairs by one owner against the other owners will no longer apply.

Section 17 – Access for maintenance purposes

80. *Section 17* introduces a right of access to parts of a tenement that are individually owned, provided that access is required for one of eight reasons. When a flat is owned in common, any of the owners may exercise the right of access under *section 28(5)*. In tenements governed by the development management scheme, *subsection (2)* provides that the right of access may also be exercised on behalf of the owners' association. If necessary the right may be enforced under *section 6* by application to the sheriff court.

81. *Subsection (1)* and *subsection (5)* qualify the right of access by reference to a reasonableness test. *Subsection (1)* sets out that reasonable notice has to be given to the owner or occupier of part of the tenement, when access to or through that part is required. An owner or an occupier may refuse to allow access or access at a particular time under *subsection (5)* if it is reasonable to refuse access at that time or if, in all the circumstances, it is reasonable to refuse access at any time.

82. *Subsection (3)* lists the reasons for which access may be granted. The list is exhaustive. Paragraphs (a) and (b) state that access may be granted for the carrying out of maintenance or other work. This may be maintenance that is required as a result of the management scheme which applies to the tenement (paragraph (a)). "Other work" is included because the management scheme may make provision for arranging improvements. Under paragraph (b) access may be required to carry out maintenance to any part of the tenement which is owned (wholly or in part) by the person requiring access.

83. Paragraph (c) allows access for an inspection to determine whether it is necessary to carry out maintenance, while paragraph (d) and (e) respectively state that access should be given where an owner is seeking to determine whether another owner is fulfilling their duty to maintain support and shelter or complying with the prohibition not to interfere with the support and shelter of the building. Paragraph (f) makes it clear that an owner will be able to access another owner's flat for the purpose of installing services by virtue of *section 19*.

84. If the floor area of part of the tenement has to be measured for the purposes of determining the liability of the owners, then paragraph (g) allows access. Paragraph (h) provides a right of access in connection with the exercise of the power of sale set out in schedule 2 of the Act. This is to avoid the situation where the sale of an abandoned tenement may be frustrated because of a lack of access and the building may then become blighted.

85. In terms of *subsection (4)* where maintenance work is urgent then reasonable notice need not be given under *subsection (1)*.

86. *Subsection (6)* provides that the right of access may also be used by a person (for example, a tradesperson) who is authorised by an owner or an owners' association. This person is referred to as an "authorised person". Authorisation is not required in writing, which would be

overly bureaucratic. An owner may, however, request evidence that a person has been authorised. If an authorised person causes damage to any part of the tenement, the owner or the owners' association who gave the authorisation will, under *subsection (7)*, be jointly and severally liable with the authorised person for any damage caused. The owner, or as the case may be, the owners' association will however have a right of relief against the authorised person.

87. Under *subsection (8)*, the person exercising the right of access (the owner or owners' association) is placed under a duty to reinstate the flat to the condition it was in prior to access being obtained. The aim is that the flat should be reinstated to its former condition before access was obtained and that an owner should be compensated for any damage caused. It is the owners on whose behalf the access is exercised who have a statutory duty to reinstate. It would still be possible for them to pursue any authorised person who had entered the flat on their behalf – such as a tradesperson – if he or she had caused the damage.

88. If there is a failure to comply with the duty of reinstatement, the owner of the part of the tenement through which access has been obtained can, under *subsection (9)*, carry out the work to restore the part to its former condition. Under paragraph (b) they may then recover the costs of doing so from the relevant owner or owners' association.

INSURANCE

Section 18 – obligation of owner to insure

89. This section imposes an obligation on the owners of all flats within a tenement to insure their flats and any pertinents attached. Under *section 33* there is an exception for the Crown. "Owner" is defined under *section 28* to mean an owner of a flat or a heritable creditor in possession.

90. *Subsection (1)* imposes the basic obligation to insure and specifies that insurance should be for the reinstatement value.

91. Under *subsection (2)*, the obligation to insure as imposed by *subsection (1)* will be met if the insurance cover is provided in whole or in part by a common policy of insurance. This will allow owners to have a combination of common and individual policies of insurance whether or not there was any provision for a common policy in the title deeds.

92. *Subsection (3)* defines the term "prescribed risks" as the risks against which owners are obliged to insure, to be prescribed by Scottish Ministers in subordinate legislation. *Section 32* contains the procedure for subordinate legislation.

93. *Subsection (4)* modifies the obligation to insure in certain circumstances. An owner will not be obliged to insure against a particular risk, if, due to the location of the tenement or other reason an owner, after reasonable efforts, is unable to obtain insurance against a particular risk or the cost of obtaining that insurance is unreasonably high.

94. *Subsection (5)* deals with enforcement. It gives individual owners (this includes *pro indiviso* owners where a flat is owned in common) the right to request from another owner in the tenement evidence of their insurance policy and of recent premium payments. The request must be made in writing. Owners have 14 days to produce the required documents. *Subsection (6)* provides that the duty to insure may be enforced by any other owner in the building.

INSTALLATION OF SERVICE PIPES ETC.

Section 19 – Installation of service pipes etc.

95. *Section 19* provides a mechanism to cover the installation of services in tenements. Under the common law, an owner could not introduce new services to a tenement through common property without the consent of all the owners. The main purpose of the provision is to provide a mechanism to avoid the need for unanimity before any new service could be introduced into a tenement through the common property of all owners.

96. *Subsection (1)* makes it clear that an owner will be entitled to install pipes or other equipment through any part of the tenement for the provision of such services as Scottish Ministers may prescribe by regulations. The right will be subject to such procedures as Scottish Ministers may also prescribe under *subsection (2)* and *subsection (3)* which ensures that an owner will not be entitled to lead anything through or fix anything to any part which is wholly within another owner's flat. The right will also be subject to the provisions of *section 17* on access.

DEMOLITION AND ABANDONMENT OF TENEMENT BUILDING

Section 20 – Demolition of a tenement building not to affect ownership

97. This section provides, in *subsection (1)*, that an owner will continue to own the airspace formerly occupied by their flat after it is demolished. "Demolition" is defined in *section 29(1)*.

98. *Subsection (2)* ensures that any pertinents attaching to a tenement building immediately prior to demolition will continue to belong to their previous owners after demolition, even though they no longer serve a flat.

Section 21 – Cost of demolishing tenement building

99. This section explains how costs are to be apportioned when a tenement building is wholly or partially demolished. *Subsection (1)* provides a general rule of equality of contribution. This rule is concerned with the liability of owners amongst themselves and does not import liability in questions with third parties.

100. *Subsection (2)* qualifies the provisions in *subsection (1)* where the floor area of the largest flat in the tenement is more than one and a half times that of the smallest flat. In such instances the costs are apportioned according to floor area. Rules on the determination of the floor area are found in *section 29(2)*.

101. *Subsection (3)* specifies when an owner becomes liable for their share of the cost of demolition. Where an owner agrees to the proposal that the building should be demolished, they become liable for costs from the date of the agreement. In any other case, owners are liable from the date the demolition is instructed. This is particularly important where a flat changes hands while the work is in progress.

102. The rules for apportioning the costs of demolition are adapted under *subsection (4)* for cases of partial demolition. Only owners of the flats in the part demolished are liable for the costs of demolition.

103. This section is concerned with the liability of owners among themselves. It does nothing to disturb the rule, under section 123 of the Housing (Scotland) Act 1987, that a local authority that has carried out the demolition may recover the cost from the owners in such proportions as the owners may agree or, failing agreement, as is determined by arbitration.

Section 22 – Use and disposal of site where tenement building demolished

104. This section provides for the use and disposal of the site where a tenement building has been completely demolished and the former flats were owned by different persons.

105. *Subsection (2)* restricts the use of the “site”, which is defined in *subsection (8)* as the solum of the tenement building that occupied the site, the airspace that is directly above the solum and any land pertaining as a means of access to the tenement immediately before its demolition. It provides that building on or other development of the site is prohibited except where all the owners of the former flats agree or where all the owners are required to do so (by the title deeds or otherwise). *Subsection (6)* provides for enforcement of the prohibition by the owners of the other former flats.

106. Under *subsection (2)* owners are prohibited from developing the site except under two conditions. When these conditions are not in place, *subsection (3)* provides that any owner may apply to the sheriff for the power to sell the entire site in accordance with schedule 3. Where a former flat is owned in common, any *pro indiviso* owner also has this right under *section 28(5)*.

107. *Subsections (4) and (5)* deal with apportioning the proceeds of the sale of the site. Under *subsection (4)*, unless a tenement burden provides otherwise, the proceeds of the sale are shared equally among all the flats, subject to *subsection (5)*. Under this subsection, where the floor area of the largest flat is more than one and a half times that of the smallest flat, then the proceeds of the sale are shared in proportion to the floor area. The method for calculating the floor area is set out in *section 29(2)*. But if the proceeds are to be divided other than equally, this will only be possible if there is available evidence of the differing floor areas of the flats or former flats.

108. *Subsection (7)* provides that the proceeds of the sale will be distributed to the owners net of the expenses incurred in connection with the sale.

Section 23 – Sale of abandoned tenement building

109. This section provides that the owner of a flat in an abandoned tenement will have the right to apply to the sheriff for the power to sell the tenement building in accordance with schedule 3.

110. *Subsection (1)* sets out the circumstances where an owner can require that a tenement building should be sold. This is where the building, due to its poor condition, has not been occupied by any owner (or someone authorised by an owner) for a period of more than six months and it is unlikely that any owner or other person will occupy the building. “Owner” is defined under *section 28* of the Act and where the flat is owned in common any *pro indiviso* owner can exercise the right under *section 28(5)*.

111. The sale proceeds are divided in the same way under *subsection (2)* as when a site is sold following demolition.

112. *Subsection (3)* makes it clear that the right to sell the tenement includes the solum of the building, the airspace above and any land which afforded access to the tenement. The inclusion of the latter is to avoid the situation where the sale of an abandoned tenement may be frustrated because of a lack of access and the building may then become blighted.

LIABILITY FOR CERTAIN COSTS

Section 24 – Liability to non-owner for certain damage costs

113. In some cases a person may have to maintain parts of a tenement which they do not own. This is because, in the case of certain key parts of a tenement, owners are made liable for

maintenance, not because they own the part (though they may do) but simply because they own a flat in the same tenement and hence take benefit from the part which is to be maintained. If that part is damaged, however, the owners in the tenement who are liable to pay for its maintenance, but who do not have ownership rights, may suffer loss as the cost of repairs are not recoverable by them under the general law.

114. *Subsection (1)* sets out that where scheme property is damaged as a result of the fault of any person (including another owner), then the owner of any flat who is bound to pay for the resulting maintenance, but who does not own the damaged part in question, will be treated as an owner of that part for the purposes of founding a claim against the person who caused the damage.

MISCELLANEOUS AND GENERAL

Section 25 – Amendments to the Title Conditions (Scotland) Act 2003

115. This section indicates that the Title Conditions Act will be amended in accordance with schedule 4.

Section 26 – Meaning of “tenement”

116. *Section 26* defines a “tenement” for the purposes of the Act. Most tenement property is residential (though even in those cases there are very commonly shops on the ground floor), but the definition in the Act includes commercial properties such as office blocks. Large houses which have been converted into flats, high rise blocks, “four in a block” and modern blocks of flats will also qualify as tenements, as well as the traditional sandstone or granite buildings of three or four storeys. A tenement is a building comprising two or more related flats which are owned or designed to be owned separately and which are divided horizontally. Generally a building will comprise a single building of related flats. The definition, however, caters for other possible circumstances.

117. As, in terms of *subsection (1)*, a part of a building may be a separate tenement if it comprises related flats, *section 26* excludes those properties which form part of a building but which do contain related flats and which were never intended should form part of a single tenement. These properties are most typically semi-detached houses and terraced houses. Where, for instance, two semi-detached houses are part of the same building, then in the event that one house were to be converted into flats, the definition should not result in the whole building becoming a tenement. There may also be circumstances where two independent management regimes operate within the same building. In effect this means that there are two or more “tenements” rather than one within the same building. This may happen where, for example, there are two or three separate tenement stairs within the same building, perhaps on a corner site. For this reason, *subsection (1)* makes reference to a “building or a part of a building”.

118. The physical features of a building are clearly relevant to deciding the question of whether flats are “related”, but *subsection (2)* provides that regard should also be had to the relevant title deeds and burdens contained therein.

Section 27 – Meaning of “management scheme”

119. The concept that every tenement will in future have a management scheme to assist in common decision making is a fundamental aim of the Act. The management scheme for a particular tenement may be set out in:

- the Tenement Management Scheme in the Act (though it is unlikely that this will apply in its entirety to very many tenements);
- the development management scheme applied under the Title Conditions Act;
- the tenement burdens contained in the title deeds (these will apply in a great many cases since they may provide a more comprehensive and sophisticated scheme than the Tenement Management Scheme); or
- a combination of the tenement burdens and individual rules of the Tenement Management Scheme (as required to supplement the tenement burdens if these are silent or unworkable on the subject matter of the rules of the Tenement Management Scheme).

120. The reference to tenement burdens in *section 27(c)* includes within the definition of “management scheme” any reference in the existing title deeds to maintenance, management or improvement of the tenement. Neither the Tenement Management Scheme nor the development management scheme provide for improvements, but it is possible that the existing titles might do so: the definition reflects that possibility. This does not expand the Act generally to include decision making on improvements and not merely maintenance. It is simply a reference to any existing improvement provisions which may be set out in individual title deeds.

Section 28 – Meaning of “owner”, determination of liability etc.

121. *Section 28* defines the meaning of “owner” for the purposes of the Act. The question of exactly when people become the owner of a flat is important since they will acquire rights and obligations at that point. This section brings the Act into line with the definition in the Title Conditions Act.

122. *Subsection (1)* makes it clear that where the word “owner” appears in the Act without any further clarification or addition, then it means the owner of a flat in the tenement. Some sections, for example, *section 8*, use the expression “owner of part of a tenement building” and in those cases the term “owner” is not intended to be limited to the owner of a flat.

123. In *subsection (2)* an owner in relation to a flat is defined as someone who has a right to a flat, that is someone who is entitled to take entry under a conveyance of the flat in question. It will not be necessary for them to have completed their title by registering it in the property registers before they can be considered owners. If more than one person comes within the description of an owner, then for the purposes of the Act the “owner” is the person who has most recently acquired that right (to take entry under a conveyance).

124. At present heritable creditors are generally regarded as standing in the place of the owner when they enter into the possession of security subjects. *Subsection (3)* extends the meaning of “owner” to mean heritable creditors who have entered into lawful possession of a flat.

125. *Subsection (4)* provides that where two or more people own a flat the term “owner” applies to both or all of them. This provision is qualified however by *subsection (5)*. The provisions listed confer rights on owners (as opposed to obligations) and the effect of this subsection is that any *pro-indiviso* owner (part owner) is able to exercise these rights independently.

126. *Subsection (6)* applies *subsections (2) to (5)* of *section 28* to owners of part of the tenement as if they owned a tenement flat (and in any such case any reference to a flat will be read as being to the part of the tenement owned by that person).

127. Where two or more people own a flat, under *subsection (7)(a)* they are jointly and severally liable for costs arising from the operation of the Act. The other owners in the tenement have a right to sue any of them for the full amount owed. When one co-owner pays a debt, there is a right of relief against the other co-owner or co-owners. Paragraph (b) provides that in relation to each other co-owners should be liable in the proportions in which they own the flat.

Section 29 – Interpretation

128. *Subsection (1)* explains certain terms used in the Act. Only a small number of definitions require explanation here.

- *Flat.* It is made clear that a flat may be premises which comprise more than one storey and may include business and other premises, not merely premises used or intended to be used for residential purposes.
- *Sector.* The term “sector” is used in the context of boundaries. In the definition of “sector”, the reference to “any other three-dimensional space not comprehended by a flat, close or lift” is intended to make clear that boundaries are an issue only where the units are in separate ownership. For example, a broom cupboard within a flat would not be a sector for the purposes of the Act.
- *Tenement burden.* This term means any real burden (within the meaning of the Title Conditions Act) which affects the tenement or any sector of the tenement.

129. *Subsection (2)* explains how “floor area” is to be calculated. The “floor area” is the total floor area within the boundaries of a flat or flats including the area occupied by any internal wall or other internal dividing structure. No account is to be taken of the pertinents or a balcony. A loft or a basement will also be excluded when it is used for storage. If they are used for another purpose then they should be taken into account.

Section 30 – Giving of notice to owners

130. Rule 9 of the Tenement Management Scheme contains detailed provisions on the giving of notices under the Scheme. *Section 30* contains provisions on giving notices under the main part of the Act.

131. The ways in which notice may be given to an owner are set out in *subsections (1) and (2)* and provision for determining the date of giving notice, whether it is posted or sent electronically, is set out in *subsection (4)*. These are consistent with the corresponding provisions in the Title Conditions Act. Under *subsection (3)*, it will be sufficient for notice to be sent to the flat in question addressed to “The Owner” or a similar expression such as “The Proprietor”. The name of the owner may not be known, or the name may be known, but the owner’s whereabouts may be a mystery. But, in order to be able to rely on *subsection (3)*, the person sending the notice will have to have made a reasonable enquiry as to where the owner is.

Section 31 – Ancillary provision

132. This section allows Scottish Ministers to make such ancillary orders as they consider necessary or expedient for the purposes of or in consequence of the Act.

Section 32 – Orders and Regulations

133. The Act empowers Scottish Ministers to make orders or regulations, exercisable by statutory instrument. *Section 32* generally provides for negative procedure except where primary legislation is being amended. This requires a resolution of the Parliament.

Section 33 – Crown Application

134. With the exception of *section 18*, the provision for compulsory insurance of tenements, the provisions in the Act will bind the Crown. The exception is necessary because in practice the Crown carries its own insurance risk and so should not be subject to a statutory obligation to take out insurance policies.

SCHEDULE 1 - TENEMENT MANAGEMENT SCHEME

135. The Tenement Management Scheme provides for a system of management and maintenance in tenements. It applies to the extent provided for in *section 4* of the Act to all tenements in Scotland, old and new. It will not apply where the development management scheme under *section 71* of the Title Conditions Act has been applied.

136. The provisions of the Tenement Management Scheme will act as a background law where the title deeds to tenements are silent. If, for example, the title deeds set out how decisions should be taken or costs should be allocated, then those provisions will continue to operate and will not be superseded by the rules contained in the Tenement Management Scheme.

137. The Tenement Management Scheme is, therefore, a simple scheme which provides the basic requirements for the management and maintenance of a tenement where the titles fail to provide appropriate rules.

138. The scheme consists of 9 rules which are outlined below.

Rule 1 – scope and interpretation

139. Not every part of the tenement is to be managed under the Scheme. The whole basis of the Scheme is the new concept of scheme property. This does not affect the ownership of a tenement or its parts, but sets out in statute the main parts of the tenement in which owners share an interest. If a part of the tenement is not scheme property, then it will not be subject to the maintenance regime in the Tenement Management Scheme.

140. Rule 1.2 sets out what is classified as scheme property. Rule 1.2(a) includes any part of a tenement that is the common property of the owners of two or more flats and rule 1.2(b) includes any other part of the tenement that is required by the title deeds to be maintained, or the cost of maintenance of which is to be shared, by the owners of two or more flats. Certain other key parts of the tenement, listed in rule 1.2(c), are also scheme property whether rules 1.2(a) or 1.2(b) apply or not. These are the ground on which the tenement is built, its foundations, its external walls, its roof, the part of any gable wall that is part of the tenement building and any other wall, beam or column which is load-bearing.

141. Scheme property is a cumulative concept and will vary from one tenement to another. The extent of scheme property should be assessed in the context of an individual tenement. The scheme property for any given tenement might include property falling within all of the three separate categories in paragraphs (a), (b) and (c).

142. Certain parts of a tenement building which would otherwise fall within rule 1.2(c) are excepted from that rule and will be scheme property only if they are covered by rule 1.2(a) or (b). These are listed in rule 1.3 and include any extension which forms part of only one flat, any door, window, skylight or vent or other opening and any chimney stack or flue.

143. Rule 1.4 provides a definition of a “scheme decision”. Decisions are scheme decisions if taken under the procedures set out in rule 2 or under procedures set out in the tenement burdens. The scope of the subject matter of scheme decisions is not limited by rule 3.1 as the tenement

burdens may enable the owners to take decisions on other matters. Rule 1.5 gives some other definitions, including that of “maintenance”. Alteration or demolition is not included in the definition nor is improvement, unless it is incidental to the maintenance. For example, an improvement which involves modernising an existing feature using up to date materials and technology is more likely to be permissible.

Rule 2 – procedures for making scheme decisions

144. Rule 2.1 stipulates that any decision to be made by the owners must be in accordance with the provisions of rule 2. Such decisions will be “scheme decisions”. *Section 4(4)* of the Act provides, however, that if the title deeds contain procedures for the making of decisions by the owners and the same procedures apply to each flat, then the title provision will prevail. A decision made by the owners in accordance with the title provisions will also be a scheme decision (rule 1.4(b)).

145. Under rule 2.2, one vote is allocated to each flat and the right to vote can be exercised by the owner of that flat or somebody who is appointed by the owner. Under rule 2.3, no vote on a scheme decision relating to maintenance will be allocated to a flat if the owner of the flat is not liable for the maintenance, or the cost of maintenance, to that part of the tenement.

146. If two or more people own a flat, then the vote allocated to that flat can be exercised by any one of them under rule 2.4. If, however, the owners disagree on how the vote is to be cast, then no vote is accepted for that flat unless one of the owners owns more than a half share of the flat (in which case that owner will exercise the vote) or the vote is agreed among those owners who own more than a half share of the flat.

147. Scheme decisions are to be reached by simple majority (rule 2.5) meaning more than 50% of the total number of votes allocated.

148. Under rule 2.6, an owner wishing to call a meeting must give at least 48 hours notice of the date, time and purpose of the meeting. An owner may wish to propose that a scheme decision is made, but may not want to call a meeting. In this case, the other owners have to be consulted about the proposal under rule 2.7, except where it is impractical to do so, for example where an owner is absent at the time that the proposal is made. Under rule 2.8, the requirement to consult each owner is satisfied if only one of the co-owners of a flat is consulted.

149. Rule 2.9 provides that owners must be informed of scheme decisions as soon as is practicable. If the decision was made at a meeting then notification must be notified to all owners who were not present when the decision was made, by a person nominated at the meeting to do so. In any other situation, notification must be given to each of the owners by the owner who proposed that the decision be made. It is safer to notify in writing and rule 9.2 explains ways in which written notices can be given.

150. Under rule 8.2, once a scheme decision has been made it is binding on all the owners and, if the flat changes hands, on any incoming owner, even where the decision is made not under rule 2 but under the provisions of the tenement burdens. *Section 30* of the Title Conditions Act makes equivalent provision. *Section 5(10)* prevents implementation of the decision for 28 days where an owner did not vote in favour of a decision, as they have the right to apply to the sheriff court to have the decision annulled.

151. Under rule 2.10, the scheme also contains some protection for an owner or owners who are liable for 75% (or more) of the costs arising from a decision made about maintenance under rule 2.5. Any owner or owners who did not vote in favour of a scheme decision to instruct

maintenance where they would be responsible for 75% or more of the costs can annul that decision by notifying the other owners within certain time limits.

152. These time limits are set out in rule 2.11. If a decision that an owner wishes to annul has been made at a meeting then notification of the annulment of that decision must be given within 21 days after the date of the meeting. In any other case notice of the annulment must be given within 21 days of receiving notification of the relevant decision.

Rule 3 – matters on which scheme decisions may be made

153. Rule 3.1 gives a list of the subjects on which scheme decisions can be made. Most scheme decisions are about maintenance and repairs and under rule 3.1(a) owners can decide to carry out maintenance to any part of scheme property. Owners may be able to arrange for an inspection of scheme property to determine whether or to what extent maintenance is required (rule 3.1(b)). A scheme decision can be made to appoint a manager or factor (rule 3.1(c)) and to delegate to that manager any of the owners' powers (rule 3.1(d)).

154. Scheme decisions can also be made to:

- arrange for a common insurance policy for the tenement (rule 3.1(e));
- install a system enabling entry to the tenement to be controlled from each flat (rule 3.1(f));
- determine that an owner is not required to pay a share (rule 3.1(g));
- authorise any maintenance of scheme property already carried out (whether by an owner, manager or factor) (rule 3.1(h)); and
- modify or revoke any scheme decision (rule 3.1(i)).

155. If owners have made a scheme decision (either under the provisions of their title deeds or under rule 3.1) to carry out maintenance, rule 3.2 allows owners to make decisions to instruct or carry out maintenance or to appoint a manager to arrange for this. To allow for the fact that tradesmen may be unwilling to start work unless money has already been collected and deposited, each owner may be required to deposit money in advance by a date which the owners decide, subject to rule 3.3. This will be the owner's apportioned share of a reasonable estimate of the costs of the maintenance.

156. Unless the title deeds enable the owners to make decisions on other subjects, scheme decisions are restricted to those subjects listed in rule 3.1.

157. Rule 3.3 deals with decisions made under rule 3.2(c) which require owners to deposit a sum of money. The two tier arrangement found in rule 3.3 will allow owners to hand over small sums of money without the safeguards applying. Under paragraph (a), if the sum of money required to be deposited is less than £100, then the safeguards found in rule 3.4 will not apply. Rule 3.3(b) contains a £200 threshold so as to ensure that owners do not have to risk handing over more than £200 in any year without the protection of having the money placed in a maintenance account. Rule 3.3(b) may kick in, however, where a small sum – perhaps only required for stair cleaning – pushes the total amount over the £200 limit. The previous sums demanded in that year may already be held in a maintenance account, and in that case the only sum at risk is the small amount being demanded. Any sums which have already been placed in a maintenance account are therefore excluded from the £200 threshold.

158. Rule 3.4 deals with procedures where scheme decisions made under rule 3.2(c) require, under rule 3.3, the deposit of sums. It deals with the collection and deposit of funds, which must

be paid into a “maintenance account”. The owners can authorise others to operate the maintenance account on their behalf. This rule provides safeguards for owners who may be required to hand over considerable amounts of money as a result of a single decision or a number of decisions made by the owners over a 12 month period.

159. Paragraph (f) provides that the notice to be given under rule 3.3 may specify a “refund date” on which the sums deposited would be repayable to the depositors if maintenance has not been commenced by that date. If the notice does not state a “refund date” then rule 3.4(g)(i)(B) provides the default rule. Owners will be able to request repayment if the work does not commence before the refund date or, if no refund date is given, within 28 days of the proposed date of commencement.

160. Rule 3.5 will prevent abuse of rule 3.1(f). An owner’s vote will not be counted towards a scheme decision if it is used to excuse him or her from payment under rule 3.1(f). This rule is intended to excuse from payment those who are genuinely unable to meet the financial demand. Without rule 3.5, there would be a risk that rule 3.1(f) could be abused particularly in circumstances where one owner owns a majority of flats in a tenement

Rule 4 – scheme costs: liability and apportionment

161. Rule 4 explains who is to pay for costs incurred as a result of scheme decisions by the owners of a majority of the flats - unless the title deeds provide that the entire liability for those costs is to be met by one or more of the owners. These costs are called “scheme costs” and rule 4.1 lists the type of cost which would fall into this category.

162. Rule 4.2 sets out liability for the maintenance of and running costs related to scheme property. Where rule 4 applies (because the tenement burdens do not apportion the entire liability for a cost) liability for the cost of maintenance of common property of two or more owners (ie scheme property under rule 1.2(a)), then the maintenance costs are shared among those owners in proportion to their ownership in the property (rule 4.2(a)).

163. The cost of maintaining other scheme property is shared equally among the owners of all the other flats, except where the floor area of the largest flat is more than one and a half times the size of that of the smallest flat. Then the costs are allocated according to the floor area (rule 4.2(b)).

164. Rule 4.3 provides that all of the owners in a tenement are liable for the upkeep of the roof where all or part of the roof is the common property by virtue of *section 3(1)(a)*. This is to make the calculation of apportionment of the cost of roof repairs easier where *sections 1 to 3* apply, as in this case the roof over the common stair would be common property but the rest of the roof would not be. The owners of main door flats may not have access to the close and, if the title deeds are silent on ownership, they will not have a right of common property to the close under *section 3(1)(a)* of the Act. Under the normal rules for liability set out in rule 4.2 the owners of main door flats would therefore not be liable to pay a share of the cost of maintaining the roof over the close. They would, however, be responsible for a share of the cost of maintaining the rest of the roof. Rule 4.3 ensures that the whole roof is treated the same under the default rules for liability contained in rule 4.

165. Under rule 3.1(e) owners may make a scheme decision to arrange a common policy of insurance for the tenement. Rule 4.4 provides that owners may decide on an equitable basis the contribution of each owner to the premium (as set out in rule 3.1(e)). If the common insurance policy is arranged in order to comply with one of the title provisions then, in the absence of title provision to the contrary, they will pay equal shares of the premium.

166. Rule 4.5 makes it clear that any scheme costs relating to the remuneration of the manager, the installation of a system enabling entry to the tenement to be controlled from each flat, the cost of calculating the floor area of each flat and any other costs relating to the management of scheme property are to be shared equally among the flats and owners are liable accordingly.

Rule 5 – redistribution of share of costs

167. Rule 5 deals with the situation where an owner is unable to pay their share of the costs perhaps because he or she is bankrupt or cannot be contacted or where a scheme decision has been made under rule 3.1(g) that the owner should be exempted from payment. It is not enough to allege that an owner cannot be contacted and it is therefore not possible to get from him or her his or her share of the costs. An effort must be made to identify and locate him or her and that effort must be a reasonable one.

168. In such cases, the relevant share must be paid by the other owners as if it was a scheme cost for which they are liable under rule 4. The “other owners” would only be the owners who were together responsible for the rest of cost of the repairs. This is to cover the situation when one of the flats is sold between the time when the owners become liable for the costs and the time when they discover that one of their number cannot pay. So if one of the flats changes hands, the irrecoverable share will be divided between the owners who are responsible for the costs. Generally this will be the outgoing flat owner.

169. If the share cannot be recovered because the owner is bankrupt or cannot be contacted, then that owner remains liable to all the other owners for the amount paid by each of them.

Rule 6 – procedural irregularities

170. Under rule 6.1, a procedural mistake will not make a scheme decision invalid. This will not, however, for example, excuse substantive failure such as a failure to achieve a majority as required by rule 2.5.

171. Rule 6.2 exempts an owner from liability for scheme costs if that owner, as a result of a procedural irregularity, did not know that expenditure was being incurred or immediately objected to the expenditure when they did become aware. The owner is left out of the calculation of the shares of costs of the work.

Rule 7 – emergency work

172. Title deeds may make provision for owners to undertake emergency work in specified circumstances. If they do not, rule 7.1 allows an owner to instruct or carry out work without a scheme decision where it is an emergency, and where, as a consequence, there is no time to consult the other owners. Rule 7.2 provides that the work is to be paid for as if a scheme decision had been taken under rule 4.1(a). The word “work” is deliberately used instead of “repairs” because some work will not fall under the category of repairs.

173. Under rule 7.3, emergency work is defined as work which has to be carried out to scheme property to prevent damage to any part of the tenement, or in the interests of health and safety, and has to be carried out before a scheme decision can be made.

Rule 8 – enforcement

174. Rules 8.1 to 8.4 provide for the enforcement of the provisions of the scheme. Scheme decisions are binding on the owners and their successors as owners and any obligation arising from the scheme or as a result of a scheme decision may be enforced by any owner. Owners may also authorise a third party to enforce an obligation on that owner’s behalf and the third party may bring an action in their own name.

Rule 9 – giving of notice

175. The ways in which notice may be given to an owner are set out in rules 9.1 to 9.4. These rules are replicated in *section 30* of the Act. This is necessary because a decision might be taken by owners to carry out maintenance under conditions in title deeds, but there might be no provision in those conditions for sending notice of the decision to owners. These provisions are consistent with the corresponding provisions in section 124 of the Title Conditions Act.

176. Rule 9.3 provides that if an owner's name is not known, or if the name is known but the owner's whereabouts are a mystery, then it will be sufficient for the notice to be sent to the flat. The person sending the notice will, however, have to make reasonable enquiry as to where the owner is.

177. Provision for determining the date of giving notice, where it is posted or sent electronically, is set out in rule 9.4 and this is either the day of posting or the day of electronic transmission.

SCHEDULE 2 – FORM OF NOTICE OF POTENTIAL LIABILITY FOR COSTS

178. Schedule 2 prescribes the form of a notice of potential liability for costs. It is necessary to give details of the flat to which the notice relates and a description of the work to which it relates. The notes for completion specify that the flat must be described in a way that is sufficient to identify it. The description must refer to the title number if the flat has been registered in the Land Register of Scotland.

SCHEDULE 3 – SALE UNDER SECTION 22(3) OR 23(1)

179. This schedule provides a procedure for applications to the sheriff court for power to sell the site of a demolished tenement building or an abandoned tenement.

180. Under paragraph 1, an owner may make a summary application to the sheriff seeking a power of sale order. The applicant must give notice of it to each of the other owners of the sale subjects. The sheriff shall grant the power unless he or she is satisfied that it would not be in the best interests of the owners as a group or would be unfairly prejudicial to one or more owners. Any previous power of sale order would be revoked on the grant of a new power of sale order. Paragraph 1 also sets out the detailed information which must be contained in an application. Paragraph 2 allows for appeals against either the grant or refusal of a power of sale order to the Court of Session on a point of law.

181. Paragraph 3 provides for the registration of power of sale orders in the property registers. Paragraph 4 contains rules about marketing in order to obtain the best price that can reasonably be obtained. Paragraph 5 requires the owners selling the sale subjects to pay the other owners their share of the proceeds and sets out rules for the calculation and payment of those shares. The sum payable to each owner will normally be an equal share of the gross proceeds of the sale less an equal share of the expenses incurred by the seller. An owner will receive the share less the cost of discharging any security the owner may have outstanding over his former flat. If another owner is not traceable, then the funds will be lodged with the sheriff court.

182. Paragraph 6 makes it clear that where the sale subjects have been sold under a power of sale order then all heritable securities affecting the sale subjects or any part of them shall be discharged.

SCHEDULE 4 – AMENDMENTS OF TITLE CONDITIONS (SCOTLAND) ACT 2003

183. *Section 25* of the Act stipulates that the Title Conditions Act will be amended in accordance with schedule 4.

184. *Section 3(8)* of the Title Conditions Act provides that a person other than “the” holder of a real burden may not waive compliance with it. The reference to “the” holder implies that a burden could only be waived, mitigated or varied by all of the persons entitled to enforce it. It should, however, be possible for the title deeds to provide that a burden may be varied by some of the persons entitled to enforce it and not just all the owners. Paragraph 2 of schedule 4 substitutes “a holder” for “the holder”.

185. Paragraphs 3 and 14 correct a possible technical problem that could have hindered the operation of the Title Conditions Act in relation to groups of related properties such as housing estates. A change is made to relax the requirements for the creation of new burdens after the appointed day but only where the burden would be a burden to which section 53 would apply. Section 53 applies to burdens imposed on groups of related properties. The change is designed to avoid issues arising as to the validity of such burdens and to make sure that all of the properties within a community (the housing estate) will be able to enforce the burdens affecting each unit against the others.

186. Paragraphs 4, 5 and 20 introduce into the Title Conditions Act the same policy on liability for incoming owners set out in *sections 12* and *13* of, and schedule 2 to, this Act. The Title Conditions Act applies to all types of property, which is why separate (but identical) provision is required. *Section 10* of the Title Conditions Act deals with affirmative burdens and the continuing liability of former owners. It provides for certain obligations to be enforceable against both the current owner and the owner at the time the obligation arose – in other words, action may be taken against either for payment, though there is a right of relief for the buyer against the seller. These paragraphs introduce the same notice procedure for the Title Conditions Act as under the Tenements Act for purchasers who are unaware of an outstanding liability due by the seller and who, after taking entry, may be faced with a bill for a share of a cost of work already carried out.

187. Paragraph 4 also provides that *section 10* of the Title Conditions Act will not apply where *section 12* of this Act (the liability of owners and their successors) is applicable in tenement property.

188. Paragraph 6 brings the Title Conditions Act into line with this Act in relation to the calculation of the floor area of a flat. In particular, it makes it clear that the internal walls or other internal dividing structure will be included in the calculation but that balconies, lofts or basements are not unless the loft or basement is used for purposes other than storage.

189. Paragraph 7 extends the provisions of the Title Conditions Act on community burdens to situations where there are two rather than four units.

190. Paragraph 8 makes changes to *section 29* of the Title Conditions Act, which deals with the power of the majority to instruct common maintenance. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Parts of rule 3 provide procedures for the deposit and retention of monies. Similar procedures are found in *section 29* of the Title Conditions Act. Paragraph 8 provides that both procedures will be the same. Paragraph 8 also makes it clear that where a scheme decision gives authority to operate a maintenance account, the authorisation must be to a manager or at least two other persons.

191. Paragraph 9 disapplies parts of section 28 and sections 29 and 31 of the Title Conditions Act (which relate to community burdens) in relation to a community consisting of one tenement or where the development management scheme applies to the tenement. These sections deal with the power of a majority to appoint a manager, the power of the majority to instruct common maintenance and remuneration of the manager and, as regards tenements, are superseded by this Act. If the community (i.e. a group of two or more properties all subject to the same or similar burdens which can be mutually enforced) consists of just one tenement, then this Act will provide appropriate rules if the title deeds do not do so.

192. Paragraph 10 amends section 33(1) and (2) of the Title Conditions Act which relates to majority variation and discharge of community burdens. It ensures that section 33(2) will apply even where a constitutive deed may allow specified owners to grant a variation or discharge and also authorise a manager to do so.

193. Paragraph 11 amends section 35 of the Title Conditions Act. Subsection (1) of that section provides that variation and discharge of community burdens by owners of adjacent units is only available “where no such provision as is mentioned in section 33(1)(a) is made”. Paragraph 11 will make both methods of variation and discharge available. In other words, it will be possible for adjacent owners to vary or discharge community burdens by using section 35 or by using provisions in the title deeds if these exist.

194. Paragraph 12 relates to rural housing bodies. Section 43(5) of the Title Conditions Act enables Ministers to prescribe a list of bodies as rural housing bodies. These bodies will be able, when selling rural housing, to agree a right to repurchase the property in order to ensure that it remains within the rural housing stock. The former terms of section 43(6) specified that to be a rural housing body, an organisation must have as an object the provision of housing on rural land (or rural land for housing). This would have excluded bodies whose constitution is that they have a broad function of providing housing in any location but not a function specifically related to rural areas. Paragraph 12 will allow a wider range of housing body to be designated as rural housing bodies, but the provisions themselves may only be used over rural land (rural land is defined as for the Land Reform (Scotland) Act 2003, namely as land other than settlements with a population over 10,000).

195. Paragraph 13 removes a definition of “local authority” which is rendered unnecessary by the insertion of a definition into section 122 by paragraph 19.

196. Paragraph 15 simply makes it clear that the reference in section 90 of the Title Conditions Act should be to applications to the Lands Tribunal to disapply a development management scheme.

197. Paragraphs 16 and 17 make it clear that when the courts are considering the best interests of the owners they must consider the interests of the owners as a whole.

198. Paragraph 18 removes subsection (9) of section 119 of the Title Conditions Act. This subsection purports to delay the full effect of sections 106 and 107 of the Title Conditions Act (which deal with the extinction of real burdens in situations involving compulsory purchase). These sections have been in force since 1 November 2003.

199. Paragraph 19 changes the definition of “tenement” in section 122 of the Title Conditions Act to bring it into line with the definition in this Act. It also removes the definition of “flat” which will now be construed by reference to this Act. Other amendments to the 2003 Act extend the use of the term “local authority” and the definition in paragraph 19(b) is a consequence of this change.

PARLIAMENTARY HISTORY

200. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the date on which Committee Reports were published and the references to those Reports.

Proceedings and Reports	Reference
Introduction 30 January 2004	SP Bill 19 (Session 2)
Stage 1	
<i>(a) Justice 2 Committee</i>	
6 th Meeting 2004 12 th Meeting 2004 13 th Meeting 2004 15 th Meeting 2004 5 th Report, 2004 (27 May 2004). Stage 1 Report on the Tenements (Scotland) Bill	24 February 2004, Cols 528-556 30 March 2004, Cols 655-682 20 April 2004, Cols 692-738 27 April 2004, Cols 744-762 SP Paper 164 (Session 2)
<i>(b) Finance Committee</i>	
10 th Meeting 2004 11 th Meeting 2004	23 March 2004, Cols 1179-1184 30 March, Cols 1204-1211
<i>(c) Consideration by Parliament</i>	
3 June 2004	Cols 8925-8945

These notes relate to the Tenements (Scotland) Act 2004 (asp 11) which received Royal Assent on 22nd October 2004

Stage 2	
<i>Justice 1 Committee</i>	
22 nd Meeting 2004 Bill (as amended at Stage 2)	15 June 2004, Cols 861-902 SP Bill 19 (Session 2)
Stage 3	
<i>Consideration by Parliament</i>	
16 September 2004	Cols 10318-10357
Royal Assent – 22 October 2004	

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