

# TENEMENTS (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Miscellaneous and General*

#### *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decisions should be taken or costs should be allocated, then those provisions will continue to operate and will not be superseded by the rules contained in the Tenement Management Scheme.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

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

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.