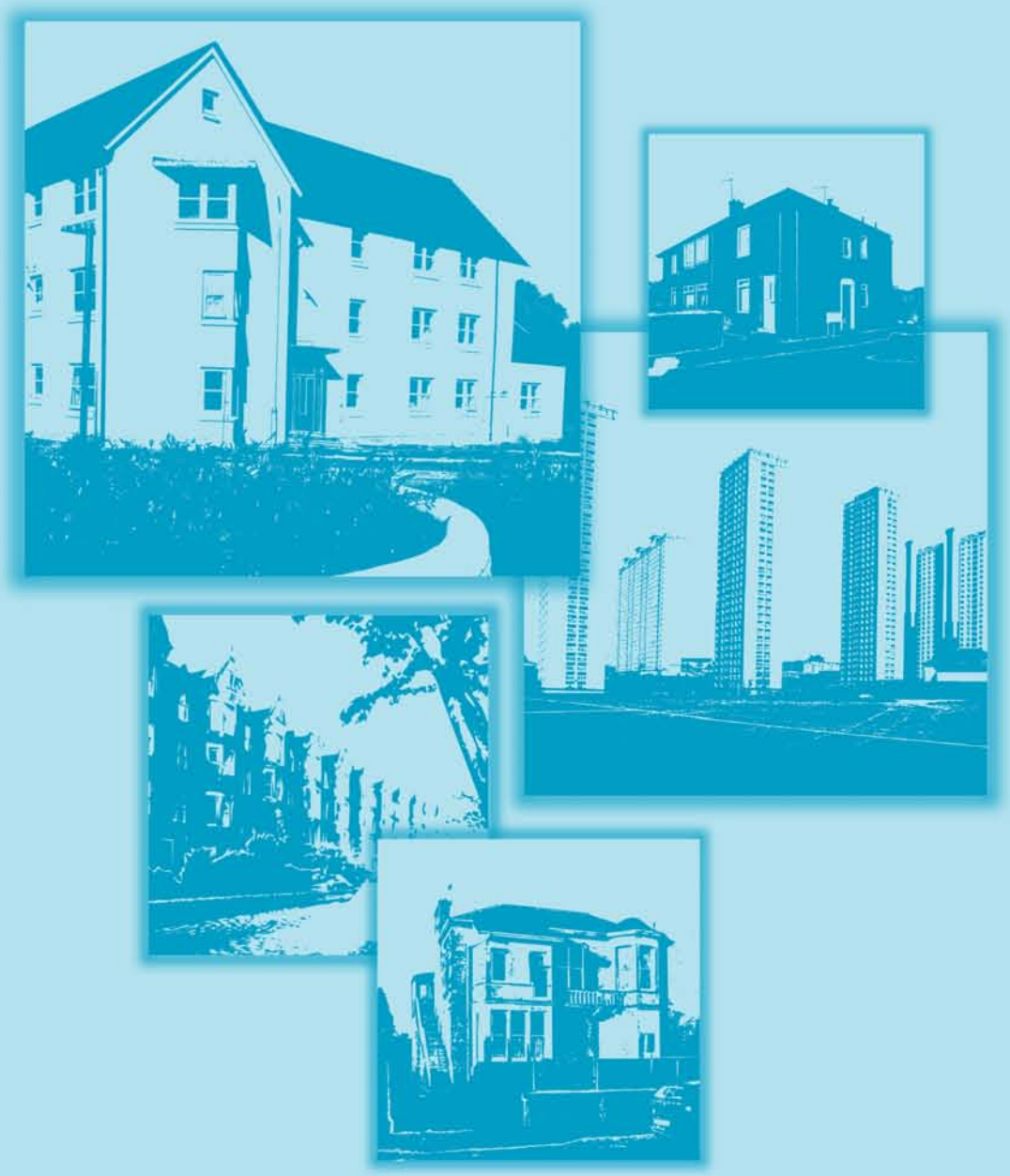

MANAGEMENT AND MAINTENANCE OF COMMON PROPERTY

Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 for Housing Professionals

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SCOTTISH EXECUTIVE

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Introduction

Who this guidance is for

1. This guidance has been produced by the Scottish Executive for the benefit and assistance of professional staff who are involved in advising owners of flats in tenements, including housing officers, solicitors, surveyors, architects and staff in advice bureaux. It is not meant to be legally binding or definitive: the Explanatory Notes produced by the Scottish Executive are meant to be the official and definitive guide to the meaning and purpose of the various provisions of the legislation.

How the guidance is structured

2. The guidance is set out in free-standing chapters so that you do not need to read it all. You may find that Chapter 15 on the Tenement Management Scheme is the one you refer to most. But the Tenement Management Scheme will not tell you the whole story. **It will be essential for you to look at the title deeds of the individual property** – in many cases the rules for managing a tenement will be a combination of its title deeds and the Tenement Management Scheme. The title deeds are vital, and a section in Chapter 1 is devoted to the connection between the title deeds and the management of the tenement. If you do not have the title deeds of the tenement you will be able to get them from **Registers of Scotland**, the government agency which holds the records of all property in Scotland. Chapter 13 describes title deeds and the way in which they are registered.

Chapter 1 – Principles behind the Tenements Act

Title deeds and the management of the tenement

3. The fundamental principle of the Tenements Act is that **all tenements will have a scheme for management and maintenance**. But not all tenements will have the same scheme. The scheme for an individual tenement will be one of:

(1) the rules set out in its title deeds;
(2) the rules set out in the Tenement Management Scheme;
(3) a combination of (1) and (2);
(4) the Development Management Scheme applied under section 71 of the Title Conditions Act; or
(5) a combination of (1) and (4).

Management by title deeds

4. Many tenements have detailed rules set out in their title deeds for their management and maintenance. These rules will have been designed with the particular tenement in mind. The Tenements Act does not interfere with these arrangements. If title deeds make provision on the ownership of parts of a tenement, or who pays for its maintenance (and in what proportions) or how decisions are to be reached by owners, then those provisions will remain in force. It will also be possible for developers and owners to draw up their own title deeds in the future. **The new law in the Tenements Act is mainly default law – it will only apply if the title deeds do not make other arrangements or if they are defective.**

5. This is because the best kind of regime for the management and maintenance of a tenement is one which was specifically drafted for that building and which takes into account the particular circumstances of that building. For example, a large villa might be converted into unequal parts. The title deeds might make specific provision for how roof repairs are to be paid for. Another example might be a tenement with shops on the ground floor. The title deeds may provide that the owners of the shops have different voting rights from the owners of flats above. The allocation of expenditure might reflect the different size of the properties.

6. In many cases, such arrangements have operated satisfactorily for many years. The provisions in title deeds have allowed many buildings to be maintained in good repair for over a century. More modern title deeds often have very comprehensive and quite sophisticated provisions.

The Tenement Management Scheme

7. The Tenement Management Scheme is the main instrument of reform in the Tenements Act. It is described in detail in Chapter 15, but this section provides a brief overview.

8. Some title deeds, particularly in older tenements, do not include a comprehensive management scheme which provides for the efficient management and regular maintenance of the tenement. Even if, for example, the deeds set out how the costs of maintenance of the common parts of a building are to be divided among the owners, there may be no procedure set out for the owners to take collective decisions to undertake the work. Under the previous common law, all owners would have had to agree before repair work could be carried out. This was often difficult, if not impossible, to achieve and repairs were often delayed or frustrated entirely.

9. The Tenement Management Scheme is a default management scheme which will ensure that every tenement in Scotland – existing and built in the future – will have proper rules for maintenance and management. **If existing tenements have defective title deeds or if their title deeds are silent on a particular matter, the rules of the Tenement Management Scheme will be applied to them.** Thus, if the title deeds say how expenditure is to be apportioned, but the shares do not add up to 100%, the new law will supersede what is in the title deeds, but if the title deeds make proper provision for the allocation of costs, they will prevail. For the future, developers will either have to make their own rules or the rules in the Tenement Management Scheme will apply.

10. The Tenement Management Scheme is set out in the form of Rules on a number of issues including:

- what "scheme property" consists of;
- the procedure for voting;
- what the owners can decide;
- how costs are to be apportioned;
- what "maintenance" means;
- how a manager can be appointed; and
- how owners can act in an emergency.

11. The major change which the Tenement Management Scheme will make is that if the title deeds do not make any provision on decision making by owners, **a majority of owners will be able to take decisions**.

12. The provisions in the Tenement Management Scheme will only apply where the title deeds do not make provision on the matters covered by the rules in the Scheme. They will apply **rule by rule**. So if the title deeds work on every one of these matters except one, the rule in the Tenement Management Scheme will apply on that one matter, but on the others the title deeds will apply.

13. The Tenement Management Scheme introduces the principle of **"scheme property"**. Scheme property is the parts of the tenement which are owned in common or maintained communally and the parts of the tenement which are so important to the structure of the tenement that they should be treated in a special way. The ownership of these parts will not change, and responsibility for the common parts will depend on who owns them. **Responsibility for the maintenance of the strategic parts will be separated from ownership and will (unless the title deeds provide otherwise) be the responsibility of all the owners.** Scheme property is defined in rule 1.2 of the Tenement Management Scheme (see Chapter 15 for details).

14. This provision changes the common law principle that with sole ownership of the roof comes the sole responsibility to maintain and to pay for its maintenance.

The Development Management Scheme

15. The Development Management Scheme is a comprehensive model scheme intended for large and complex developments. It can be adapted to fit particular developments. Detailed provision for it is yet to be made.

Responsibilities of flat owners

16. The specific obligations of owners are set out in the title deeds of their own property. This information can only be found in the title deeds of their property. The provisions of the title deeds should be explained to prospective purchasers by their solicitor, so that they are aware of the obligations they will face if they buy a property.

Chapter 2 – Ownership of a tenement

17. Certain strategic parts of a tenement are so important that they are covered by the Tenement Management Scheme (where the title deeds do not make provision for their maintenance). These parts are defined in the Tenements Act as "scheme property". This does not affect the ownership of the tenement, and the first sections of the Act set out who owns what in a tenement. **Apart from scheme property, owners are responsible for the maintenance of the parts of the tenement that they own.**

Boundaries of flats

18. The Act provides that the rules of ownership within a tenement will apply to both existing and new tenements. **The rules will, however, only apply where the title deeds do not state who owns a part of the tenement.** In most cases the title deeds state where ownership lies, and there is no doubt. But the Act will clear up uncertainties where the title deeds are not clear.

19. The overall effect of the rules will be that a flat will be a section of airspace bounded by 4 walls, a ceiling and a floor. The rules may be summarised as follows:

- Boundaries will be the mid-point of the dividing structure – in the case of two flats on the same level, the boundary would be the mid-point of the common wall, while the boundary between an upper and a lower flat would be the centre line of the joists. The wall separating the close from an individual flat will be owned on each side to the mid-point.
- Any door or other item which wholly or mainly serves a particular flat will be regarded as wholly part of that flat.
- Where the boundary of a flat is an external surface of the building, the flat will be taken to include the full thickness of that boundary.
- A top flat will extend to and include the roof over that flat.
- A bottom flat will extend to and include the ground (sometimes called the solum) under that flat.

20. The Act also provides that:

- Ownership of a sloping roof (or part of the roof) will carry with it ownership of the triangle of airspace lying between the roof and the highest point of the building (this could be important if for instance the owner wanted to put in a dormer window).
- Ownership of the ground (or part of the ground) should carry with it ownership of the airspace directly over the ground and above the tenement building.

Common parts

21. The title deeds of a tenement usually allocate the ownership of the parts of a tenement used in common by the owners and often state who is to contribute to their maintenance. But if they do not, the Act will step in as follows:

- The main structural parts of the tenement will be maintained by all the flats.
- The close, stair and a lift if there is one will be maintained by all flats that have access to them – thus they are different to the main structural parts because if a main-door flat does not have access to the close it will not have to pay a share of its maintenance.

22. That leaves other parts of the tenement such as the pipes, rhones, fire escape etc. The Act allocates ownership of them and says that the responsibility to maintain will go with ownership (**unless the title deeds allocate ownership or maintenance responsibility**). The general basis for attributing ownership of common parts will be service. The ownership of a part (often called a pertinent) would depend on which flats it served. So, for example, if a pipe serves only two flats in a tenement then it will be owned by the owners of those two flats who will be responsible for its maintenance.

Chapter 3 – What happens if the title deeds are incomplete or unworkable?

23. The title deeds of the flats in a tenement may be silent on some matters or they may be unworkable on some matters. In these cases the rules of the Tenement Management Scheme will come into play.

24. Title deeds will often make no provision for decision-making in a tenement. If your title deeds do not say how the owners are to take decisions, rule 2 of the Tenement Management Scheme (see Chapter 15) will apply, and the majority of the owners will be able to take a decision. **The majority decision will be binding on all the owners.**

25. If your title deeds allocate expenditure between the various flats, but the total does not add up to 100%, rule 4 of the Tenement Management Scheme will apply and it **will allocate the costs between the flats equally** unless one flat is much larger than the others. This is explained in more detail in Chapter 15.

26. If you need to establish what provisions in title deeds and the Tenement Management Scheme will apply to any particular building, you should read the title deeds in conjunction with the Tenement Management Scheme in order to identify gaps or deficiencies which the Scheme will rectify. In most cases it will be obvious whether the rules of the Scheme are already catered for in the title deeds, but if the title deeds are ambiguous you may need to seek legal assistance.

27. It is possible that title deeds may contain provisions which are very basic but which do work. In these cases, the title deeds will still prevail, but you could amend them. The way to do this is described in the next section.

Changing title deeds

28. You may not be happy with having title deeds which provide for allocation of the costs of repairs on the basis of rateable value or feu duty. You may not want a management regime which involves a mixture of the provisions of title deeds and the provisions of the Tenement Management Scheme. You may want all of the rules of management and maintenance to be set out in one place. Remember that the title provisions will, if the flats have been registered in the Land Register, all be set out in the Land Certificates for the various flats. Remember also that the Tenement Management Scheme is intended to be a basic scheme which provides only the main elements thought to be necessary for the efficient and effective management and maintenance of a tenement. Many title deeds, particularly for more modern blocks, provide a much more comprehensive and sophisticated regime which goes far beyond what is in the Tenement Management Scheme and which is customised to the particular circumstances of the individual building.

29. The alternative to relying on the provisions of the Tenement Management Scheme to supplement incomplete or unworkable title deeds is to amend the title deeds to include new or different arrangements

for management or maintenance. There are now two main ways of doing this. In both cases variation of the title deeds would need to be registered at the Registers of Scotland, since **these are legal processes. It would therefore be highly likely that you would need to employ a solicitor**. You would also need to act together with your co-owners.

30. One way by which owners can amend title deeds is under section 33 of the Title Conditions Act. If, for example, it is difficult to calculate the apportionment of the costs of repairs to a tenement between the owners, a majority of the owners, or (where authorised to do so) the property manager, can take action as follows:

- they can prepare a deed varying the title conditions as desired (no particular form or style is required);
- get the deed signed by the owners of a majority of the flats;
- notify those owners who did not sign (by written notice, with a copy of the executed deed);
- wait for 8 weeks during which those owners who did not sign can raise objections in the Lands Tribunal; and
- register the deed in the property registers.

The deed is then effective against the whole tenement.

31. The alternative to using section 33 would be to change the title provisions by application to the Lands Tribunal. This procedure may be easier to use in large developments, where it may be difficult to assemble a majority.

32. Section 91 of the Title Conditions Act allows the owners of 25% of the flats in a tenement to apply to the Lands Tribunal to vary or discharge a community burden or community burdens which affect all or part of a community. Thus, the owners of 25% of the flats in a tenement can, for example, seek to make it easier to calculate the apportionments of liability for the cost of maintenance or to change the apportionment to equal shares.

33. Once an application has been received, the Lands Tribunal must notify interested parties, which in the case of a tenement means all of the owners who are not applicants. Objections must be made within 21 days in writing.

34. In considering the reasonableness of an application, the Lands Tribunal will consider a series of factors. One of the factors which the Lands Tribunal will consider is how practicable or costly it is to comply with the title condition in its present form. It will also consider the purpose of the condition. If the Lands Tribunal grants an order, this will not take effect until it is registered in the property registers.

Chapter 4 – References to rateable value and feu duty

35. Title deeds sometimes apportion the share of maintenance costs among owners in a tenement in proportion to rateable value or feu duty. This might have been done because the flats are of widely differing sizes and values and it was felt appropriate for the owners of more expensive properties to pay a greater share of the costs.

36. Section 111 of the Local Government Finance Act 1992, replacing the Abolition of Domestic Rates etc (Scotland) Act 1987, froze rateable values as at 1 April 1989 for apportionment purposes. This means that the values of domestic and commercial properties in the same tenement are not out of line with each other as the same baseline is used for apportioning costs for both types of property.

37. It is possible to examine the valuation rolls which are still kept by local authorities. The property registers contain information about feu duty payments.

38. If the tenement burden simply uses the different allocation of feu duty among the flats in the block as a mechanism to set out the different proportions due by each owner it will not matter that the feu duty itself has disappeared.

39. The Keeper of the Register will, when making up a title sheet for a flat at the time of registration in the Land Register for Scotland, enter a statement of the amount of feu duty apportioned to the flat and will state that this is still the case, even after abolition of the feudal system.

40. If owners experience real difficulties in working out shares of costs using rateable values or feu duty, it is open to them to amend their title deed provision using the procedure in sections 33 and 91 of the Title Conditions Act to make the calculation easier (see Chapter 3).

Chapter 5 – Resolution of disputes

41. Most disputes in tenements are about paying for common repairs or maintenance. The Tenements Act does not put in place any mechanism for mediation on this. But it does make it easier for owners to reach decisions, and should therefore reduce the number of disputes. **A majority will be able to take a decision, and that decision will be binding.** One recalcitrant owner will not be able to hold out against a decision. The result should be that more repairs will be completed. But what happens if some owners try to refuse to pay?

Pursuit of payment

42. The likely scenario is that the majority would decide to have a repair done. That decision would be binding on the others. Would they be likely to hold out and force the majority to go to court? They might themselves challenge under section 5 (see below) but they might just do nothing and refuse to pay.

43. The majority would then have to decide what action to take. They could commence court action immediately. Alternatively, they could write to the owners who were refusing to pay or engage a solicitor to send a letter on their behalf. A letter could threaten court action and give a deadline for response. If the matter was to go to court, a summons or initial writ would be served and the recalcitrant owners would be obliged to lodge defences.

Right of minority to appeal (section 5)

44. Although it is reasonable for individual wishes to give way to the majority within a tenement at least in relation to repairs, some sort of protection is available to the minority against a potentially oppressive majority. The Act provides that an individual who did not vote in favour of a decision under the management scheme in operation for a tenement should be entitled to apply to the sheriff for an annulment of that decision. Under section 5, the sheriff can only grant the application if satisfied that the decision is not in the interest of the owners or is unfair to one or more of the owners.

45. Section 6 of the Act provides for application to the sheriff court to resolve legal issues relating to the operation of the management scheme for a particular tenement, for example, whether a scheme decision had been validly made, whether it related to scheme property and who is liable for the cost of repair. The sheriff may grant an order to ensure the proper working of the management scheme.

46. It is important to be clear that the court will only adjudicate on matters that involve a legal dispute. A dispute between the owners as to whether or not certain repair work should be carried out is not itself a legal dispute, any more than a dispute as to what colour the close should be painted is a legal dispute.

Alternative dispute resolution

47. The Scottish Executive's booklet entitled "Resolving Disputes Without Going to Court" gives information and advice on alternative methods of dispute resolution as well as links to other sources of advice and information about mediation and mediation services. The information is available online, via the Scottish Executive's website and it has been distributed to the sheriff courts and to advice organisations such as Citizens Advice Bureaux.

Arbitration

48. Some existing titles already provide for arbitration procedures and parties are free to choose that option if they wish, but this would not always stop the unsuccessful party appealing to the court. Arbitration may be an expensive option, since the arbiter may well charge commercial rates and if the parties are legally represented, the overall cost to them may not be far short of, or indeed may exceed, the cost of an action in the sheriff court.

Chapter 6 – Common interest: obligations in relation to parts of the tenement which provide support and shelter

49. The physical layout of tenement buildings means that each owner is particularly vulnerable to the actions of neighbours and at the same time must accept constraints on their own behaviour in the interests of the tenement as a whole. This is particularly important where the structure of the building is concerned.

50. Because certain parts of a tenement are so fundamental to the soundness of the building, the principle of common interest (not to be confused with common property) has in the past required owners to maintain any part of the tenement in their ownership which was needed for the shelter or support of the building as a whole. An owner also had a corresponding right of common interest in those parts of the building which were not theirs. It was the principle of common interest which obliged the owner of the top flat to maintain the roof to provide shelter for the rest of the building (if the title deeds did not make any other arrangement). The Tenements Act replaces the doctrine of common interest with a statutory re-statement of the rules.

51. The need to enforce the common interest obligation to maintain one's property where it is necessary for the support and shelter of the building is likely to be less common in the light of the various provisions in the Act. With majority voting becoming the norm, repairs should be carried out more easily and more often than under the previous law. A repair that is necessary to maintain the support or shelter offered by part of a tenement building is likely to receive the support of the majority of owners in most circumstances.

52. The positive obligation to maintain support and shelter has, however, been retained (section 8 of the Act) for two reasons. First, the rule will help if an owner has difficulty in persuading a majority of co-owners to carry out a repair. Secondly, some parts of the building are the responsibility of individual owners. It is possible that they could fall into disrepair. The positive obligation to maintain has been retained to ensure such neglect does not occur. It would be enforceable by any other owner who would be directly affected.

53. Sometimes the building will be so dilapidated that it is not worth repairing. Section 8 provides that an owner should not be bound by the positive obligation to maintain if to do so would be unreasonable having regard in particular to the age and condition of the tenement and the likely cost of the work.

54. Section 9 deals with the negative obligation to refrain from any alterations or work which might interfere with the support and shelter of the building. Where there is a genuine risk to the building, owners should be entitled to prevent works taking place. This negative obligation applies to the whole building and not merely those parts of it which currently provide support and shelter. An example might be if the owner of the top floor flat wants to add an additional storey by building into the roof space. The other owners should have the ability to prevent this, if it would greatly increase the structural pressure on the rest of the building.

55. At common law the doctrine of common interest has also applied to matters other than support and shelter and to areas outside the building. The garden or other land must not be built upon in such a way as to interfere with the natural light reaching the building. The prohibition is confined to light and does not apply to building which merely harms the prospect of a particular property or its general amenity. This rule is restated in the Act.

56. These negative obligations will be enforceable by any owner of part of the tenement which would be directly affected. Enforcement rights will be enforceable against occupiers as well as owners. While the implementation of the positive duty to maintain could require considerable expense and it would therefore be unfair to allow that to be enforceable against occupiers such as tenants, the negative obligation on the other hand does not require action and is not likely to incur expense. This mechanism will restrict tenants in relation to the use they make of the property, without the landlord having to resort to enforcement of the terms of the lease.

57. Section 10 provides that the cost of a repair which is carried out to scheme property as a result of the positive obligation to maintain, could be recovered from the other owners as if the repair had taken place as part of a management scheme decision. There might otherwise be a danger that, where part of scheme property is owned solely by one owner, a scheme decision to carry out repairs could be blocked on the basis that the other owners might try to enforce the positive obligation to maintain which would relieve them of any maintenance costs.

58. This rule would apply not only where the positive duty to maintain has been enforced, but also where the owner has carried out the repairs on their own initiative. An owner's right to recover costs from works they alone instigated is, however, subject to the test of whether this is reasonable given the age and condition of the tenement and the likely cost of the maintenance.

Chapter 7 – What happens when one of the flats is sold in the middle of repairs

59. There is a high turnover of owners in tenement flats and problems sometimes arise over the apportionment of costs when a property is sold. In addition, co-owners might not be aware of changes in ownership or might not have a forwarding address. Under the previous law, the incoming owner might not have been liable to pay a proportion of the cost. The cost would then have fallen in practice to the other owners to share among themselves. The prospect of one or more owners within a tenement putting their flats on the market might therefore have delayed or frustrated repair work going ahead if the other owners could not be sure of receiving the share of the costs for the sold flat.

60. Section 12 of the Tenements Act provides a general rule that **an incoming owner will be severally liable with the seller of a flat** for the share of any costs allocated to the relevant flat by the management scheme in operation for the building. This means that both the seller and the buyer are liable for the full amount, so that the other owners in the building can choose which to approach for the money. But the new owner has a right of relief against the seller and so can pursue them for the money.

61. Section 12 also provides, however, that an incoming owner will only be liable for the cost of maintenance or other work which has been carried out prior to the date on which the new owner becomes the owner of the flat (normally the date of settlement) if a notice of potential liability for costs has been registered in the property registers. This draws a distinction between work which has yet to be done (where the incoming owner would be liable) and work which has been done (where the incoming owner would only be liable if a notice had been registered). The notice procedure will not apply to work carried out by a local authority under a statutory notice since there are other means for finding out whether such a statutory notice exists.

62. The notice will (a) protect the other owners in the tenement because, where a notice is registered, liability will transmit to an incoming owner (though that person will still have a right of relief against the seller) and (b) warn an incoming owner about an outstanding liability. In practice, if a notice has been registered, a purchasing solicitor will undoubtedly want to see proof that the debt has been paid or the appropriate sum will be retained from the purchase price.

63. If there is no notice, then liability for work already carried out does not transmit to the incoming owner and the other owners will have to bear the extra cost of the relevant share if they cannot, for whatever reason, get the money out of the seller.

64. The notice will have to be registered on or before a date 14 days prior to the new owner becoming the owner. The 14 day period will mean that a final search made by the agent acting for an incoming owner immediately before settlement will show up any notice which has been registered in the appropriate timescale. If it has not been registered 14 days before settlement, then the new owner will not be liable.

65. Any owner within a tenement (or the property manager if there is one) may register a notice of potential liability for costs. A notice may be registered in relation to one or several flats or in relation to the same or different maintenance or work. Notices will expire three years after the date of registration in the property registers, but it will be possible to renew a notice by registering it again before the expiry date.

Completing the forms

66. The main reason for employing professional assistance would be because the owners do not feel confident enough to complete the section 12 notice and send it for registration. An application form also needs to be completed for the purposes of registration in the appropriate property register at the Registers of Scotland. But the notice and the form can be completed by a lay person.

67. The property must be described in a way that is sufficient for the staff at the property registers at the Registers of Scotland to identify it. All that is required to describe property which is registered in the Land Register of Scotland is the title number, for example GLA 12345 – this will appear on the front cover of the Land Certificate.

68. Property registered in the Register of Sasines is usually described by reference to the breakaway deed which first dealt with that particular unit and its date of recording in the appropriate Division of the General Register of Sasines, for example for the County of Lanark. This may sound complex but in fact it can be copied from the description in the owner's own title deed. So, for example, this is a valid (if imaginary) Sasine description: the eastmost house on the second floor above the ground floor of the tenement 1 High Street, Auchtermuchty, described in a Disposition in favour of John Smith, recorded in the Division of the General Register of Sasines for the County of Fife on 29th November 1911.

69. The relevant description would simply be inserted in the appropriate section of the notice (the style of which is in Schedule (1A) of the Act) along with a description of the maintenance or work in general terms. The name and address of the person applying for registration of the notice or the name and address of their agent must also be added. The notice must be signed on or behalf of the applicant.

70. If a deed or application is submitted to the Keeper of the Registers of Scotland in a form which makes it unacceptable for registration to proceed, the Keeper's staff will inform the applicant of what requires to be amended or what additional information is required – there is no extra fee. The Customer Service Centres of the Registers of Scotland can be contacted in person, in writing, by telephone, fax or email for advice. See below for contact details:

Erskine House
68 Queen Street
Edinburgh
EH2 4NF
Tel. 0845 607 0161
Fax. 0131 200 3932
Email. customer.services@ros.gov.uk

9 George Square
Glasgow
G2 1DY
Tel. 0845 607 0164
Fax. 0141 306 4424
Email. customer.services@ros.gov.uk

Textphone users can contact Registers of Scotland on 0845 607 0168.

Chapter 8 – Contacting absentee owners

71. Sometimes an owner is absent and the other owners are not able to make contact to arrange for maintenance or the payment of costs.

72. The identity of an owner can be determined by enquiries at the Registers of Scotland, but there may be no address other than the flat. To some extent the problem will be solved by the Anti-Social Behaviour Act 2004 which contains a provision for a register of landlords to be maintained by local authorities. This will be a public register and the other owners will therefore be able to obtain an address for a missing owner who is letting out their flat. The suitability of the landlord will also be assessed by the local authority.

73. Under the proposals of the Anti-Social Behaviour Act, a landlord would require to:

- provide a list of properties let by them with details of their addresses;
- provide details of any agents involved in managing those properties; and
- notify any changes as they occur.

74. The aggregated list of registered landlords and agents, contact addresses and properties will form the public register.

Chapter 9 – Access for repairs, etc and installation of service pipes

Access for repairs, etc

75. A distinctive feature of tenements is that they have a good deal of common property – the common close and the stair and so on. This chapter is about new powers to enable owners to install new services through common property and to get access to other owners' property for certain specified purposes.

76. Section 17 of the Tenements Act introduces a statutory right of access to parts of a tenement that are individually owned. Access must be for one of eight reasons, and it must be reasonable to require access. Access can be refused if it is reasonable to refuse it – for example if the timing is inconvenient or inappropriate. Reasonable notice would be required before access is permitted, except in cases of emergency.

77. Access can be gained for one of the following reasons:

- to carry out maintenance or other work by virtue of a management scheme;
- to carry out repairs to the flat of the person requiring access;
- to ensure that any part of the tenement building which provides or is intended to provide support and shelter to the building is being maintained;
- to ensure that there is no infringement of the duty to refrain from causing material damage to any part of the building which provides support and shelter, or to ensure that there is no infringement of the duty not to diminish the natural light enjoyed by the building;
- to calculate the floor space of an individual's flat;
- to carry out an inspection to determine whether maintenance is necessary;
- to install service pipes etc; or
- to do anything necessary under a power of sale which has been granted in relation to the sale of an abandoned tenement building or its site.

Installation of service pipes

78. Section 19 is about the installation of new services in tenements. There is legislation in place already to cover some services – for example electricity. It is intended to introduce similar powers to cover other services. Section 19 gives Scottish Ministers the power to prescribe services which may be installed in tenements and to prescribe the procedures which will have to be followed.

Chapter 10 – Insurance

79. Section 18(1) of the Tenements Act requires each owner of a tenement flat to insure their flat for the reinstatement value of the flat. Each owner will be entitled to inspect the policy of their neighbours and ask for proof that their premiums were up-to-date. **It will be compulsory for tenement flats to be insured.**

80. The Act does not require that owners take out a policy of common insurance because if the owner of one property did not pay their insurance, the whole policy might fail. This means that an individual owner who had paid up their share of the common policy would be in a worse position than if he had just paid up the premiums on a single policy to cover their own flat.

81. There is, however, nothing to stop owners from having a common policy of insurance arranged for the entire tenement building, or from having a combination of individual and common policies. Some title deeds require the owners to put in place a common policy.

82. The list of risks which are to be insured against is to be prescribed by Scottish Ministers.

Chapter 11 – Property managers and factors

83. The aim of the Tenements Act is to encourage owners to establish effective arrangements for managing communal repairs and maintenance. Both the Tenements Act and the Title Conditions Act facilitate common factoring by making it easier for owners to appoint – or dismiss – a factor. It will be possible for a majority of owners to do this where their title deeds are silent on the appointment and dismissal of a property manager.

84. If the majority of owners in a tenement wish to engage a factor, the minority who voted against will nevertheless be obliged to pay their shares of the fees. The increased ease of appointing or changing a property manager will mean that more owners will be able to employ a factor and more tenements will enjoy the benefits of common factoring by one factor who can act on behalf of all the owners.

85. There is no obligation on owners to appoint a property manager. In some tenements, owners will prefer to do the factoring themselves.

Chapter 12 – Owners' associations

86. A section 104 order will be brought forward at Westminster in consequence of the Tenements Act which will require owners' associations to be established in new and existing developments of **12 or more flats.**

Chapter 13 – Registration and title deeds

Land registration and land certificates

87. There are two property registers in Scotland. The Register of Sasines, which has been in operation since 1617, is a register of deeds. The old register is being gradually replaced by the computerised and plan-based Land Register of Scotland. As properties are sold, their record is moved from the Sasine to the Land Register.

88. When a property is registered on the Land Register, the staff of the Registers map the property on to the Ordnance Survey plan and conduct a thorough examination of the legal title. At the end of the process, if they are satisfied that the application and its accompanying documentation are in order, they will issue a fully indemnified Land Certificate. This means that the Keeper of the Registers will guarantee the title to the property and will pay the costs of anyone who can prove that they have suffered loss as a result of any error or omission in the Land Certificate.

89. A Land Certificate is a copy of the title sheet for a property and contains:

- a title plan of the property based on the Ordnance Survey;
- a Property Section, giving a description of the property and the rights which benefit the property, such as a right to use the back green or the right to enforce a burden on a neighbouring property;
- a Proprietorship Section, showing details of the owner(s) of the property;
- a Charges Section, showing details of any mortgage or other financial charge on the property; and
- a Burdens Section, listing all of the burdens and conditions affecting the property (these may include obligations of maintenance and repair and restrictions on use).

90. It is therefore much easier to find out what rights, burdens and conditions attach to a property when the property has been registered in the Land Register.

Title deeds

91. Throughout this guidance, much reference is made to the title deeds of a tenement. For the avoidance of doubt, and for the purposes of clarity, any reference in this guidance to the title deeds of a flat or a tenement also means and includes a reference to the title sheet on the Land Register for the individual flat or for the flats within a tenement.

92. All tenement flats will have title deeds. Where title to the property is registered in the Sasine Register, the title deeds will typically include the deed which conveyed the ground on which the tenement is built (since it may contain conditions about the type of building to be erected on the plot). The rights, burdens and conditions affecting the individual flats in the tenement will either be contained in the "breakaway" deed (usually a Disposition, sometimes called the "foundation writ") which first conveyed the flat as a separate and unique unit, or in a Deed of Conditions (if there is one). Deeds of Conditions are particularly common in the West of Scotland. It is irrelevant where the burdens are set out, though it is undoubtedly easier to be certain that the burdens apply equally to all the flats in a tenement if they are set out in a Deed of Conditions and the breakaway deed for each flat simply refers to that Deed. Otherwise it is necessary to check all of the breakaway deeds to find out whether all of the flats are equally liable for roof repairs for example.

93. Title to the property will be registered in the Land Register. In this case the burdens and conditions affecting a tenement flat will be set out in the Burdens Section of the relevant title sheet.

Chapter 14 – Demolition and abandonment of tenement buildings

94. Sections 20 to 23 of the Tenements Act restate and reform common law rules on the demolition and abandonment of tenement buildings. As the main thrust of this guidance is to assist readers who are interested in repairing and renovating tenement buildings rather than demolishing them, no detail is included on the provisions on demolition and abandonment. These provisions are explained in detail in the Explanatory Notes on the Act prepared by the Scottish Executive and available from the Stationery Office.

Chapter 15 – The Tenement Management Scheme

95. This chapter gives details of the rules of the Tenement Management Scheme.

Rule 1 – Scope and interpretation

96. The Tenement Management Scheme outlines procedures for the management and maintenance of "scheme property". 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. Those parts are scheme property, which means that decisions on their repair and maintenance can be taken collectively. 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.

97. 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. Rule 1.2(b) includes any other part of the tenement which 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.

98. Scheme property will vary from one tenement to another, and should be assessed in the context of an individual tenement.

99. Certain parts of a tenement which would otherwise fall within rule 1.2(c) are excepted from that rule and will only be scheme property if they qualify under rule 1.2(a) or 1.2(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.

100. 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.

101. Rule 1.5 gives some other definitions, including that of "maintenance". Obviously maintenance includes repairs and can include rebuilding and replacing. Alteration or demolition is not included in the definition nor is improvement, unless it is incidental to the maintenance. An improvement which involves modernising an existing feature using up to date materials and technology is permissible. For significant improvements which are not incidental to maintenance and repair, the common law will still apply and the unanimous agreement of the owners will be required. If the scheme property is individually owned the proprietor is free to carry out the improvement, but at their own expense.

Rule 2 – Procedure for making decisions

102. 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". A decision made by the owners in accordance with the title provisions will also be a scheme decision (rule 1.4(b)). But section 4(4) of the Act provides that if the title deeds contain procedures for taking decisions, and the same procedures apply to each flat, these procedures will prevail.

103. 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 cost of maintenance to that part of the tenement. In other words, only those who are liable for the maintenance of a part (under the title deeds or under rule 4) will have a vote on the maintenance of that part. This applies where the title deeds impose an obligation to pay for a share of the cost of maintenance as well as where the obligation is expressed simply as an obligation to maintain.

104. If two or more people own a flat, 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 counted for that flat unless it is cast by an owner or owners who own more than a half share of the flat.

105. Scheme decisions are to be reached by simple majority of the votes allocated (not the votes cast) (rule 2.5), even if there are only three flats.

106. If the intention is to convene a meeting to make a scheme decision, under rule 2.6 all owners must be given at least 48 hours' notice of the meeting where the scheme decision is to be made. 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.

107. 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 given to all owners who were not present when the decision was made, by a person nominated at the meeting. 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 explains ways in which written notices can be sent if there is no provision in the title deeds saying how this is to be done.

108. Once a scheme decision has been made it is binding on all the owners and if the flat changes hands it is binding on any incoming owner as well, under rule 8.2. This applies irrespective of whether the scheme decision is made under the title deeds or under the Tenement Management Scheme. Where the scheme decision is made under the provisions in the title deeds rather than under the Tenement Management Scheme, then section 30 of the Title Conditions Act applies to this effect. Section 5(10) of the Tenements Act 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.

109. Rule 2.10 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. 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.

110. 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 sent within 21 days after the date of the meeting. In any other case notice of the annulment must be sent within 21 days of receiving notification of the relevant decision.

Rule 3 – Matters on which scheme decisions may be made

111. Rule 3 applies to the extent that its provisions are not already provided for in the title deeds, but scheme decisions made under rule 3 are restricted to those subjects listed in rule 3.1. A decision made under provision in the title deeds is also a scheme decision (rule 1.4).

112. Rule 3.1 gives a list of the subjects on which scheme decisions can be made even if the title deeds make no provision for decision making. 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, including the power to decide to instruct and carry out maintenance (rule 3.1(d)).

113. Under rule 3.1 decisions can also be made to arrange for a common insurance policy for the tenement, to install a system enabling entry to the tenement to be controlled from each flat, to authorise any maintenance of scheme property already carried out by an owner or a manager, to determine that an owner is not required to pay a share and to modify or revoke any scheme decision.

114. 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 permits them to instruct or carry out the maintenance and to appoint a manager to manage the carrying out of the work. Each owner may, subject to rule 3.3, be required to deposit money in advance by a date which the owners decide. This will be no more than the owner's apportioned share of a reasonable estimate of the costs of the maintenance.

115. Rule 3.3 deals with certain decisions made under rule 3.2(c) which require owners to deposit a sum of money. Rules 3.3 and 3.4 in effect create a two-tier arrangement which will allow owners to hand over small sums of money without the safeguards found in rule 3.4 applying. If the sum of money required to be deposited is less than £100, then the safeguards will not apply. Rule 3.3(b), however, contains a £200 limit 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 where a small sum – perhaps only required to be deposited 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. This would result in unnecessary complications for the owners. Any sums which have already been placed in a maintenance account are therefore excluded from the £200 threshold.

116. Rule 3.4 deals with procedures where scheme decisions made under rule 3.2(c) require the deposit of sums exceeding the limits in rule 3.3. 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 is supplementary to the provisions of rule 3.3. It 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.

117. Rule 3.4(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 owners will be able to request repayment if the work does not commence within 28 days of the proposed date of commencement.

118. Rule 3.5 will prevent abuse of rule 3.1(g). 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(g). This rule is intended to excuse from payment those who are genuinely unable to meet the financial demand.

Rule 4 – Scheme costs: liability and apportionment

119. Rule 4 explains who is to pay for scheme costs where the title deeds do not provide that the entire liability for those costs is to be met by one or more of the owners. "Scheme costs" are listed in rule 4.1. Once again, the provisions of rule 4 will only apply to the extent that the title deeds do not make alternative provision.

120. The costs specified in rule 4.1 will be considered to be scheme costs whether they arise under title provisions or under the relevant rule of the Tenement Management Scheme. Rule 4 will apply to these costs if the title deeds do not make provision for liability and apportionment.

121. Rules 4.2 and 4.3 set out liability for the maintenance of and running costs related to scheme property. If part of a tenement which is having work done to it is classified as scheme property because it is the common property of the owners of two or more flats, then the maintenance costs are shared among the owners of those flats in proportion to their ownership in the property (rule 4.2(a)).

122. The cost of maintaining other scheme property is shared equally among the owners, 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)).

123. In the absence of title provision, rule 4.3 provides that all of the owners in a tenement are liable for the upkeep of the whole roof including the part over the common close. This is to make the calculation of apportionment of the cost of roof repairs easier where the default rules apply. 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. The owners of the other flats, however, will own the roof over the close in common by virtue of section 2(5) and section 3(1)(a). 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 – ie all owners are liable for the whole roof.

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

125. Rule 4.5 makes it clear that any other costs relating to the remuneration of a 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 or 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

126. Rule 5 applies if there is no equivalent title provision and deals with the situation where an owner is unable to pay their share of the costs perhaps because they are 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 just to allege that an owner cannot be contacted and it is therefore not possible to get their share of costs. An effort must be made to identify and locate them, and that effort must be a reasonable one.

127. The defaulting owner's share of the costs would have to be allocated between the other owners and paid by them. The "other owners" would only be the owners who were together responsible for the rest of the 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.

128. 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

129. Rule 6 also applies if there is no equivalent provision in the title deeds. A decision made by the owners of tenement flats will not be invalidated by a procedural mistake which occurred when it was being taken. The irregularities meant here are minor procedural ones. This rule is not intended to excuse a fundamental mistake such as failing to achieve a majority where required by rule 2.5. Unless the title deeds themselves make a specific provision on procedural matters, rule 6.1 and section 4(8) ensure that this principle will cover any decision made in respect of the tenement, whether the irregularity occurred in a decision made under the Tenement Management Scheme or under provisions set out in the title deeds.

130. At times there may be a procedural error in the making of a scheme decision. When an owner has been directly affected by the procedural irregularity and was not aware that costs were being incurred as a result of that decision or, when they became aware, they objected immediately, rule 6.2 provides that they are not liable for those costs.

Rule 7 – Emergency work

131. Title deeds may make provision for owners to undertake emergency work in specified circumstances. If they do not, rule 7.1 provides that an owner will be able to carry out emergency work.

132. The definition of an "emergency" in rule 7.3 is not so narrow that swift action to avoid damage to the tenement would be prevented. On the other hand it is not too wide: it will prevent owners from attempting to carry out normal repairs under the auspices of emergency work, if they fail to achieve majority support for them.

133. Health and safety – in relation to both the occupiers of the tenement and the public at large – is included in the definition of an emergency. This is so that the definition does not concentrate merely on the effect that deterioration could have on the building itself, without contemplating risks to the public or occupiers, for example in connection with loose roof tiles.

134. The word "work" is deliberately used instead of "repairs" because some work will not fall under the category of repairs.

135. An "emergency" for the purposes of this rule will arise only where the work is so urgently necessary that it cannot wait the few hours required for consultation with other owners for a scheme decision to be taken. Few repairs are likely to be as urgent as this.

136. The cost of emergency work will be recoverable from the other owners as if it had been carried out as the result of a scheme decision (rule 7.2). Without a genuine emergency the person carrying out the work would be unable to recover the cost. This might sometimes lead to harsh results, and so the owners will have the option of making a scheme decision ratifying the works after the emergency work has been carried out.

Rule 8 – Enforcement

137. Where any rule of the Tenement Management Scheme applies in a tenement, it will be binding on all owners (rule 8.1). Any scheme decisions made under the scheme are binding on all the owners and their successors under rule 8.2. An obligation imposed on an owner by the Tenement Management Scheme or arising from a scheme decision is enforceable against the owner by any other owner (rule 8.3). A third party could be authorised by an owner or owners to act on their behalf and in doing so could bring any action or claim in their own name (rule 8.4).

Rule 9 – Giving of notice

138. Under the Tenement Management Scheme it would not always be mandatory for notice to be given in writing. Notice could be given by telephone or by knocking on doors. In certain circumstances, however, written notification is clearly advisable especially in cases of substantial expenditure. Under the Scheme, dates can be important. The 28-day period for appeals to the sheriff runs from either the date of the decision or the date of notification.

139. The ways in which notice may be given to an owner in writing 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 the 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 the Title Conditions Act.

140. If notice is given in writing, rule 9.2 stipulates that it could be given in one of three forms:

- by delivering the notice to the owner's flat;
- by posting the notice to the flat or any other address that the owner is known to have; or
- by sending it via electronic mail.

141. 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.

142. 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.

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