



Tenements (Scotland) Act 2004

The Tenements (Scotland) Act 2004 received Royal Assent on 22 October 2004 and came into force, along with the Title Conditions (Scotland) Act 2003 and certain remaining provisions of the Abolition of Feudal Tenure etc (Scotland) Act 2000 on 28 November 2004.

The statutory rules replaced the common law of the tenement. The common law was seen as unsatisfactory in a number of respects. It was sometimes uncertain. It was sometimes unfair, particularly on the owner of the top floor flat who, under the common law, had sole liability for the roof. In addition it made no provision for management and inadequate provision for maintenance.

The new rules

The Tenements (Scotland) Act seeks to solve these problems. In principle the new law, like the old, is a default law. The default status means that if the titles provide for every matter which the Act provides for, the Act does not apply. But since the Act makes much fuller provision than the common law, it will be unusual for the Act not to apply at least to some extent. In addition, a few provisions of the Act - for example in relation to insurance, or access for repairs - are not default rules and apply whatever the titles may or may not say.

Ownership

The Act simply reproduces the existing law of ownership as to redistribute ownership would fall foul of Human Rights legislation. 'Tenement' is used in the same sense as in the common law, ie to refer to any building where ownership is divided horizontally. The new law applies to commercial and residential properties and to mixed use properties alike. The Act applies to tenements new and old. Thus tenements already in existence on 28 November 2004 will immediately be subject to the new law. And all tenements created after that date will, equally, be affected.

The Act sets out the boundaries of each 'flat' or property within the tenement as follows: -

- the boundary between two adjacent flats is the mid-point of the wall which separates them;
- the boundary between a flat and the close is, likewise, the mid-point of the wall; and
- the boundary between a lower and an upper flat is the mid-point of the joists.

Each owner has exclusive rights to his or her own side of the boundary feature. However, a door or window which serves one flat only - for example the door into a flat from the close - is the sole property of the owner of that flat.

There are special rules for the highest and the lowest flat, and for the close, namely:-

- A top flat extends to and includes the roof over that flat;
- A bottom flat extends to and includes the solum under that flat; and
- A close extends to and includes the roof over, and the solum under, the close.

Maintenance and Management

By far the most important effect of the Act is to introduce a default management scheme - the **Tenement Management Scheme** ('TMS') - which will apply to all tenements, new and old. The governing principle is majority rule. The owners of a majority of flats can decide to carry out common repairs, to require that the cost be paid in advance, to install an entry-phone system, to take out a policy of common insurance, and so on. Generally the costs are divided on an equal basis, but if the floor area of one of the flats is more than one and a half times that of any other, costs are divided on the basis of floor area. But these are all default rules only and give way to contrary provision in the titles.

Not all parts of the tenement are subject to the TMS. The TMS applies only to 'scheme property', as defined in the Act. In terms of the TMS all scheme property is commonly maintained.

Certain strategic parts of the tenement are those parts which are to be maintained by everyone on an equitable basis whether they are common property or not. They are listed in the Act as follows:

- the foundations
- the solum
- the external walls (but not chimney flues or windows and doors serving one flat only)
- the roof (including supporting structures but excluding chimney stacks, and skylights etc serving one flat only)
- any mutual gable wall to any adjoining building, to the mid-point only
- any wall, beam or column that is load-bearing.

The Act makes provision for the making of 'scheme decisions' in relation to scheme property to allow for matters such as maintenance to be carried out to scheme property, a common insurance policy to be put in place or the appointment of a manager to oversee matters. Decisions are in the main taken on a majority basis but there are safeguards built in allowing appeals to the Sheriff by disaffected owners against a scheme decision in certain circumstances.

The overall effect is to make sure that, however lacking the titles, all tenements will be a subject to a full set of rules in respect of management and maintenance.

Other matters covered by the Act include:

- a right of access over other flats in order to carry out repairs and for certain other purposes
- an obligation on all owners to insure for reinstatement value
- shared liability for the cost of demolition
- where a tenement is demolished or abandoned, any owner can have the site sold and the proceeds divided (equally or by floor area)
- the apportionment of liability for repairs between incoming and outgoing owners.

For more information contact deborah.lovell@andersonstrathern.co.uk or call Deborah on 0131 625 7249