

TENEMENTS (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

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

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).