

# TENEMENTS (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Repairs: Costs and Access*

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

60. *Section 11* is intended to ensure that there is a set of rules which will determine when liability for certain costs (“relevant costs”) arises, and that these rules will apply irrespective of whether the liability for that expenditure arises under the burdens in the title deeds, rule 4 of the Tenement Management Scheme or under the general provisions of the Act itself.
61. *Subsection (1)* makes it clear that an owner is liable for any relevant costs arising from a scheme decision from the date on which the scheme decision is made. *Subsection (5)* makes alternative provision for accumulating relevant costs. “Relevant costs” is defined in *subsection (9)*. It is wider than scheme costs. This is necessary because relevant costs for which an owner is liable by virtue of the management scheme in force for a particular tenement may not be restricted to “scheme costs”. Rule 4 of the Tenement Management Scheme applies only to “scheme costs”. But where the management scheme in operation for a particular tenement is wholly or partly made up of burdens contained in the title deeds, it may go much further than the Tenement Management Scheme. Where burdens do so, then the liability imposed would not come within the scope of “scheme costs”. The reference to “relevant costs” ensures that *section 11* provides one set of rules to determine when liability for costs arises, whether this arises under the Tenement Management Scheme, the burdens in title deeds or a combination of both.
62. *Subsection (2)* determines when a scheme decision is taken to be made in order to determine when an owner’s liability for certain costs arises. Under paragraph (a), this could be where the decision is taken at a meeting. It could happen that two people own a flat, but only one attends the meeting. It is preferable that liability for both arises on the same day, and even where a decision is taken by a majority at a meeting, the non-attending owners should be liable from that date even if they did not attend. Under paragraph (b), liability will arise in any other case on the date on which notice of the making of the decision is given to the owner. The decision could have been made by means of one owner going round the doors seeking the consent of enough owners to comprise a majority of the flats.
63. The rule in *subsection (3)* provides that an owner becomes liable for any relevant costs arising from emergency work from the date on which the work is instructed. *Subsection (4)* covers relevant costs which are recoverable by a local authority as a result of a statutory notice requiring the carrying out of the work to which those costs relate and liability will arise from the date of the notice. *Subsection (5)* does not deal with situations when liability arises under the statutory notice in a question with a local authority and deals only with “relevant costs” and therefore liability in questions arising under the management scheme for the tenement. *Subsection (5)* makes it clear that

liability for any accumulating relevant costs such as the cost of an insurance premium will arise on a daily basis.

64. Under *subsection (6)*, an owner is liable for any relevant costs arising from work instructed by a manager from the date on which the work is instructed. Again this does not determine the date of liability in questions with the manager, which may for example arise in a question of contract law rather than under the management scheme. *Subsection (1)* relates to work (or other costs) arising from a scheme decision. These are not mutually exclusive. A scheme decision might quite often be taken to carry out works and then a manager is given the task of instructing the work. Where both apply, the rule on determining the date of liability in *section 11(1)* will prevail.
65. *Subsection (7)* provides that where an owner is liable under *section 10* for any relevant costs arising from maintenance carried out by virtue of *section 8*, liability arises on the date on which the maintenance is completed.
66. *Subsection (8)* is a catch all provision to cover all relevant costs which fall within the scope of *section 11* but for which there is no specific rule provided. It is an equivalent provision to that in section 10(4)(b) of the Title Conditions Act for those cases where the cost arises from an obligation set out in burdens in title deeds. *Subsection (9)* explains that “relevant costs” means a share of any costs for which an owner is liable by virtue of the management scheme in operation for the particular tenement (under the burdens in the title deeds, the Tenement Management Scheme or a combination of both), but not under the development management scheme if that has been adopted by the owners. Relevant costs also cover costs which arise because of the Act itself.

### ***Section 12 – Liability of owner and successors for certain costs***

67. This section deals with the apportionment of liability for repair and other costs when a flat is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a flat. *Subsection (1)* provides that an owner will remain liable for relevant costs after the property has been sold. This restates in statutory form the principle of the existing law by which liability which has crystallised cannot be avoided by disposing of the property. Relevant costs could arise by virtue of any tenement burden, the Tenement Management Scheme or under a provision of the Act.
68. *Subsection (2)* deals with the liability of an incoming or “new” owner of a flat. A new owner is severally liable with the outgoing owner. If there are two or more new owners, both or all are bound. This is, however, subject to the provisions of *subsection (3)* which provides that an incoming owner will be liable for the cost of maintenance which has been carried out prior to the date on which the new owner becomes the owner of the flat only if a notice of potential liability for costs in a form prescribed in schedule 2 has been registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner). Liability for the cost of completed maintenance where no notice has been registered is thus excluded. In other words, if no notice is registered, the purchaser is not liable. Where a notice is registered, then a new owner would be liable for the full amount of the maintenance costs in respect of the work described in the notice. This notice procedure does not apply to work carried out as a result of a statutory notice imposed by a local authority. Such notices will have effect for three years and will only bite against the new owner if they have not expired before the acquisition date.
69. *Subsection (4)* defines “acquisition date” and “local authority work”. The phrase “acquisition date” is tied to the date on which the purchaser acquires right to the flat. This wording has been generally used in recent legislation and is used in connection with the definition of owner in *section 28* of the Act. In the case of a typical purchase, a person has right to a flat once that person has received a disposition or another form of conveyance of the flat – this will be delivered along with the keys in return for payment of the purchase price. In other words, the date of acquisition is the date on which the person becomes owner.

70. Where the new owner pays any relevant costs, under *subsection (5)* they may recover the amount paid from the former owner, if the former owner is liable.
71. *Subsection (6)* is a transitional provision, explaining that *section 12* will apply in relation to any relevant costs that the owner becomes liable for on or after the day on which the section came into force (28 November 2004).

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

72. *Section 13(1)* sets out who may register a notice of potential liability for costs which must be signed by or on behalf of the applicant. *Subsection (2)* makes it clear that a notice may be registered in relation to more than one flat or in relation to more than one piece of work. A notice will expire after three years under *subsection (3)* to remove the need for a discharge, though it may be renewed. Under *subsection (4)*, the rules in *section 13* apply to a renewed notice of potential liability as they apply to any other such notice.
73. *Subsection (5)* provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for costs is accurate and *subsection (7)* makes it clear that there will be no entitlement to be indemnified by the Keeper for any loss which arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered under the Tenements Act or the Title Conditions Act.

### ***Section 14 – Former owner’s right to recover costs***

74. This section will allow the former owners of flats in a tenement to recover certain costs owed to them under provisions of the Act or rules of the Tenement Management Scheme.
75. Rule 8.3 of the Tenement Management Scheme enables “any owner” to enforce any obligation arising from a scheme decision. This may include cases where the obligation is an obligation to contribute towards payment and an owner seeks to recover shares of a scheme cost from the other owners. A former owner may still be seeking to recover sums due arising from the operation of the following: rule 4, which deals with liability and apportionment of scheme costs, rule 5, dealing with special cases of scheme costs, and rule 7, concerned with emergency work. In such cases, an owner will be able to recover any money owed to him or her even if he or she has ceased to be an owner of a flat.
76. Under *section 10* of the Act an owner is entitled to recover a share of the cost of maintenance carried out by virtue of *section 8* as if the maintenance had been carried out by virtue of the management scheme in question. Without the provisions of *section 14*, *section 10* would limit the right of recovery to a current owner and so a former owner would lose out. Similarly an owner would lose his right to recovery when selling his flat under *section 17(9)* which allows an owner to instruct works and recover the costs of them, where there has been a failure to reinstate his property to or through which access has been taken. This does not seem fair and *section 14* therefore provides that a former owner should also be able to recover those costs.
77. This section only deals with costs arising under the Tenement Management Scheme or the Act and not under burdens in title deeds as section 8(2)(c) of the Title Conditions Act already makes provision for these cases.

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

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

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

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

***Section 17 – Access for maintenance purposes***

80. *Section 17* introduces a right of access to parts of a tenement that are individually owned, provided that access is required for one of eight reasons. When a flat is owned in common, any of the owners may exercise the right of access under *section 28(5)*. In tenements governed by the development management scheme, *subsection (2)* provides that the right of access may also be exercised on behalf of the owners' association. If necessary the right may be enforced under *section 6* by application to the sheriff court.
81. *Subsection (1)* and *subsection (5)* qualify the right of access by reference to a reasonableness test. *Subsection (1)* sets out that reasonable notice has to be given to the owner or occupier of part of the tenement, when access to or through that part is required. An owner or an occupier may refuse to allow access or access at a particular time under *subsection (5)* if it is reasonable to refuse access at that time or if, in all the circumstances, it is reasonable to refuse access at any time.
82. *Subsection (3)* lists the reasons for which access may be granted. The list is exhaustive. Paragraphs (a) and (b) state that access may be granted for the carrying out of maintenance or other work. This may be maintenance that is required as a result of the management scheme which applies to the tenement (paragraph (a)). "Other work" is included because the management scheme may make provision for arranging improvements. Under paragraph (b) access may be required to carry out maintenance to any part of the tenement which is owned (wholly or in part) by the person requiring access.
83. Paragraph (c) allows access for an inspection to determine whether it is necessary to carry out maintenance, while paragraph (d) and (e) respectively state that access should be given where an owner is seeking to determine whether another owner is fulfilling their duty to maintain support and shelter or complying with the prohibition not to interfere with the support and shelter of the building. Paragraph (f) makes it clear that an owner will be able to access another owner's flat for the purpose of installing services by virtue of *section 19*.
84. If the floor area of part of the tenement has to be measured for the purposes of determining the liability of the owners, then paragraph (g) allows access. Paragraph (h) provides a right of access in connection with the exercise of the power of sale set out in schedule 2 of the Act. This is to avoid the situation where the sale of an abandoned tenement may be frustrated because of a lack of access and the building may then become blighted.
85. In terms of *subsection (4)* where maintenance work is urgent then reasonable notice need not be given under *subsection (1)*.
86. *Subsection (6)* provides that the right of access may also be used by a person (for example, a tradesperson) who is authorised by an owner or an owners' association. This person is referred to as an "authorised person". Authorisation is not required in writing, which would be overly bureaucratic. An owner may, however, request evidence that a person has been authorised. If an authorised person causes damage to any part of the tenement, the owner or the owners' association who gave the authorisation will, under *subsection (7)*, be jointly and severally liable with the authorised person for any damage caused. The owner, or as the case may be, the owners' association will however have a right of relief against the authorised person.
87. Under *subsection (8)*, the person exercising the right of access (the owner or owners' association) is placed under a duty to reinstate the flat to the condition it was in prior

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to access being obtained. The aim is that the flat should be reinstated to its former condition before access was obtained and that an owner should be compensated for any damage caused. It is the owners on whose behalf the access is exercised who have a statutory duty to reinstate. It would still be possible for them to pursue any authorised person who had entered the flat on their behalf – such as a tradesperson – if he or she had caused the damage.

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