# Scottish Law Commission

**DISCUSSION PAPER No. 91**

# LAW OF TENEMENT

**DECEMBER 1990**

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LAW OF THE TENEMENT

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# PROPERTY LAW

# THE LAW OF THE TENEMENT

## PART I

## INTRODUCTION

1.1 This paper is the first in a series of papers to be issued by the Commission on the topic of property law which is included in our Fourth Programme of Law Reform.[1] This paper seeks comments on proposals for a statutory code comprising revised rules in respect of the law of the tenement. These rules regulate the rights and responsibilities inter se of proprietors with a common interest in tenement property where the titles are silent. In paragraph 151 of chapter XI of the Halliday Report[2] this area of law was identified as a suitable subject for consideration by this Commission. In this paper we discuss how the existing common law rules might be updated and restated in statutory form within the context of a new system of land tenure.

1.2 The next paper, to be published shortly, will make proposals for abolition of the feudal system of land tenure and its replacement with a system of land tenure based on absolute ownership. A third paper will deal with the reform of existing long residential leases while other miscellaneous matters may be covered in a fourth paper.

1.3 In Part II of this paper we detail what are generally considered to be the current rules comprising

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[1]Scot Law Com No 126.

[2]Cmnd 3118 Report on Conveyancing Legislation and Practice.

the law of the tenement although it must be stressed that these common law rules are subject to local variations and should not, accordingly, be taken as being of universal applicability. Part III contains our proposals for certain general rules which should apply to ownership of tenement property and our provisional proposals in respect of specific parts of tenement property are contained in Part IV. In Part V we consider certain aspects of the management of tenement property and also the proposals made recently in England for the introduction of a new form of land tenure to be known as "commonhold" to deal with the particular problems raised by property in multiple ownership.[1] The Appendix to this paper comprises a glossary of terms used in this paper which we have compiled with the assistance of the Royal Incorporation of Architects in Scotland whose help we acknowledge with thanks.

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[1]By "multiple ownership" in this context we have in mind buildings consisting of separate units where each unit belongs to a different proprietor or proprietors.

## PART II

## THE PRESENT LAW

### Introduction

2.1 One of the most recent exhaustive reviews of the common law rules relating to tenements is contained in a series of articles by J G S Cameron in the Conveyancing Review[1] These articles looked at the rules which have evolved in relation to the roof, solum, walls, passages and stairs of a tenement respectively and form the basis of the following statement of the current common law of the tenement. Many of the rules comprised in the law of the tenement have never been tested in court and it seems that the rules may vary according to the custom of different localities. There must, accordingly, be a measure of uncertainty as to the universality of the rules propounded by Mr Cameron. Where Mr Cameron's views as to the appropriate rule have been disputed in later commentaries considered by us, we indicate that this is so in the text. Consultees will be aware that our purpose in stating the following rules is to provide a foundation for discussion, and not to make firm pronouncements in what is an uncertain area of the law.

### Common Law Rules

2.2 The common law rules comprising the law of the tenement may be stated as follow:

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[1]Conv Rev I, 105 and 248 and II, 102. A more recent commentary on the law of the tenement may be found in two articles by Kenneth G C Reid, "Common Interest" and "The Law of the Tenement" (1983) 28 JLS 428, 472.

(i) Roof. The roof and the space beneath it[1] belong to the proprietor of the top flat immediately beneath it who is required not to act in such a way as to impair the efficiency of the roof. Lower proprietors have a common interest in the roof which entitles them to require that it be maintained in good order.[2]

(ii) Rhones and rainpipes - Rhones and rainpipes from the roof are treated as part of the roof for the purposes of ownership and maintenance liability.[3]

(iii) Hatchway - The position in relation to responsibility for a hatchway to a roof is obscure. It is thought that those who use it are liable for maintenance.

(iv) Chimney stalk and vents - The chimney stalk belongs to persons with vents in the stalk who are liable to contribute to the maintenance of the stalk proportionally.[4] According to Cameron, the chimney vents and cans belong to and are maintained by the persons whose

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[1]Taylor v Dunlop (1872) 11 M 25.

[2]Smith v Giuliani 1925 SC (HL) 45. This case is often referred to for a general statement of the law of the tenement. However, subsequent commentators, notably Reid in an article on "Common Interest - a reassessment" in (1983) 28 JLS 428 at pp 432-433 have questioned Lord Dunedin's exposition (at p 59) of the benefited proprietors' rights of common interest.

[3]Reid, however, argues that rainpipes may be owned in separate sections by each proprietor of the adjacent flats: (1983) 28 JLS 472 at p 474.

[4]Whitmore v Stuart & Stuart (1902) 10 SLT 290.

properties are served by them. Reid, however, takes a different view, stating that vents belong to the owner of the wall in which they are situated and the right of the proprietor of the property served by the vent to use it for the discharge of smoke is founded on common interest. Reid's view is that the cans accede to the stalk.[1] If that is so, presumably they are subject to maintenance by the proprietors of the vents. There is, accordingly, no agreed view as to the ownership of vents and chimney cans.

(v) Solum - The solum and foundations belong to the proprietor of the ground flat resting on the solum[2] so far as they lie under the ground flat, subject to the common interest of the proprietors of the higher flats in relation to support. The owner of the solum is obliged not to do anything prejudicial to the support of other flats.

(vi) Common passages and stairs (including walls)- The solum beneath the passages and stairs may

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[1](1983) JLS 472 at p 475. The opinions in Gellatly v Arrol (1863) 1 M 592, cited by Reid as "the leading case" on this point, were concerned with the rights of proprietors in a tenement to a gable wall. LJ-C Inglis was inclined to the opinion that the interest of each proprietor in the gable "for the purpose of affording means for carrying up the vents for his part of the tenement" was a common interest (p 599). Lord Cowan and Lord Neaves expressed the view that each proprietor had a right of common property (pp 601, 602-603). Lord Benholme was non-committal (p 602).

[2]Johnston v White (1877) 4 R 721 and W V S Office Premises Ltd v Currie 1969 SC 170.

be the common property of persons with common rights in those passages following the analogy of ownership of the two ground flats in the tenement giving rights of ownership to the solum under each of the flats respectively to the proprietors of those flats. It is not, however, possible to be certain as to the position. The common passages and stairs themselves are the common property of all the proprietors in the tenement.[1] Whether all the proprietors share equally is not clear. Cameron favours Rankine's view that the share is proportionate to use while Reid considers that shares should be equal. Neither argument is supported by decision. So far as walls between common passages and stairs and individual flats are concerned Reid disputes Cameron's view that such walls are the common property of the owners of the passage and stairs and the owners of the neighbouring flats. Reid[2] and Professor Halliday[3] prefer the view that such walls are owned ad medium filum by the proprietors of the passage or stair and the proprietors of the flat respectively. The current law in this area is far from clear.

(vii) Unbuilt on ground - The solum pertaining to a tenement which has not been built on, such as the back green or front area, is thought to

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[1] WVS Office Premises Ltd v Currie 1969 SC 170.

[2] (1983) 28 JLS 472 at p 476.

[3] Conveyancing Law and Practice II, 212.

belong to the proprietor of the adjacent solum subject to the common interest of the other proprietors which entitles them to object if the unbuilt-on solum is used in a way materially injurious to their interests.[1]

(viii) Balconies - Balconies are the property of the owners of flats served by them who are also liable for their maintenance.

(ix) Walls - Walls external to the tenement and internal walls to a flat belong to the owner of the flat subject to a common interest on the part of other proprietors for support.[2]

(x) Gable walls - Walls which are common gable walls between two tenements are owned by the proprietor of the flat on either side so far as the centre of the gable. Each proprietor has a common interest in the other half of the gable.[3]

(xi) Walls between flats - A wall between two flats is common between the owners of the flats. This rule was suggested by Rankine[4] and is repeated by Cameron. Reid, however, doubts whether the rule is "sensible" suggesting that a better approach would be to invest each

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[1]Johnston v White (1877) 4 R 721.

[2]Bell Principles para 1086.

[3]Trades House of Glasgow v Ferguson 1979 SLT 187.

[4]Land Ownership (4th ed) p 667; Cameron, Conveyancing Review, II, 105.

owner with absolute ownership up to the medium filum with a right of common interest in the other half. Professor Halliday[1] prefers Reid's approach but quotes no direct authority for that view. The law is not clear, there being no judicial decisions on this point.

(xii) Floors and ceilings - Floors and ceilings belong to the proprietors of upper and lower stories according to an imaginary line through the joists.[2] It is thought that the rights of the respective proprietors are consistent with their having a common interest in the adjoining floor/ceiling as the case may be.

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[1] Conveyancing Law and Practice Vol II p 212.

[2] McArly v French's Trustees (1883) 10 R 574.

## PART III

## PROPOSED GENERAL RULES

### Introduction

3.1 The common law rules comprising the present law of the tenement are based on concepts of common interest among proprietors of properties in a tenement and have evolved in a reasonably equitable manner to regulate the rights and responsibilities of individual proprietors where individual titles are silent. While the rules were acceptable for a long time, in modern practice they have ceased to provide a suitable basis for the apportionment of liability, having been increasingly overtaken by specific contractual provisions for ownership and maintenance of common parts (hereinafter referred to as "contractual provisions").

3.2 The practice in formulating contractual provisions has now diverged so far from the common law rules that the contractual provisions regulating certain aspects of ownership of common property and maintenance obligations are frequently the opposite of the common law rules. We have in mind the current practice of conveying pro indiviso shares of solum and roof to all proprietors in a tenement and requiring each proprietor to contribute to maintenance costs.

3.3 In addition, while many titles do regulate the responsibility for repairs and rights of recovery of the cost of such repairs, such practice is by no means universal and there are still cases where no specific provision is made regarding responsibility for effecting certain repairs, particularly less obvious ones like repairs to external walls. In such cases it is

necessary to refer to the common law rules for guidance. These rules do not necessarily give a clear indication of the incidence of responsibility for effecting repairs and the liability for the cost of those repairs, once they have been effected.

3.4 We take the view that some, at least, of the common law rules are now so outmoded and inappropriate to current practice that they require to be revised and, where necessary, extended to cover existing lacunae particularly in relation to the regulation of responsibility for effecting common repairs. In this part of the paper we consider the possibility of extending the proposed statutory code to all premises in shared ownership and falling within the definition of the word "tenement". We also propose general rules which should apply to maintenance responsibilities within a tenement and to the responsibility of each proprietor to effect necessary maintenance work. In Part IV we make provisional proposals as to the content of specific rules applying to specific parts of tenement property.

Applicability

3.5 We have concluded that the new law of the tenement should apply to buildings which become subject to multiple ownership after the commencement of the Act where no alternative provision is made in the titles of the constituent parts of the building. We considered whether application of the new code should be mandatory in the case of new tenements but have concluded that it is essential to maintain the flexibility that contractual provision for mutual ownership and liability permits. It is hoped that a statutorily expressed law

of the tenement will have a beneficial effect in reducing the necessity for many of the provisions which might otherwise require to be included in titles to properties which would fall within a statutory definition of "tenement".

3.6 We have also considered whether the new law of the tenement should be compulsorily applied to all tenements which are already in existence and in multiple ownership at the commencement of the Act where the titles contain provisions which are inconsistent with the proposed statutory rules. We are inclined to think that if that were done some proprietors would derive an immediate benefit while others would not, but that on balance, over a period of time, the advantages and disadvantages for individual proprietors would be approximately equal. We have reached the view, however, that it would be inappropriate to alter automatically by statute private property rights and liabilities which individual proprietors have freely accepted.

3.7 On the other hand we think that provision should be made to enable the new law of the tenement to be applied to existing tenements. Where all the proprietors in an existing tenement unanimously agree that all or part of the new law of the tenement should apply to their tenement, there should be little difficulty. We propose that they should be entitled to execute and record or register a deed of conditions setting forth their agreement to the application of the new rules or of those parts of them which they agree should apply. We believe that all that would be required to give effect to this proposal would be an amendment of section 32 of the Conveyancing (Scotland) Act 1874.

3.8 Where only some, but not all, of the proprietors in an existing tenement wish that the new rules or part of them should apply to their tenement, the matter is less straightforward. We propose that any such proprietor should be entitled to apply to the Lands Tribunal for Scotland (hereafter "the Lands Tribunal" or "the Tribunal") for an order that the rules, or the selected part or parts of them, should apply to the tenement. The Tribunal would be required to consider the extent to which the order sought would have the effect of increasing or diminishing the value of individual units in the tenement. If it took the view that the diminution in value of any unit would be such that the prejudiced proprietor could not be recompensed appropriately by an award of compensation payable by the proprietors of any unit or units whose value would be enhanced, it would refuse to make the order. If, on the other hand, it took the view that there was no question of any diminution in value of any individual unit and that it was reasonable in all the circumstances to make the order sought, it would do so. If, again, it took the view that it would be reasonable to make the order provided that compensation were paid by any benefited proprietor to any prejudiced proprietor, it would assess the amount of compensation and state by whom and to whom it was to be paid. The order would not take effect until the Tribunal had endorsed it to the effect, either that the compensation had been paid or that all persons to whom any compensation had been awarded but who had not received payment of it had agreed to the order taking effect. The order once made, or made and so endorsed where compensation had been assessed, would be recorded in the Register of Sasines or registered in the Land Register.

We therefore provisionally propose

1. **(i) A new law of the tenement should be enacted.**

**(ii) It should apply to any tenement which comes into existence after the appointed day to the extent that the titles of such a tenement do not make provision for any of the matters dealt with in the new law of the tenement.**

**(iii) It should not apply to any tenement which is in existence on the appointed day except to the extent that either (a) all the proprietors of that tenement so agree by a deed of conditions duly recorded or registered, or (b) the Lands Tribunal for Scotland so orders under procedures to be prescribed.**

Definitions

3.9 A tenement has been defined[1] as

> "a single or individual building, although containing several dwellinghouses, with, it may be, separate means of access, but under the same roof and enclosed by the same gables or walls".

Although we are not aware that the restriction of this definition to dwellinghouses has caused any problems in

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[1] Scott v Police Commissioners of Dundee (1841) 4 D 292 per Lord Fullerton 303.

practice, we consider that it should be made clear that a tenement need not only comprise dwellinghouses. We take the view that the definition should be extended to include, specifically, premises other than dwellinghouses, for example shop and office premises which form part of tenement buildings. Furthermore, the present definition depends to a significant extent on the notion of the gable wall limiting the extent of the tenement. With the introduction of new building methods whereby, for example, roofs are no longer supported by external walls but by internal structures, it is doubtful if the existence of the gable wall is of as much significance now as it was in the 19th century. While we make no formal proposition in this respect we consider that a statutory definition of tenement should not be dependent on the existence of shared gable walls. The criteria for assessing whether premises form part of a tenement should include the sharing with other premises of a roof or solum. We would be interested in any suggestions which consultees may wish to make as to a suitable definition.

3.10 We recognise that there are elements of the law of the tenement which might also be applied usefully to terraced property. In relation to such properties, which do not fall within the usually accepted definition of "tenement", it is arguable that, at least, the proposed statutory provisions as to gable walls should apply. Consultees' views on the extension of some, at least, of our proposals to terraced property would also be welcome.

3.11 One of the difficulties in applying the common law rules is the uncertainty which exists in relation to the definitions appropriate to the technical terms used

in the rules. Modern usage may be different from custom at the time when the rules evolved and there may be local variations in that usage. We have, with the assistance of the Royal Incorporation of Architects in Scotland, prepared a glossary of terms in which we define the technical terms used by us for the purpose of this Paper. The glossary is reproduced as an appendix.

Allocation of Liability - General Rules

3.12 In making the provisional proposals for a statutory code contained in Part IV of this paper we have proceeded on the basis that those proposals should be subject to certain general rules. In the following paragraphs, we discuss those rules and make provisional proposals for consideration by consultees.

3.13 Standard of repair. In our use of the word "maintenance" throughout this paper we do not intend to regulate only the responsibility of proprietors of individual units to maintain the common parts of the tenement in their existing state. We consider that an obligation to maintain must be widely interpreted to include responsibility for ensuring that the building is subject to routine maintenance, is repaired and, where necessary, renewed to a standard which would be acceptable to a prudent proprietor. We do not, however, consider that an obligation to maintain a building to such a standard should imply an obligation to effect works which would qualify as improvements or upgrading beyond the acceptable standard mentioned above.

3.14 Emergency repairs. Our proposals in respect of maintenance are principally directed towards routine continuing maintenance of property. The occasion will

arise from time to time when an emergency repair will be required to prevent further deterioration of a common part. We consider more fully the responsibility for effecting maintenance works at paragraph 3.17 below. For the purposes of this paragraph we consider that it would be helpful if we explain what we mean by "emergency repair". An "emergency repair" is a repair which requires to be effected urgently to prevent deterioration of a common part, the repair itself being to a standard which would be acceptable to a prudent proprietor.

3.15 Liability of proprietors. We take the view that every person with an interest as proprietor of any part of a tenement should be bound to maintain the parts in which he has such an interest to the appropriate standard and should, accordingly, be liable to contribute to the cost of such maintenance. Except where explicitly provided to the contrary in the provisional proposals in Part IV, in all cases where parts and services are in common ownership, proprietors should be bound to contribute proportionally (see para 3.16 below) to the cost of maintaining, repairing and, where necessary, renewing the common part or service. They should be bound to refrain from any activity prejudicial to the structural integrity of the tenement.

3.16 Apportionment of liability. We consider that liability should be allocated among proprietors proportionally according to the proportion which the internal floor area of any individual unit bears to the total of the internal floor areas of all the units in the tenement or, where appropriate, those units served by the common part or service. We hope that a clear

statement of the relevant floor areas for the purpose of apportionment of costs will be incorporated in the description in the conveyances of units becoming subject to the law of the tenement. Where existing buildings are converted into tenements, or there is an adoption of the new code for existing tenements, it will be for the owners, their builders or architects to ensure that agreed measurements are available for use. While the alternative approach of equal apportionment among the proprietors of all benefiting units would have the merit of simplicity, we take the view that an apportionment based on floor areas is likely to be more equitable. If consultees consider, however, that there are aspects of our proposals where liability should be apportioned equally as opposed to proportionally, we shall be pleased to hear from them. We intend that the apportionment should apply only to the liability of owners of units in tenements among themselves. Our proposals should not affect the rights and liabilities of individual proprietors insofar as third parties are concerned.

3.17 Common ownership. Our proposals in Part IV of this paper are based on the notion that common parts of the tenement will be owned in common by all the proprietors benefiting from those parts. For the purposes of the law of the tenement we have in mind an interest in property of an owner pro indiviso who, nonetheless, cannot dispose of that interest except insofar as he disposes of the unit to which the interest attaches. The present rules of ownership of common property "that decisions relating to it must be taken by all the proprietors, any of whom may forbid alteration or extraordinary use of the property but not

necessary repair or restoration"[1] will, however, in their application to the law of the tenement, require to be somewhat modified to take account of our provisional proposals.

3.18 Responsibility for effecting repairs. In view of the proprietors' common interest in ensuring that buildings are properly maintained and the difficulties sometimes encountered in practice in ensuring that necessary maintenance work is carried out, we considered whether it would be appropriate to include in the statutory statement of the new law of the tenement, a provision regulating the responsibility for instructing necessary repairs and the recovery of the cost of such repairs. We have considered whether the initial responsibility for effecting any maintenance, repair or renewal of a part of a building which is subject to the statutory law of the tenement should rest with the person with readiest access to the part requiring repair. In most cases this would be the person owning the unit within which the part requiring maintenance repair or renewal was located. We have concluded, however, that routine repairs or maintenance work should ordinarily be executed only as a result of a decision of a majority of the proprietors. On the other hand, we propose that where emergency repairs, as opposed to routine repairs, are required, any proprietor should be qualified by his ownership in common of the part or service requiring repair to institute such repairs. We explain our views on these matters more fully in paragraph 5.3-13 below.

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[1]Halliday Conveyancing Law and Practice Vol II pp 221, 222.

We provisionally propose

2. (i) **An obligation to maintain a tenement or any part of it should comprise an obligation to effect routine maintenance, repairs and, where necessary, renewals of the tenement or parts of it to preserve a state of repair which would be acceptable to a prudent proprietor.**

(ii) **Where parts and services are in common ownership each owner should be liable to contribute proportionally to the cost of maintaining, repairing and where necessary renewing the common part or service. Each owner of a common part or service should be bound to refrain from any activity prejudicial to the structural integrity of the tenement.**

(iii) **Where parts of a tenement are subject to common ownership, the liability to be apportioned according to that ownership should be proportional according to the proportion which the internal floor area of each unit bears to the total internal floor area of all the units in the tenement or the total internal floor area of the benefiting units, as the case may be.**

(iv) **"common ownership" should be on a pro indiviso basis but should not give rise to a right of alienation of the subjects in common ownership except on alienation**

of the unit to which they are ancillary.

(v) No specific provision should be made as to the initial responsibility of individual proprietors to effect any routine work of maintenance repair or renewal.

Note: We would welcome suggestions from consultees as to an appropriate definition of "tenement". Should any of our proposals in respect of tenement property be applied to terraced property?

## PART IV

## LAW OF THE TENEMENT - RULES AFFECTING SPECIFIC PARTS

### Introduction

4.1 One of the principal features of owning property in a tenement is that even property in individual ownership may be subject to the interest of other proprietors in the tenement. Such proprietors have a common interest in the structure and fabric of the building as a whole. As Kenneth Reid pointed out in his article on common interest[1] there is some doubt as to the extent of the obligation imposed on proprietors in tenements burdened by common interest. Reid suggests three models for the duty of support which derives from common interest. He suggests that the duty may be (a) absolute, (b) to take reasonable care to maintain support or (c) to take reasonable care to maintain existing support. Since it is evident that the current state of the law in this area is far from clear, we consider it appropriate to go as far as possible in our restatement of the common law rules, to clarify for the future the obligations inter se of proprietors of tenement property. Our proposals for the future will not, of course, provide a solution for difficulties with existing tenements unless all the owners of the constituent units of such a tenement agree to apply the new rules to existing interests or the rules are applied by order of the Lands Tribunal.

4.2 Consultees will find that while we have not, in

[1](1983) 28 JLS p 428.

some of the options we offer, entirely departed from the concept of common interest, our proposals are directed towards achieving the greater certainty which we think would flow from common ownership of identifiable portions of the specified common parts. We consider that our proposals as to common ownership should overcome difficulties in establishing whether a common interest exists and the extent of obligations thereby imposed on proprietors of property.

Common Parts

4.3 We list below the parts of a tenement which we consider should be subject to general rules regulating ownership, maintenance in good repair and renewal for the benefit of more than one proprietor in the tenement:-

a. solum and foundations (including footings)

b. external walls (including cornices, lintels and rybats but excluding windows and walls containing flues)

c. internal structural walls (excluding walls containing flues)

d. structural columns, beams and joists (including dooks)

e. internal non-structural walls and areas

f. common areas (including common passages and stairs)

g. walls, floors and ceilings of common areas (including common passages and stairs)

h. doors, metalwork, woodwork, lighting, windows and hatchways in common areas including passages and stairs

i. roof including roof lights, cupolas, rhones, valleys, flashing, drains, gutters, downpipes and hatchways; dormer windows

j. roof spaces

k. walls containing flues and chimney stalks

l. gable walls (including skews)

m. common water and sewage pipes (including tanks)

n. common pipes (other than water and sewage pipes), vents, ducts, cables, aerials and entry phone systems

o. lift shafts, lifts and related machinery

p. common hot water, ventilation and heating systems

q. common refuse chutes and service ducts

r. floors and ceilings between units

The rules

4.4 We consider in the following paragraphs the rules which should apply to each aspect of the common parts of a tenement identified in paragraph 4.3 above. Our provisional proposal in respect of each item is made at the end of the relevant paragraph.

4.5 a. Solum and foundations Traditionally rights and obligations in relation to the solum on which a building stands and its foundations have been stated separately. A clear distinction can usually be drawn, in fact, between the solum and foundations, the solum being the area of earth on which the building and foundations rest and the foundations being some sort of man-made structure adding to the support provided to the building by the solum. It appears to us, however, that there is no reason why the solum and foundations should not be considered together for the purpose of allocation of rights and liabilities as, together, their function is to support the building erected upon them.

4.6 "Foundations" have been defined in the annexed glossary of terms as "base, generally underground, on which walls, columns, beams and other supports rest". For the purposes of our provisional proposals in respect of the law of the tenement, we have concluded that foundations should be deemed to be part of the solum of a building. The solum, accordingly, may be defined as the ground under the building, and the foundations. We consider that this definition recognises the common functions of the solum and foundations and should, we hope, minimise argument as to the extent of either the solum or foundations of a building. We take the view

that if foundations are used for any purpose other than purely to support a building, eg for car parking, specific provision should be made in the titles regulating rights of ownership and maintenance obligations. In the absence of such specific provision, our proposed rule should apply.

4.7 We have concluded that the solum of the tenement should be deemed to be owned by all the proprietors in the tenement proportionally.[1] Each proprietor should be bound to contribute to the cost of maintaining the solum in good order, and to refrain from any activity prejudicial to the integrity of the solum or the interests of other co-owners. The airspace above the tenement should continue to be owned in accordance with ownership of the solum.

We provisionally propose

3. **The solum should be statutorily defined as comprising the earth on which a building is erected and its foundations, and, along with the airspace above it, be in common ownership**

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[1]In a recent article Kenneth G.C. Reid discussed problems which might be encountered in practice in relation inter alia to ownership of the solum of a tenement - "The Law of the Tenement" (1990) 35 JLS 368. In the article he suggests that, following the judgment in Johnston v White (1887) 4 R 721, difficulties could arise where a specified share in the solum of a tenement is conveyed by way of an express grant to a ground floor flat proprietor. He suggests that, in certain special circumstances, it would be appropriate for an express reservation of the remaining shares of the solum to be made. (Consultees may wish to consider responses made to the matters raised by Reid, from Iain J S Talman and Professor D J Cusine (1990) 35 JLS 400). Our proposals would obviate any difficulties in those remaining shares of the solum.

**of all the proprietors in the tenement proportionally.**

4.8 b. External walls (excluding windows and walls containing flues).[1] With modern building techniques, it is possible that external walls may not support the structure of a building but instead may be provided principally to keep the building wind and watertight. Accordingly, while the structure of the building might not be adversely affected by a failure to maintain the external surfaces of the walls, damage might nonetheless occur to individual units through such failure. For example, wet and dry rot can affect units some distance from a point of water penetration. For this reason, we consider the external walls, whether they support the structure of the building or not, form a part of the building in which there is a common interest which should give rise to shared responsibility. Windows located in those walls and serving individual units, on the other hand, should, in our view, continue to be the responsibility of the proprietors of the units who benefit from them.

4.9 The present common law rule is that, an external wall belongs to the owners of the adjacent units subject to the common interest of all proprietors. One consequence of this approach is that when repairs are effected to the whole external face of a wall, the lower proprietors will be liable only for such of the costs as are attributable to work at their level. They will not be liable for a pro indiviso share of the cost of the scaffolding needed to reach the higher units. So far as

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[1]For a discussion on walls containing flues see paragraph 4.24 on p 41.

repairs to the internal surfaces of such walls are concerned, at present each proprietor is responsible for his own walls.

4.10 While we take the view that external walls should be owned in common, we would not wish, by conferring common ownership on proprietors benefiting from external walls, to deprive individual proprietors of adjacent units of the freedom to do what they will with internal surfaces, subject to the overall maintenance of the structure of the wall in good condition. For this reason, we have considered three possible approaches to the question of ownership of and liability for such walls. These options are discussed at greater length in the following paragraph.

4.11 The first option is, effectively, a reiteration of the existing common law rule founded on the concept of common interest. The second option divides the wall notionally into an exterior half, subject to common ownership and an interior half belonging to the proprietor of the adjacent unit. The third, preferred, option is based on the notion of common ownership in the whole wall and accords to a greater extent with our general approach to the statutory restatement of the law of the tenement. We also take the view that adoption of this option would facilitate the carrying out of necessary maintenance work.

The options we have considered are -

(i) Under the first option, external walls would belong to the extent of the whole thickness to the proprietor of the unit immediately adjacent to them. The owner would be bound to

bear the cost of maintaining both the interior and exterior surfaces of the wall in such a condition that other units in the tenement would not suffer any decay or damage as a consequence of the condition of the walls. We have rejected this option for the reasons given in paragraphs 4.8 and 4.9 above.

(ii) Under the second option external walls would belong to the extent of one half of their thickness (including lath and plaster) measuring from the interior surface, to the proprietor of the unit adjacent to the wall who would be bound to pay the cost of maintaining his share of the wall in such a condition that other units in the tenement would not suffer decay or damage as a consequence of the condition of that share of the wall. The remaining one half share of the thickness of the wall measuring to the exterior surface would be in the common ownership of all the proprietors of the tenement proportionally. All proprietors would be bound (a) to contribute to the cost of maintaining the external half of the walls in good order and (b) individually, to refrain from any activity prejudicial to the integrity of the walls. We are not attracted to this option because it appears to us to be unduly complicated.

(iii) Under our preferred third option the whole thickness of the wall would be in the common ownership of all the proprietors in the tenement, proportionally, subject to an

absolute right on the part of the proprietor of the unit adjacent to the wall to use the internal surfaces and to lead pipes, cables and ducts through the wall, so long as the structural integrity of the wall was not adversely affected thereby. The responsibility for maintaining the decoration of the internal surface would lie with the owners of individual units but structural maintenance would be shared proportionally. We consider that this option offers the simplest, most equitable solution.

We provisionally propose

4. **External walls should be in the common ownership, proportionally, of all the proprietors in a tenement subject to the right of the proprietors of adjacent units to use the internal surface of the walls for pipes, cables and ducts or for any other purpose not prejudicial to the structural integrity of the walls.**

4.12 c. Internal structural walls (excluding walls containing flues)[1]. Much the same considerations apply to internal walls as to external walls. The choice between individual ownership, subject to common interest and common ownership of part of the wall is roughly the same as in our discussions on external walls. Accordingly, we have also considered alternative options here as follows -

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[1]We consider walls carrying flues at paragraph 4.24.

(i) The first option for consideration would be that internal walls which are essential to maintaining the structure of the building should belong to the proprietor of the unit in which they are located or, if they are located between separate units, should belong to the extent of one half of their thickness to the proprietors of the adjacent units. The owner or owners should be bound to bear or contribute to the cost of maintaining such walls in such a condition that other units in the tenement will not suffer any decay or damage as a consequence of the condition of the walls. We take the view that given the interest of all the proprietors in a tenement in the structural parts of that tenement, this option is not satisfactory.

(ii) Our preferred option is that internal walls which are essential to maintaining the structure of the building should be owned in common proportionally by all the proprietors of the tenement. Such ownership should be subject to the absolute right on the part of any proprietor within whose unit the surface of the wall is located to use such wall in any manner he wishes which is not prejudicial to the structure of the tenement. Such a right would include the right to lead pipes, ducts and cables through the wall. All proprietors would be bound (a) to contribute to the cost of maintaining the walls in good structural order, and (b) individually, to refrain from any activity prejudicial to the integrity of

the walls. The common ownership would be subject to the rights outlined above of proprietors of the units within which the surface of the wall is located. Non-structural maintenance of the surfaces of the walls internal to individual units would be the responsibility of the proprietors of those units. We consider that this option is more consistent with our view of the status of common parts of a tenement.

We provisionally propose

5. **Internal structural walls should be owned in common proportionally by all the proprietors of the tenement subject to the absolute right of the proprietors of the units within or between which the walls are located to use the walls in any manner not prejudicial to the structure of the building.**

4.13 d. Structural columns, beams and joists. We are aware that there are parts of tenements which although essential to the stability of the structure, do not appear to be the subject of common law rules dealing specifically with them. Columns, beams and joists come into this category although they are often but not invariably incorporated into walls or floors/ceilings and treated accordingly. Insofar as such parts are not otherwise catered for, similar choices of approach exist as for Propositions 4 and 5 discussed in the foregoing paragraphs. We have considered the following alternative options -

(i) Under the first alternative, columns, beams

and joists which are essential to the structure of the building would be owned by the proprietor or proprietors of the unit or units in which they are located. The owner or owners would be bound to bear the cost of maintaining such columns, beams and joists in such a condition that other units in the tenement would not suffer any decay or damage as a consequence of the condition of the parts.

(ii) Under the second, preferred, alternative, columns, beams and joists which are essential to the structure of the building would be owned in common proportionally by all the proprietors in the tenement. Such ownership would be subject to an absolute right on the part of the proprietor or proprietors in whose unit or units the part was located to use such part in any manner which he or they wish which was not prejudicial to the structure of the building. Such a right would include the right to lead pipes or cables through the part, and to affix lighting. All proprietors would be bound (a) to contribute to the cost of maintaining the parts in good order, and (b) individually, to refrain from any activity prejudicial to the integrity of the parts. Such common ownership would be subject to the rights in respect of structural walls outlined above of the proprietor of the unit within which the parts are located. Proprietors of individual units would be liable for the maintenance of the surface of the parts located in the units.

We provisionally propose:

6. **Columns, beams and joists essential to the structure of the building should be owned in common, proportionally, by all the proprietors in the tenement subject to the absolute right of the proprietors of the units within or between which the parts are located to use the parts in any manner not prejudicial to the structure of the tenement.**

4.14 e. Internal non-structural walls. Where such walls are wholly internal to an individual unit, we take the view that they should belong to the owner of that unit. Likewise where such walls separate two units, they should belong to the extent of one half of their thickness to the proprietors of the adjacent units. In the case of walls separating individually owned units from common areas, they should (a) belong wholly to the proprietor of the unit, subject to the rights of use of the owners of the common area or (b) belong to the extent of one half of their thickness to the owners of the unit and the owners of the common area respectively, or (c) belong wholly to the proprietors of the common areas subject to the rights of use of owners of adjacent units.

We invite views on the following:

7. (i) **Non-structural walls within a unit should belong to the proprietor of that unit;**

(ii) **Non-structural walls between two units**

**should belong to the extent of one half of their thickness to the proprietors of each unit;**

**(iii) Should non-structural walls between units and common areas belong -**

**(a) wholly to the proprietor of the unit with the proprietors of the common area having rights of use, or**

**(b) to the extent of one half their thickness to the proprietors of the units and the proprietors of the common areas respectively, or**

**(c) wholly to the proprietors of the common areas with the proprietors of the adjacent unit having rights of use.?**

4.15 f. Common areas (including common passages and stairs). The actual space occupied by common areas may be distinguished from the surfaces of the areas. Access rights may be exercised over the floor of the common area but they are also taken through the space above the area. Subject to a general requirement that proprietors in a tenement should not carry on activities within the tenement which would have a detrimental effect on the general amenity of such common areas, we consider that we should confine regulation of their use to a general statement that common areas are owned in common, proportionally, by all proprietors in the tenement with access to them. Each proprietor should be bound to ensure that at all times free and unrestricted access will be available through the passages to all persons with rights therein, their tenants, invitees and licensees.

We provisionally propose

8. **(i) Common areas should be owned in common, proportionally, by all proprietors in a tenement with access thereto.**

**(ii) Each proprietor should be bound to contribute proportionally to the cost of maintaining such common areas.**

**(iii) Each proprietor should be bound to ensure free unrestricted access through such areas.**

4.16 g. Walls, floors and ceilings of common areas (including common passages and stairs). We have considered, at paragraph 4.14, the allocation of responsibility for maintaining internal non-structural walls, including such walls separating units in individual ownership from common areas and at paragraph 4.15 above, the general responsibility for maintaining common areas, including passages and stairs. We take the view that proprietors having access to common areas should be responsible for the maintenance of such areas in good repair. Where the parts involved are not adjacent to individually owned units and are not subject to our proposals in relation to structural parts, ownership of the walls, floors and ceilings of common areas and liability to contribute to the cost of maintaining such areas should be divided proportionally among the proprietors having access thereto in the proportion which the floor area of each unit bears to the total floor area of all units having access.

4.17 It is, however, more usual that the common area is adjacent to units in individual ownership. We consider that, subject to our proposals in respect of structural parts, there is a choice in allocating ownership and responsibility.

(i) The first option would involve drawing an imaginary line down the medium filum of the mutual part with the ownership of the half on the common area side being common and ownership of the half on the side of the unit belonging to the proprietor of that unit, subject to apportionment of the costs of maintenance, repair etc, of the whole part proportionally according to the ownership of each side (see Proposition 7(iii)(b)).

(ii) A second option, which would be consistent with our preferred approach to common parts, would be to treat the whole part as being common, with the proprietor of the adjacent unit being given rights in relation to the surface of the common part internal to his unit identical to those outlined at sub-paragraph 4.11 (iii) above. (See Proposition 7(iii)(c)).

(iii) The final option on which we seek comments is that the proprietor of any adjacent unit should own the whole common part, subject to our proposals as to structural parts, with the proprietors of the common area having rights in respect of pipes, cables and ducts in the common part and being bound to maintain the

surfaces of the common area in good order and repair (see Proposition 7(iii)(a)).

We see no reason in principle for treating walls, floors and ceilings in common areas differently.

We invite views on the following:

9. (i) **Where the walls, floors and ceilings of common areas are not structural and are not adjacent to units in individual ownership, those parts should be owned in common proportionally by all the proprietors in the tenement with access thereto; and**

(ii) **Where the floors and ceilings of common areas are adjacent to individually owned units, should they be owned -**

(a) **to the extent of one half of their thickness by the owner of the adjacent unit and to the extent of the other half proportionally by owners of the common area; or**

(b) **proportionally by all the proprietors owning the common area but subject to the right of proprietors of adjacent units to use the parts in any manner not prejudicial to the structure of the tenement; or**

(c) **wholly by the proprietor of the** adjacent unit but subject to the

**right of the proprietors of the common area to lead pipes, cables and ducts through the parts and to use them for any other purpose not prejudicial to the structural integrity of the tenement?**

4.18 h. Doors, metalwork, woodwork, lighting, windows and hatchways in common areas. We take the view that, except insofar as any of them serve individual units exclusively, all of these parts should be owned proportionally according to ownership of the common areas and that the maintenance liability should also be the same.

We provisionally propose

10 **Except where used exclusively for individual units, doors, metalwork, woodwork, lighting, windows and hatchways in common areas should belong proportionally to the owners of the common areas who should be bound to maintain the same in good order.**

4.19 i. Roofs, including rooflights, cupolas, rhones, valleys, flashings, drains, gutters, downpipes, and hatchways; dormer windows. We have offered a definition of "roof" in our glossary of terms. There is not, so far as we are aware, any universally accepted definition of what is included in a reference to "a roof" and it may be helpful if we expand on our definition and give some indication of what we take references to roofs to include. For the purposes of this paper, the roof is primarily that part of the fabric of a building covering the building itself and protecting

it from the effects of weather, insulating it and forming the uppermost surface of the building. Roofs may be made of a variety of materials including glass which makes it important to be able to differentiate between roofs and windows, and may be constructed in a variety of ways.

4.20 The question of the space between the uppermost unit and the roof is dealt with in paragraph 4.23 below. For the purpose of this paragraph, we are confining our discussion to the fabric of the roof which we consider should also include ancillary items related to the roof's function as an insulator against the effects of weather. For example, valleys, flashings, roof lights, guttering and piping designed to carry away water from the roof and any related stonework should, in our view, form part of the roof for the purpose of allocating ownership and responsibility for maintenance. On the other hand, chimney stalks, which are not principally intended to effect weather proofing, are treated for the purposes of this paper as part of the wall of which they are a continuation.

4.21 All proprietors in a tenement benefit from the protection which a roof affords them. Subject to our proposals in relation to dormer windows in the following paragraph, we take the view that all proprietors should share proportionally in the ownership of the roof and be bound (a) proportionally to contribute to the cost of maintaining it in good order and repair, and (b) individually to refrain from any activity prejudicial to the integrity of the roof.

4.22 While we take the view that roof lights, even where they serve individual units, should be treated as

part of the roof and be subject to common ownership and maintenance obligations, we propose that, in the case of dormer windows, a different approach should be adopted. Such windows, while they may, exceptionally, form part of the original structure of the tenement, are usually introduced on a subsequent conversion. We consider that, insofar as dormer windows serve individual units, the proprietors of those units should own them in their entirety (including the whole structure of the window, roof, sides and any related gutters and flashing) and be solely responsible for their maintenance in good order and repair.

We provisionally propose

11. (i) **Dormer windows should be owned by and be the responsibility of the proprietors of the units served by them.**

(ii) **Roofs and ancillary parts should be owned in common proportionally by all the proprietors in a tenement.**

4.23 j. Roof space. At common law, the space between the uppermost unit and the roof (the attic as it is sometimes known), and the roof itself belong to the proprietor of that unit. Often in buildings where there are usable roof spaces they may accommodate water tanks and other services common to units within the tenement. Access to such services may be by way of hatches leading from common areas or from within individual units. In view of this and our provisional proposition that roofs should be subject to common ownership (Proposition 11), we have considered whether roof spaces should be treated in the same way as other common areas. Alternatively,

consultees may take the view that such a space should logically belong to the adjoining unit. In any case all benefiting proprietors should be entitled to exercise reasonable rights of access to the roof and to any common services located in the roof space.

Consultees are invited to indicate whether

**12. Roof spaces should**

**(a) be treated as common areas; or**

**(b) belong to the proprietor of the unit adjacent to the space, subject to rights of access for proprietors benefiting from any services located in the roof space?**

4.24 k. Walls containing flues and chimney stalks. We consider that individual proprietors should be responsible for the maintenance of their own flues and chimney cans. However, insofar as walls which contain such flues are also external or internal structural walls, we think that there should be some recognition of the fact that all the proprietors in the tenement benefit, no matter how indirectly, in the case of external walls from the weather-proofing afforded and in the case of all structural walls from the support afforded. They should accordingly, share some liability for the wall both at the stalk level and below.

4.25 The position of external and internal structural walls has been discussed at paragraphs 4.8-4.12 above. We have specifically excluded walls containing flues from our discussions there as we take the view that different considerations may apply. For example a

failure to maintain adequately a chimney lining of one flue may lead to damp and chemical penetration affecting the fabric of the wall. A failure to maintain by one proprietor should not render his co-proprietors liable to share in the repair occasioned by that failure.

4.26 As indicated above, we consider that the maintenance and repair of individual flues should be the responsibility of the proprietors of property served by such flues. Any damage sustained as a consequence of a failure to meet this obligation should also be the responsibility of the individual proprietor.

4.27 Where walls contain flues but are also external or structural walls, we take the view that, while the maintenance obligation for the wall itself up to the roof line should be in accordance with propositions 4 and 5 above, that obligation should be subject to absolute liability for damage caused to the wall by virtue of failure by an individual proprietor to maintain his flue in the wall. Such liability would rest with the proprietor of the unit served by the flue regardless of whether the flue was in use. The chimney stalk, or that part of the wall projecting above the roof line would belong to and be the responsibility of those proprietors of units with flues in the stalk proportionally to the number of flues.

We provisionally propose

**13. (i) Individual proprietors should be liable for maintenance and repair of flues and ancillary items serving their units.**

**(ii) Individual proprietors should be liable**

**to the owners of the wall of which the chimney stalk is an extension for any damage caused to the wall by any failure to maintain the flues.**

**(iii) The proprietors of units with flues should be owners in common of the chimney stalk containing the flues and should be liable for the maintenance of the stalk proportionally according to the number of flues belonging to each proprietor in the stalk.**

**(iv) External or internal structural walls containing flues should otherwise be in the common ownership of all the proprietors in the tenement and maintained proportionally.**

4.28 1. Gable walls. We consider that the gable or end wall of a building should be subject to the same rules as any other external wall, with or without flues as appropriate. Where there is a double gable between two adjoining tenements, each gable wall should be treated as an external wall.

4.29 Where however, two tenements share a single gable, we consider that one half of the wall should be treated as belonging to each tenement and the appropriate rule applied to ownership of that half.

We provisionally propose

**14. (i) Gable walls should be treated in the same way as external walls except where they**

**separate two tenements.**

**(ii) In the case of adjoining tenements -**

**(a) if there is a single gable, one-half of the thickness should belong to each tenement and ownership and liability for maintenance etc among the proprietors of the respective tenements should be apportioned as for external walls.**

**(b) if there is a double gable, each gable should belong to the tenement which it serves and ownership and maintenance liability should be apportioned as for external walls.**

4.30 m. Common water and sewage pipes (including tanks). Where a tenement is served by a single system with common pipes, we take the view that the ownership of and liability for maintaining the pipes and related tanks should be shared among the proprietors benefiting from the use of the pipes and tanks. Individual proprietors should be responsible for those elements of the common system serving their units exclusively but, so far as the pipes and tanks are not in exclusive use, proprietors benefiting from the system should be liable proportionally for the maintenance of the system in good order.

We provisionally propose

**15. (i) Pipes and tanks not used exclusively in connection with individual units should**

**be owned in common by proprietors in the tenement benefiting from them.**

**(ii) Proprietors should be liable proportionally for their maintenance in good order and repair in so far as they are not exclusively used by individual units.**

**(iii) Pipes and tanks used exclusively in connection with individual units should be the sole responsibility of the proprietors of those units.**

4.31 n. Other common pipes, vents, ducts, cables, aerials and entry-phone systems. The same rules as are outlined for water pipes in the immediately preceding paragraph should apply.

We provisionally propose

**16. Common pipes, vents, ducts, cables, aerials and entry phone systems should be owned in common by proprietors in the tenement using the same. Proprietors should be bound proportionally to maintain them in good order and repair.**

Note: We would be interested to know if, in this case in particular, consultees consider that ownership and the apportionment of liability for maintenance etc could be more equitably allocated in some manner other than proportionally.

4.32 o. Lift shafts, lifts and related machinery. Increasingly, lifts are being provided in tenement buildings and we consider it desirable to provide a rule which would cover the liability for maintenance and repair of lifts, lift shafts and the lift mechanism itself. Apportionment of rights and liabilities according to user would be bound to give rise to disputes. One approach would be to provide for a graduated scale of ownership and maintenance liability to apply where, for example, the share to be attributed to each owner could be calculated according to a formula.

4.33 A distinction can be drawn between tenements where the lift apparatus is used to give access to individually owned units only, and tenements where there are common facilities which may be reached by the lift. It seems equitable that different rules should apply to the ownership of and liability for maintenance of lift apparatus in each case. We suggest in the following paragraphs, formulae for allocating shares of ownership and liability in each case.

4.34 (a) Where the lift does not give access to common facilities it will be used by all the proprietors in the tenement apart from those on the ground floor. The extent of use is likely to be related to the distance from the ground floor of the unit served by the lift. Accordingly, the formula which places a larger share of liability on proprietors more distant from the starting point of the lift might be considered to be appropriate. A simpler approach would be to apportion liability equally among all the proprietors benefiting from the apparatus.

In devising a formula, it seems important to avoid the excessive complexity which might arise with varying liabilities. We favour a formula which requires the total number of shares to be assessed on the basis of one half share each to units on the floor immediately above and below the ground floor and one share to all other units. Such a formula might be equitable in that it provides for units whose occupants are more likely to make greater use of the apparatus to bear a greater proportion of the cost of maintaining it. The following example for a building with 3 flats on each of the Basement, first, second, third and fourth floor levels and 2 flats on the ground level, shows how the formula would work -

Worked Example of Liability for Lift Maintenance

| Level | Flat (no) | Share | |
|---|---|---|---|
| 4 | 3 | 3 x 1 | 3 |
| 3 | 3 | 3 x 1 | 3 |
| 2 | 3 | 3 x 1 | 3 |
| 1 | 3 | 3 x 1/2 | 1 1/2 |
| G | 2 | 2 x 0 | |
| B | 3 | 3 x 1/2 | 1 1/2 |
| | | | 12 |

Liability Levels 2, 3 & 4 each flat = 1/12

Levels 1 & B " " = 1/24 (1/2 x 1/12)

A formula requiring ever greater proportions to be shared depending on distance from the ground floor could

prove very difficult to apply in tall buildings and we, accordingly, do not favour such an approach. Consultees may, however, favour a formula more structured towards distance from the ground with, say, the share increasing with distance.

4.35 (b) Where the lift gives access to facilities shared by all the units in the tenement. We consider that the formula chosen should provide for a portion of the liability for the maintenance of the apparatus to be allocated on the ground floor units also and suggest that a fair allocation would be a one half share. In such cases, the ground and first floor or basement units would bear a one half share and other units a whole share of the maintenance liability.

We seek views on the following

17. (i) **Ownership of and responsibility for the maintenance of lifts, lift shafts and ancillary machinery should be apportioned among proprietors benefiting from the use of the lift.**

(ii) **Where the lift does not give access to shared facilities**

(a) **Should the ground floor units be exempt, the first floor and basement units be liable for a one half share only and the units on all other levels be liable for a single share; or**

(b) **Should all units, apart from the**

**ground floor, bear equal shares?**

**(iii) Where the lift gives access to shared facilities should**

**(a) the basement, ground and first floor units bear a one half share and all other units bear a single share; or**

**(b) all units bear equal shares?**

4.36 p. Common hot water, heating and ventilation systems. We consider that, except insofar as such systems are used exclusively by individual units, ownership of and liability for maintenance of such common services should be shared proportionally among proprietors entitled to use the systems. Individual proprietors should, however, be liable to meet the costs of any consumption metered separately.

We provisionally propose

**18. (i) Common hot water, heating and ventilation systems which are not used exclusively by individual units should be owned in common, proportionally, by all the proprietors entitled to use the services.**

**(ii) Each proprietor should be liable to contribute to the cost of maintenance and repair of such systems proportionally.**

4.37 q. Common refuse chutes and service ducts. We consider that ownership of and liability for such common

services should be shared proportionally among proprietors entitled to use them. As in the foregoing proposal, we consider that individual proprietors should be liable to maintain such services as are used exclusively in connection with individual units.

We provisionally propose:

19. (i) **Common refuse chutes and other maintenance ducts which are not used exclusively by individual units should be owned in common, proportionally, by all the proprietors entitled to use the services.**

(ii) **Each proprietor should be liable to contribute to the cost of maintenance and repair of such systems, proportionally.**

4.38 r. Floors and ceilings. Where there is a space between the floor of one unit and the ceiling of the unit below, we consider that the floor and ceiling should belong wholly to the proprietors of the units in which they are respectively located. The space itself should be owned in common by adjacent proprietors. Where, on the other hand, the floor and ceiling below are not separated by a space we consider that the existing common law position should be maintained with an imaginary line being drawn at the medium filum and ownership to the extent of one half being apportioned to each of the upper and lower proprietors, subject to each proprietor being liable to maintain his share of the part in good repair and to refrain from any activity or operation which might result in damage to the adjoining floor or ceiling as the case may be.

We provisionally propose:

20. (i) **Where there is a space between a floor and ceiling below, each should belong to the proprietor of the unit within which it is located and the space between them should be owned in common.**

(ii) **Where there is no space between the floor and ceiling below, the surface should belong to the extent of one half of its thickness to each proprietor who should be bound to maintain his share in good order and repair.**

Note: We would welcome suggestions from consultees as to any other items in respect of which ownership and maintenance liability should be apportioned under the proposed statutory rules.

## PART V

## MANAGEMENT OF TENEMENTS

### Introduction

5.1 We have made provisional proposals in this paper for the apportionment of liability for maintenance of tenement property among the owners of that property. In this Part we consider how far it is possible to devise means by which owners in common can ensure that their fellow owners meet their obligations in respect of maintenance of the common property.

5.2 In the following paragraphs we consider management schemes, majority decisions, emergency repairs, identification of proprietors and, lastly, the proposals made in England for a new form of tenure to be called "commonhold".

### Management schemes

5.3 Some tenements, particularly in the west of Scotland, are managed by factors or a committee of owners. Provision may be made in the titles for such management or it may be done by separate personal agreement among the proprietors. We have considered whether we should make provision for compulsory schemes in the case of new tenements. We recognise that such schemes have significant advantages as continuing routine maintenance programmes can be initiated, provision can be made for sinking funds to meet future large items of capital expenditure and common insurance policies can be negotiated to ensure that the whole tenement is adequately insured. Management committees may be constituted informally or may be set up as

partnerships or limited companies. While individual developers who institute management schemes may adopt a consistent approach to the type of scheme they personally prefer, there is no generally accepted single approach for each type of development.

5.4 We are aware that there has been a certain amount of discussion on this topic recently and that certain bodies have favoured the introduction of a scheme akin to the scheme for commonhold tenure which has been recommended in England. In paragraphs 5.14 to 5.17 we comment fully on the English recommendations and explain why we do not favour such a scheme for Scotland.

5.5 We have not considered it appropriate to propose any statutory provision requiring the appointment of management committees or factors to oversee the management of tenements. We take the view that a general requirement that all the proprietors in any tenement should be bound to enter a management scheme in respect of specified matters such as common repairs, insurance and the establishment of sinking funds, or alternatively be bound to employ a factor, would be impossible to enforce. We also think that the introduction of a statutory code regulating the day to day management of a tenement would not be practicable or, in fact, desirable. At present it is for the developer or for individual proprietors to decide which arrangements for management and maintenance are best suited to the particular circumstances of their tenement. Detailed statutory requirements would mean the end of the flexibility with which local arrangements can be made. Any statutory scheme would involve complex rules which would not meet every situation which could arise. If consultees wish to make

suggestions as to how such a scheme could be formulated, we would be pleased to hear from them.

We provisionally propose

21. **Tenement management schemes should be a matter of voluntary agreement among the proprietors of a tenement except where provision is specifically made in the title deeds.**

Note: If consultees wish to suggest a simple and workable statutory scheme we shall be pleased to consider it.

Majority decisions

5.6 Routine repairs and maintenance work are essential to maintaining the fabric of a building in a good state. A well maintained building is more likely to retain its value as an investment and is less likely to require major and expensive remedial work. It is in the interests of all the proprietors in a tenement that the building should not be permitted to deteriorate and that routine repair or maintenance work is carried out timeously.

5.7 Where routine repair or maintenance work are required we propose that the necessary work should be authorised by a majority decision of the proprietors of the units in the tenement, voting on the basis of one vote per unit. We are not attracted to the idea that each proprietor should have a number of votes determined by his floor area. The decision of the majority would be binding on all the proprietors. In the following proposition, we offer consultees a range

of options as to the size of the majority which should be required. We are, however, inclined to the view that a simple majority should be sufficient for this purpose as a rule requiring a larger majority might, we think, result in the rejection of proposals for essential non-urgent works.

5.8 Our proposals in relation to essential routine repairs or maintenance work would require such work to be executed in a reasonable manner and only to the minimum standard which would be acceptable to a prudent proprietor. Where work which exceeds such a standard is proposed, we envisage that proprietors would require to be unanimous in their approval.

5.9 We have also considered whether any provision should be made for the situation where a majority of the proprietors do not favour the execution of works considered by the minority to be essential. We consider that, in such cases, the dissatisfied proprietors should be entitled to apply to the Lands Tribunal for an order, binding on all the common owners in the tenement, requiring that the work be executed to the appropriate standard within a specified period. We also put forward, for consideration by consultees, the possibility of enabling a minority of proprietors to apply to the Lands Tribunal for an order to the effect that works proposed by the majority are not essential routine works of repair or maintenance or are not reasonably required in the circumstances. If consultees favoured the introduction of such remedies, the jurisdiction of the Lands Tribunal would require to be extended accordingly.

5.10 Where routine repair or maintenance work is

carried out, each proprietor should be liable for a share of the total cost of such work in accordance either with the appropriate statutory rule, or the share allocated by his titles if his titles make such a provision. There would be a statutory entitlement to recover from the other responsible proprietors appropriate shares of the total repair or maintenance costs and any other outlays, including interest. As indicated in paragraph 5.8 above, we envisage a general requirement that the proprietor effecting repair or maintenance work should be bound to act reasonably in so doing. A suitable indicator of reasonable behaviour would be the fact that he had obtained several estimates and the agreement of a majority of all other liable proprietors before instructing the work to be done. We think, however, that to embody such a test in a statutory provision would be unwieldy and unnecessary. We have considered whether Part VIII of the Civic Government (Scotland) Act 1982[1] adequately provides for any difficulties which may arise where statutory powers of entry are required to execute repairs. While we consider that this Act would provide an adequate "fall back" in the event of difficulties with obtaining access to effect repairs, consultees may take the view that additional statutory powers of entry may be needed to enable repairs agreed by a majority to be effected. While we make no formal proposals in this respect, we would be interested in consultees' views. We should stress once more that our proposals as to majority decisions would not apply where there is a contradictory

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[1]1982 c 45. S.87 authorises a local authority to rectify defects in buildings and s 88 enables the sheriff to grant a warrant to instal pipes and drainage through common property in the absence of consent of a proprietor in common.

provision in the titles to the property.

We provisionally propose:

22. (i) **The new statutory code should make specific provision for the responsibility for effecting essential repairs or maintenance work to common parts where no provision is made in the relevant title deeds.**

(ii) **Any decision to effect essential routine repairs or maintenance work should be taken by a majority of proprietors on the basis of one vote per unit.**

(iii) **Should that majority be**

**(a) a bare majority; or**

**(b) a 2/3 majority; or**

**(c) a 3/4 majority?**

(iv) **In the event of there being no majority in favour of the instruction of essential routine repairs or maintenance work, it should be competent for a minority of proprietors to apply to the Lands Tribunal for an order requiring the proposed work to be carried out.**

(v) **A minority of proprietors should also be able to apply to the Lands Tribunal for a declaration that repair or maintenance**

**work authorised by the majority is not essential or that its execution is not reasonable in the circumstances.**

Note: In the case of works affecting parts in common ownership other than essential repairs or maintenance work, the consent of all the owners in common would be required prior to commencement of the work by common law (see para 3.17). We would be pleased to know if consultees consider that provision should be made for the consent of a majority to be sufficient to enable a proprietor to carry out structural works, other than essential repairs or maintenance work, on a common part, no matter where situated.

We also invite views on whether consent should continue to be required from the other owners of common property, whether of a majority or otherwise, where a proprietor of one unit intends to carry out non-structural works, other than essential repairs or maintenance work, on a common part situated (a) within his unit and (b) outwith his unit.

Finally, we invite views on the question whether, alternatively, all structural and non-structural works - both within and outwith individual units- other than the decoration of individual units or the insertion of pipes, ducts, cables etc within them, should require the consent of all the other owners of the common property, or of a majority of them.

Emergency repairs

5.11 We have suggested in paragraph 3.17 that any proprietor should be able to have work executed if that work is urgently required to prevent significant deterioration in the state of the tenement. We consider that in such cases, where the proprietor responsible for having the work executed exercises his right to recover an appropriate proportion of any cost and outlays he has incurred from his co-owners, it should be a condition of his entitlement to recover that he should have acted reasonably in the circumstances.

We provisionally propose:

**23. (i) In the case of emergency repairs, any proprietor who is a common owner should be entitled to instruct the necessary repairs and, on demonstrating that he has acted reasonably in the circumstances, recover pro rata from other common owners.**

**(ii) An "emergency repair" is a repair which would require to be effected immediately to prevent deterioration of a common part and should be carried out to a standard which would be acceptable to a prudent proprietor.**

Identification of proprietors

5.12 Since the abolition of domestic rates, the valuation roll kept by the Regional Assessor for each

region is no longer a useful source of information as to the identity of proprietors in a tenement from time to time. Delays at Register House can mean that information on ownership of property may not be available until some considerable time after the property has changed hands. Difficulties are, accordingly, occurring with increasing frequency in establishing the identity of proprietors liable for a share in the cost of any repair or maintenance work.

5.13 We do not think it would be appropriate to seek to establish a separate public register of property owners. This function is fulfilled by the General Register of Sasines and the Land Register. We do, however, recognise the difficulties which may be encountered by proprietors in identifying their co-proprietors. We have considered whether an appropriate response to the problem would be to require the notification of the identity of a new owner of property to all the owners in common on the sale of that property. Where a management committee exists notification to that committee should be sufficient. The obligation to effect notification would rest with the person signing the warrant of registration, in the case of a writ presented for recording in the General Register of Sasines or, in the case of a registered title, the person signing the application for registration in the Land Register. On balance we consider that such an approach would be unduly burdensome and we do not make any formal proposals in this respect. We would, however, be interested to know if consultees consider that there are simpler cost effective ways of meeting the emerging difficulties in this respect.

Commonhold

5.14 We have considered the possibility of introducing in Scotland a version of the commonhold system of land ownership recently recommended by a working group established by the English Law Commission[1]. Under English law it is not possible to create burdens running with land. Thus, where the owner of a freehold property enters into a positive obligation connected with his ownership that obligation may not be enforceable against successive owners of the property. Most flatted property in England is, accordingly, held leasehold with successive lessees being liable to comply with obligations imposed by the lease. There is a real problem with the reducing value of leased property for the purposes of mortgage as the term of the lease nears expiry. The English, accordingly, have been examining the possibility of introducing a new form of tenure to overcome these difficulties. We believe that our existing system of land tenure with the changes we have recommended in the foregoing paragraphs will achieve a satisfactory result for Scotland.

5.15 The main features of the proposed new, optional, commonhold tenure are as follows -

(i) Where a new development is to be subject to commonhold, the site should be freehold and registered with absolute title. All buildings on the site must be included in the commonhold; and the development or phase of

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[1]Commonhold: Freehold Flats and Freehold Ownership of other Interdependent Buildings: Report of a Working Group Cm 179 July 1987.

development must be structurally complete before any unit is transferred to an owner.

(ii) Existing property may be converted into a commonhold either where a property is vacant, in which case the procedures for a new development would be followed; or where everyone with an interest in the property consents to the conversion (consent is required from proprietors, leaseholders, sub-tenants, lenders etc).

(iii) The procedure for buying a commonhold unit should be substantially the same as for buying any other property, except that the purchaser should inquire of the commonhold association for details of the management rules. Liability for service charges will remain with the vendor until the commonhold association is notified of the sale.

(iv) A unit owner should be entitled to sell or lease his unit. Any easements, restrictive covenants or land obligations which he may create over it should cease when the commonhold ends unless created with the consent of the commonhold association.

(v) The rights and obligations of each unit owner will attach to each unit and will be laid down in subordinate legislation made under the Act. Variations to generally applicable regulations may, however, be effected and must be registered. Unit owners, occupiers of units and the commonhold association would be

entitled to enforce the regulations.

(vi) The commonhold association to which all unit owners would automatically belong would be a corporate non-profit-making body not subject to legislation affecting companies but subject to standard rules governing its constitution and internal conduct. The association should be obliged to carry out duties prescribed by statute and have the necessary powers. It should be responsible for organising common services and facilities and should own common parts and the whole property when the commonhold comes to an end.

(vii) The proportion of service charge exigible from each unit will be stated in the commonhold declaration and the association will have a lien over each unit for arrears and a right of sale. Commonholds would be obliged to maintain reserve funds.

(viii) Various provisions are made as to the rights of tenants, mortgagees and third parties.

(ix) Provision is also made for variations to the commonhold and termination of the commonhold. The group do not recommend the setting up of a Commonhold Commission nor do they advise the introduction of a separate disputes procedure.

5.16 Consultees may find it helpful to have our views on each of these proposals in the light of our own recommendations -

(i) We perceive no need for a new type of land holding for flatted or tenement property in Scotland.

(ii) Our proposal in relation to the application of the new statutory law of the tenement to existing property to some extent mirrors the recommendation that the consent of all proprietors and other existing interested parties should be sought before the introduction of commonhold to existing property.

(iii) In Scotland, information about liability for maintenance should be available to any purchaser prior to completing his purchase. We would expect any purchaser to ensure in the missives which constitute the contract of sale that liability for outstanding maintenance charges would be apportioned equitably at an agreed date.

(iv) The concept of land obligations etc ceasing at the termination of the individual owner's interest in the commonhold may reflect the general law as to the unenforceability of such obligations against successive owners of freehold property in England. We have not, in this paper, recommended the introduction of such short term obligations as we favour retention of the traditional Scottish real burden attaching to land in perpetuity but subject to variation or discharge where appropriate.

(v) We envisage that the subject matter of the proposed commonhold regulations would be very similar to either matters regulated by real burdens or the provisions of our proposed statutory law of the tenement. We think it unlikely that the enforcement rights proposed in relation to commonhold regulations would provide a better method of enforcement than exists in Scotland.

(vi) We consider, for the reasons given at paragraphs 5.3 to 5.5 above that the management of tenements is better left to evolve on a non-statutory basis. In England, the present forms of land tenure preclude the approach to common liabilities which we have proposed in this paper.

(vii) We recognise that some provision for the constitution of reserve funds is desirable. We do not think that, for Scotland, a statutory provision requiring the constitution of such funds is necessarily the answer. The need for reserve or sinking funds probably exists in every case where there are mutual obligations. We do not consider that it is possible to introduce legislative provision appropriate to all types of property. We envisage that the difficulties of enforcing contribution to such funds would be substantial. In addition, we take the view that the regulation of the management of such funds would give rise to substantial difficulties outweighing the benefit to be derived from any statutory requirement that

may be constituted. It is to be hoped that a growing awareness among home owners of the benefits of making provision for substantial common items of repair will lead to a growing practice of voluntarily constituted sinking funds.

(viii) The provisions made with regard to the rights of tenants, mortgagees and third parties are special to the concept of commonhold and do not require comment in the light of our proposals for a statutory law of the tenement.

(ix) For the same reason, we need not comment on proposals made under this heading.

5.17 On the whole matter, we consider that, whatever may be the need for a commonhold scheme of land ownership in England, given the way that their system of land tenure has developed, the difficulties which have arisen with tenement properties in Scotland would be more appropriately met by a statutory restatement of the law of the tenement in accordance with our proposals. We are concerned that commonhold might be considered appropriate only in the case of substantial developments. We are anxious to ensure that so far as possible the new statutory law of the tenement will have a universal application to all properties falling within the definition of tenement in Scotland, regardless of size. In view of this we make no proposals in relation to the adoption of a commonhold tenure or modified commonhold tenure for property in Scotland which is subject to common ownership rights and obligations.

## PART VI

## SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

### Introduction and application of the proposed new rules

1. (i) A new law of the tenement should be enacted.

(ii) It should apply to any tenement which comes into existence after the appointed day to the extent that the titles of such a tenement do not make provision for any of the matters dealt with in the new law of the tenement.

(iii) It should not apply to any tenement which is in existence on the appointed day except to the extent that either (a) all the proprietors of that tenement so agree by a deed of conditions duly recorded or registered, or (b) the Lands Tribunal for Scotland so orders under procedures to be prescribed.

(Paragraphs 3.1-8)

### General Rules

2. (i) An obligation to maintain a tenement or any part of it should comprise an obligation to effect routine maintenance, repairs and, where necessary, renewals of the tenement or parts of it to preserve a state of repair which would be acceptable to a prudent proprietor.

(ii) Where parts and services are in common ownership each owner should be liable to contribute proportionally to the cost of maintaining, repairing and where necessary renewing the common part or service. Each owner of a common part or service should be bound to refrain from any activity prejudicial to the structural integrity of the tenement.

(iii) Where parts of a tenement are subject to common ownership, the liability to be apportioned according to that ownership should be proportional according to the proportion which the internal floor area of each unit bears to the total internal floor area of all the units in the tenement or the total internal floor area of the benefiting units, as the case may be.

(iv) "common ownership" should be on a pro indiviso basis but should not give rise to a right of alienation of the subjects in common ownership except on alienation of the unit to which they are ancillary.

(v) No specific provision should be made as to the initial responsibility of individual proprietors to effect any routine work of maintenance repair or renewal.

Note: We would welcome suggestions from consultees as to an appropriate definition of "tenement". Should any of our proposals in respect of tenement property be applied to terraced property?
(Paragraphs 3.12-18)

**Solum and foundations**

3. The solum should be statutorily defined as comprising the earth on which a building is erected and its foundations, and along with the airspace above it should be in common ownership of all the proprietors in the tenement proportionally. (Paragraphs 4.5-7)

**External walls**

4. External walls should be in the common ownership, proportionally, of all the proprietors in a tenement subject to the right of the proprietors of adjacent units to use the internal surface of the walls for pipes, cables and ducts or for any other purpose not prejudicial to the structural integrity of the walls.
(Paragraphs 4.8-11)

**Internal structural walls**

5. Internal structural walls should be owned in common proportionally by all the proprietors of the tenement subject to the absolute right of the proprietors of the units within or between which the walls are located to use the walls in any manner not prejudicial to the structure of the building.
(Paragraph 4.12)

**Columns, beams and joists**

6. Columns, beams and joists essential to the structure of the building should be owned in common, proportionally, by all the proprietors in the tenement subject to the absolute right of the proprietors of the units within or between which the parts are located to use the parts in any manner not prejudicial to the structure of the tenement.
(Paragraph 4.13)

**Internal non-structural walls**

7. (i) Non-structural walls within a unit should belong to the proprietor of that unit;

(ii) Non-structural walls between two units should belong to the extent of one half of their thickness to the proprietors of each unit; or

(iii) Should non-structural walls between units and common areas belong -

(a) wholly to the proprietor of the unit with the owners of the common area having rights of use, or

(b) to the extent of one half their thickness to the proprietors of the units and the proprietors of the common areas respectively, or

(c) wholly to the proprietors of the common areas with the proprietors of the

adjacent units having rights of use.?
(Paragraph 4.14)

**Common areas**

8. (i) Common areas should be owned in common, proportionally, by all proprietors in a tenement with access thereto.

(ii) Each proprietor should be bound to contribute proportionally to the cost of maintaining such common areas.

(iii) Each proprietor should be bound to ensure free unrestricted access through such areas.
(Paragraph 4.15)

**Walls, floors and ceilings of common areas**

9. (i) Where the walls, floors and ceilings of common areas are not structural and are not adjacent to units in individual ownership, those parts should be owned in common proportionally by all the proprietors in the tenement with access thereto; and

(ii) Where the floors and ceilings of common areas are adjacent to individually owned units, should they be owned -

(a) to the extent of one half of their thickness by the owner of the adjacent unit and to the extent of the other half

proportionally by owners of the common area; or

(b) proportionally by all the proprietors owning the common area but subject to the right of proprietors of adjacent units to use the parts in any manner not prejudicial to the structure of the tenement; or

(c) wholly by the proprietor of the adjacent unit but subject to the right of the proprietors of the common area to lead pipes, cables and ducts through the parts and to use them for any other purpose not prejudicial to the structural integrity of the tenement?

(Paragraphs 4.15-17)

**Items pertaining to common areas**

10. Except where used exclusively for individual units, doors, metalwork, woodwork, lighting, windows and hatchways in common areas should belong to the owners of the common areas proportionally who should be bound to maintain the same in good order.
(Paragraph 4.18)

**Roofs**

11. (i) Dormer windows should be owned by and be the responsibility of the proprietors of the units

served by them,

(ii) roofs and ancillary parts should be owned in common proportionally by all the proprietors in a tenement.

(Paragraph 4.19-22)

**Roof spaces**

12. Roof spaces should

(a) be treated as common areas; or

(b) belong to the proprietor of the unit adjacent to the space, subject to rights of access for proprietors benefiting from any services located in the roof space?

(Paragraph 4.23)

**Flues and walls containing flues**

13. (i) Individual proprietors should be liable for maintenance and repair of flues and ancillary items serving their units.

(ii) Individual proprietors should be liable to the owners of the wall of which the chimney stalk is an extension for any damage caused to the wall by any failure to maintain the flues.

(iii) The proprietors of units with flues should be owners in common of the chimney stalk containing the flues and should be liable for

the maintenance of the stalk proportionally according to the number of flues belonging to each proprietor in the stalk.

(iv) External or internal structural walls containing flues should otherwise be in the common ownership of all the proprietors in the tenement and maintained proportionally.

(Paragraphs 4.24-27)

**Gable walls**

14. (i) Gable walls should be treated in the same way as external walls except where they separate two tenements.

(ii) In the case of adjoining tenements -

(a) if there is a single gable, one-half of the thickness should belong to each tenement and ownership and liability for maintenance etc among the proprietors of the respective tenements should be apportioned as for external walls.

(b) if there is a double gable, each gable should belong to the tenement which it serves and ownership and maintenance liability should be apportioned as for external walls.

(Paragraphs 4.28-29)

**Pipes and tanks**

15. (i) Pipes and tanks not used exclusively in connection with individual units should be owned in common by proprietors in the tenement benefiting from them.

(ii) Proprietors should be liable proportionally for their maintenance in good order and repair in so far as they are not exclusively used by individual units.

(iii) Pipes and tanks used exclusively in connection with individual units should be the sole responsibility of the proprietors of those units.

(Paragraph 4.30)

**Common services**

16. Common pipes, vents, ducts, cables, aerials and entry phone systems should be owned in common by proprietors in the tenement using the same. Proprietors should be bound proportionally to maintain them in good order and repair.

Note: We would be interested to know if, in this case in particular, consultees consider that ownership and the apportionment of liability for maintenance etc could be more equitably allocated in some manner other than proportionally.

(Paragraph 4.31)

**Lifts**

17. (i) Ownership of and responsibility for the maintenance of lifts, lift shafts and ancillary machinery should be apportioned among proprietors benefiting from the use of the lift.

(ii) Where the lift does not give access to shared facilities

(a) Should the ground floor units be exempt, the first floor and basement units be liable for a one half share only and the units on all other levels be liable for a single share; or

(b) Should all units, apart from the ground floor, bear equal shares?

(iii) Where the lift gives access to shared facilities should

(a) the basement, ground and first floor units bear a one half share and all other units bear a single share; or

(b) all units bear equal shares?

(Paragraphs 4.32-35)

**Common systems**

18. (i) Common hot water, heating and ventilation systems which are not used exclusively by

individual units should be owned in common, proportionally, by all the proprietors entitled to use the services.

(ii) Each proprietor should be liable to contribute to the cost of maintenance and repair of such systems proportionally.

(Paragraph 4.36)

**Common chutes and ducts**

19. (i) Common refuse chutes and other maintenance ducts which are not used exclusively by individual units should be owned in common, proportionally, by all the proprietors entitled to use the services.

(ii) Each proprietor should be liable to contribute to the cost of maintenance and repair of such systems, proportionally.

(Paragraph 4.37)

**Ceilings and floors between units**

20. (i) Where there is a space between a floor and ceiling below, each should belong to the proprietor of the unit within which it is located and the space between them should be owned in common.

(ii) Where there is no space between the floor and ceiling below, the surface should belong to the extent of one half of its thickness to

each proprietor who should be bound to maintain his share in good order and repair.

Note: We would welcome suggestions from consultees as to any other items in respect of which ownership and maintenance liability should be apportioned under the proposed statutory rules.
(Paragraph 4.38)

**Management schemes**

21. Tenement management schemes should be a matter of voluntary agreement among the proprietors of a tenement except where provision is specifically made in the title deeds.

Note: If consultees wish to suggest a simple and workable statutory scheme we shall be pleased to consider it.
(Paragraph 5.3-5)

**Responsibility for effecting routine repairs and majority decisions**

22. (i) The new statutory code should make specific provision for the responsibility for effecting essential repairs or maintenance work to common parts where no provision is made in the relevant title deeds.

(ii) Any decision to effect essential routine repairs or maintenance work should be taken by a majority of proprietors on the basis of one

vote per unit.

(iii) Should that majority be

(a) a bare majority; or

(b) a 2/3 majority; or

(c) a 3/4 majority?

(iv) In the event of there being no majority in favour of the instruction of essential routine repairs or maintenance work, it should be competent for a minority of proprietors to apply to the Lands Tribunal for an order requiring the proposed work to be carried out.

(v) A minority of proprietors should also be able to apply to the Lands Tribunal for a declaration that repair or maintenance work authorised by the majority is not essential or that its execution is not reasonable in the circumstances.

Note: In the case of works affecting parts in common ownership other than essential repairs or maintenance work, the consent of all the owners in common would be required prior to commencement of the work by common law (see para 3.17). We would be pleased to know if consultees consider that provision should be made for the consent of a majority to be sufficient to enable a proprietor to carry out structural works, other than essential repairs or maintenance work, on a common part, no

matter where situated.

We also invite views on whether consent should continue to be required from the other owners of common property, whether of a majority or otherwise, where a proprietor of one unit intends to carry out non-structural works, other than essential repairs or maintenance work, on a common part situated (a) within his unit and (b) outwith his unit.

Finally, we invite views on the question whether, alternatively, all structural and non-structural works - both within and outwith individual units- other than the decoration of individual units or the insertion of pipes, ducts, cables etc within them, should require the consent of all the other owners of the common property, or of a majority of them.
(Paragraphs 5.6-10)

**Emergency repairs**

23. (i) In the case of emergency repairs, any proprietor who is a common owner should be entitled to instruct the necessary repairs and, on demonstrating that he has acted reasonably in the circumstances, recover pro rata from other common owners.

(ii) An "emergency repair" is a repair which would require to be effected immediately to prevent deterioration of a common part and should be carried out to a standard which would be acceptable to a prudent proprietor.
(Paragraph 5.11)

## APPENDIX

## GLOSSARY OF TERMS

| TERM | DEFINITION | COMMENTS |
|---|---|---|
| 1. WALLS | | |
| Gable walls | Wall from the foundations up, the upper part of which is shaped to suit roof pitch. | While the upper part is generally triangular in shape other roof forms may require different shapes. |
| Structural walls etc | Part of the structure of the building including supporting walls etc carrying a load in addition to their own weight. | |
| Dividing walls | Wall which separates two properties or other defined areas. | |
| Lintel | Beam over wall opening | |
| Raggle | Groove cut in stonework to receive stone or flashing. | |
| Skew | Gable coping, including "crow steps". | Lowest member known as "skewputt". |

| | | |
|---|---|---|
| Cornice | (a) External horizontal moulded projection at wall head<br>(b) Internal ornamental moulding at intersection of walls and ceiling | |

2. ROOF

| | | |
|---|---|---|
| Roof | Upper covering of building including glazed areas. | |
| Hatchway | Internal access to otherwise enclosed space to facilitate inspection, maintenance etc. | Hatchways provide access from within the building to the interior of the building and to the exterior. |
| Roof Light | Glazed opening in roof otherwise known as skylight. | |
| Dormer window | Window standing up vertically from the slope of a roof. | |

| | | |
|---|---|---|
| Roof Space | Space formed by roof rafters and ceiling joists of highest storey. | |
| Cupola | Small domed roof generally glazed. | |
| Downpipe | Pipe which conveys rain water from roof, rhones and gutters to ground level. | |
| Eaves | Overhanging edge of roof. | |
| Gutter | One of a variety of water collection channels on a roof. | There are eaves gutters, parapet gutters, secret gutters etc. |
| Rhone | Eaves gutter, generally applied to half-round cast-iron variety. | |
| Valley | Area between two downward-sloping roofs. | |
| Flashing | Watertight covering (originally but not necessarily lead) at a roof joint. | |

3. CHIMNEY (and ancillary parts)

| | | |
|---|---|---|
| Flue | Passage in chimney for waste products of combustion. | Flues were originally for smoke but may now be used for the discharge of waste products from oil and gas fuels. |
| Vent | Outlet duct or pipe for air, gases etc, other than waste products of combustion. | In Scots building vocabulary "vent" and "flue" traditionally had the same meaning. In order to avoid confusion more modern definitions have been assigned to these terms. |
| Chimney stalk | Part of wall or shaft, containing a flue or flues, which extends beyond the roof. | Traditionally the terms chimney head, stalk and stack were inter-changeable. A single term is used in this Paper. |

4. CEILINGS AND FLOORS

| | | |
|---|---|---|
| Beam | Horizontal structural member normally carrying a load. | |

| | |
|---|---|
| Joist | One of several parallel beams supporting a floor or ceiling. |

5. MISCELLANEOUS

| | |
|---|---|
| Foundation | Base, generally underground, on which walls, columns, beams and other supports rest. |
| Footing | The projecting part of the foundation. |
| Rybat | Hewn stone forming part of side of opening in wall generally applied to window and door openings. |
| Dook | Wood plug driven into wall to hold nail for strapping (timber framework). |

Note: Where we use general terms in the text such as "roof" we intend to include all ancillary parts in that reference.

Printed in Scotland by HMSO Reprographic Unit, Edinburgh
1m 11/90 (029771) (CRC supplied)