Legal (Scottish)

This coursework sets out the legal framework by which owners of common property in Scotland are governed. It describes how legal relationships are formed and maintained between owners of tenement flats, those in housing estates, landlords and tenants and lastly the managing agents. It gives an introduction to a number of important areas of the law which you must be aware of including health and safety law and disability discrimination. The following areas are covered in the course:

- *3.1 The historical background to land tenure*
  - *(i) Feudal tenure*
  - *(ii) The transfer of land/property*
  - *(iii) Rights and obligations of vassals and superiors*
  - *(iv) Register of Sasines and Land Register*
  - *(v) Differences with the English system of land ownership*

- *3.2 Sources of law*

- *3.3 The common law in relation to how it affects individuals and common interests in property.*
  - *(i) Third party enforcement of rights between co-feuars*
  - *(ii) Third party enforcement of rights between co-disponees*
  - *(iii) Title and interest to sue*

- *3.4 The position prior to the introduction of*
  - *(i) The Abolition of Feudal Tenure etc. (Scotland) Act 2000,*
  - *(ii) The Title Conditions (Scotland) Act 2003, and*
  - *(iii) The Tenements (Scotland) Act 2004.*

- *3.5 The position following the enactment of all the above legislation.*
  - *(i) The Abolition of Feudal Tenure etc (Scotland) Act 2000*
  - *(ii) The Title Conditions (Scotland) Act 2003*
    - *a) General*
    - *b) Enforcement – title and interest of benefited proprietor*
  - *(iii) The Tenements (Scotland) Act 2004*

- *3.6 Tenants rights as an occupier within a communal building or development to insist on communal repairs being carried out*

- *3.7 The appointment of a manager:-*
  - *a) The procedure - either by the owners or a developer.*
  - *b) The manager's term of office,*
  - *c) The manager's rights and obligations (contractual or otherwise)*
  - *d) The manager's responsibility for Health & Safety,*
  - *e) The manager's responsibility for Data protection etc.*
  - *f) The procedures for the termination of the manager's appointment,*
  - *g) Interpretation of contract terms and conditions*

- *3.8 Housing (Scotland) Act 2006 including:*
  - *(i) Statutory Repairing standard*
  - *(ii) Private Rented Housing Panel (PRHP)*
  - *(iii) Tenancy Deposit Scheme*
  - *(iv) Mandatory Licensing of Houses in Multiple Occupation (HMO's)*

(v) Private Landlord Registration Scheme
(vi) Antisocial Behaviour etc (Scotland) Act 2004, as amended
(vii) Right to adapt rented houses
(viii) Provision of information on Sale of Houses including Energy Reports / EPCs

- *3.9 The methods of resolving disputes between owners and/or the managers*
  (i) Sheriff Courts
  (ii) Court of Session
  (iii) Alternative Dispute Resolution
    a) Arbitration
    b) Adjudication
    c) Mediation
    d) Negotiation
    e) Other forms of ADR
  (iv) Lands Tribunal for Scotland
  (v) Scottish Land Court

- *3.10 Employment law including rights of:-*
  (i) company staff
  (ii) staff employed on behalf of others.

- *3.11 Introduction to company law.*

- *3.12 Introduction to Insurance law relating to the provision of services by managers and Financial Services Authority (FSA) compliance.*

- *3.13 Introduction to basic European Law as it affects property ownership and management in Scotland*

- *3.14 Introduction to Health and Safety law affecting property ownership and management in Scotland*
  (i) Control of Asbestos Regulations 2006
  (ii) Working at Height Regulations 2005
  (iii) The Control of Substances Hazardous to Health Regulations 2002
  (iv) Management of Health and Safety at Work Regulations 1999, as amended
  (v) Construction Design and Management Regulations 2007
  (vi) Fire Safety Scotland Regulations 2006 and Fire Scotland Act 2005

- *3.15 Disability Discrimination Act 2005*
  (i) Service providers
  (ii) Controllers of let premises and reasonable adjustments

- *3.16 Development and alterations to property*
  (i) Buildings (Scotland) Act 2003 and Building (Scotland) Regulations 2004
  (ii) Planning etc. (Scotland) Act 2006

3.1 *The Historical Background to Land Tenure*

(i) Feudal Tenure

In Scotland, traditionally, property was held in what is called “feudal” or “feuhold” tenure. This has, however, been the subject of changes in the law which are dealt with in more detail below. You should be aware when you are reading any documents which relate to Scottish property that these are often out of date, or have been drafted by English practitioners with no understanding of the Scottish system – be aware! However, in order to understand the modern system of Scottish property ownership you should have a good understanding of the historical system.

Feudalism is a concept which is a thousand years old in Scotland and is difficult to define in modern terminology. Its origins come from a time where the notion of individuals holding private property was bound up with their duties to the King as sovereign. Historically, the Crown would make a grant of land in return for military services. The person given the land, originally a noble called the grantee, would be required as a condition of the grant to provide soldiers when called upon to do so by the King, known as the grantor. This arrangement worked very well for centuries until stability and peace made the military service condition obsolete. Goods, chattels and thereafter money gradually replaced military service as a condition of a grant of land by the Crown. The Nobles, or grantees, would in turn make sub-grants out of their land holding for other services and so on, and a ‘hierarchy’ or ‘pyramid’ of interests in the same land was created.

To explain, those making grants - the "superiors" - retained a legal interest in the land (known by the Latin expression "*dominium directum*" or directing interest), and so a hierarchical structure was created with each property or piece of land having a number of “owners”, co-existing simultaneously. These owners formed a feudal “chain”:

CROWN

↓

OVER-SUPERIOR (s)

↓

SUPERIOR (dominium directum)

↓

VASSAL (dominium utile)

The person who for all practical purposes we would consider to be the “owner” of the property and entitled to occupy it was called the “vassal”, otherwise owner of the “*dominium utile*” or useful interest. Above him was a “superior” or owner of the “*dominium directum*”. There were often many more levels in the chain with “over-

superiors". The feudal chain went all the way up to the Crown and subject to a few exceptions the "Crown" was considered, in legal theory at least, to be the ultimate owner of the land.

However the vassal had the "useful ownership" of the land (this is known in legal terminology as stated above, as the "*dominium utile*"). Many property owners had no idea that they were subject to one or more "superiors" but there are a few important areas in modern times where the relationship came into play and these are mentioned below.

(ii) The Transfer of Land/Property

Since 20 November 2004, when land or property is purchased (as opposed to leased) the deed transferring the property from one person to another will be a disposition.

However, deeds prior to the **Abolition of Feudal Tenure etc (Scotland) Act 2000**, which came into force on 28 November 2004, were one of two kinds: dispositions or feudal dispositions. The relevance of the kind of deed in relation to the old feudal tenure was that if property was transferred by means of a simple disposition the person purchasing the property (strictly speaking the "dominium utile" in the property), was 'stepping into the shoes' of the seller. That meant that the purchaser took the place of the seller in the feudal chain, i.e. a sideways move, and no new links downwards were created.

Transfer of property by disposition:

SUPERIOR SUPERIOR

↓ ↓

Original VASSAL → disposition to → New VASSAL

However, if the seller used a feudal disposition, he became the superior of the new purchaser, who became another vassal, a further link down the chain. The real importance of this lay in the element of control which this gave the superior in a number of ways which are discussed in more detail below.

SUPERIOR → becomes → OVER SUPERIOR

↓ ↓

ORIGINAL VASSAL → becomes → SUPERIOR

Feudal Disposition to

↓ ↓

NEW VASSAL → becomes → VASSAL

(iii) Rights and obligations of vassals and superiors.

The service which the vassal had to perform for the superior was gradually replaced first by goods and chattels and then by an annual monetary payment known as

"feuduty". This payment was usually payable in perpetuity (for ever). The amount of this payment was found in the title deeds to a property.

The **Land** Tenure **Reform (Scotland) Act 1974** stopped the creation of new feuduties and provided for the "redemption" of existing ones. Redemption involved the vassal paying a single capital sum of money to the superior to extinguish the liability to pay the annual feuduty which was compulsory if a property was sold or voluntary if the vassal simply wished to give up paying the feuduty each year. However, the right/obligation to pay an existing feuduty was not abolished by the 1974 Act but the liability to pay it was dealt with by the **Abolition of Feudal Tenure (Scotland) Act 2000**.

Feudal deeds generally also imposed conditions on the property feued – for example on the type of use made of the property, liability for maintenance, and probably most important of all, restrictions against development or building. These feudal "real" burdens were enforceable by the superior. This means that if a feuar (or vassal) wanted to do certain things on the property it might have required the permission of the superior – which was not always given and in any case was likely to involve the payment of money to the feudal superior for the permission granted. This was often seen in new property developments where the builder "feued off" the plots to house buyers but retained control by remaining as feudal superior of the property. There may have been a prohibition, for instance, on erecting a satellite dish, or building a conservatory or extension without first seeking the permission of the feudal superior. All of this is changed with the **Abolition of Feudal Tenure (Scotland) Act 2000**.

(iv) Register of Sasines / Land Register.

Whichever method of transfer of property was used - disposition or feudal disposition - the transaction required to be registered in the official record books. This remains the same despite the abolition of feudal tenure and all transfer of property transactions must still be registered.

The Register of Sasines, in which all transactions in land and buildings were recorded has been in existence and open to the public, for around 400 years since 1617. It is a register of deeds and entries can be searched for owners of land and buildings and also prices on payment of the appropriate search fee.

The Register of Sasines is gradually being replaced by a new Land Register which is a public register of titles (rather than deeds) based on Ordnance Survey maps. A new feature is that when registered, each title carries a government 'guarantee' or 'indemnity', and there are certain rights to compensation from the Government for inaccuracies. Another advantage is that the legal transfer of property is simpler and less expensive for property already on the Land Register than under the old system.

Although all new transactions are going onto the Land Register as they occur, it will be appreciated that unless a property changes hands it will remain on the Register of Sasines indefinitely. Both the Register of Sasines and Land Register are likely to be with us for a very long time to come.

(v) Differences with the English system of land ownership

The Scottish system of land ownership is different from the English system where there are "freeholders" who have the outright ownership of the land and "leaseholders" who are the day to day occupiers of the property but cannot do certain

things to the property without the freeholders' permission. Residential leases in England are sometimes very long, such as 999 years and the value of a leasehold property goes down as the lease gets shorter. It is common for leaseholders to find it difficult to sell leases under 75 years in length without reducing the purchase price.

There is a large body of new law related to leaseholders in England and Wales including certain rights for leaseholders to buy the freehold under compulsion from the freeholders in some cases. Where the words "freeholder", "leaseholder", "freehold" and "leasehold" appear in textbooks you can be sure that these are dealing with the English property law as these concepts are alien to Scots law. (For example, it is not legal in Scotland to create a lease of a dwellinghouse in excess of twenty years).

Always be aware of the materials you are consulting and make sure you do not fall into the trap of referring to or relying upon English law.

You will, however, see later in these materials that beyond the basic law of property ownership which is very distinct as between Scotland and England, there are a number of areas such as Health and Safety law where you will find some laws which have UK wide application. This is often as a result of European law which requires Member States to implement the provisions into their own legal systems. In such cases the same regulations may apply to different parts of the UK and become part of their respective legal systems. The Regulations themselves will contain a section which deals with which legal systems they apply to. If Scotland is not included in the application section then you know that they are not part of Scots law.

3.2 *Sources of law*

It is essential to understand that the law of Scotland comes from many different sources, and it is not all "written down" as such.

In the area of property law the main sources of law are:

- The "**common law**" – this is a body of law which develops on an *ad hoc* basis as decisions are made by the Courts of Scotland. There is a hierarchical court structure and decisions of higher courts take precedence over lower ones; decisions on appeal also take precedence over those decided by a single judge etc. This is perhaps over-simplifying the matter but you should understand that "the law" is an evolving thing and to find out the up-to-date position on a question of law, it is almost always necessary to consider what the most up-to-date case law says on the matter. This can be searched on-line or by using databases of reported decisions and Scottish Advocates and solicitors are skilled in knowing how to search in order to determine what "the law" is.
- **Legislation from the UK Parliament applying to Scotland** – both:
  - primary legislation called "Acts" or "Statutes" and
  - subordinate legislation such as "Statutory Instruments", "Regulations", "Orders" etc. This will normally be in relation to "reserved" matters which the Scottish Parliament was not given the power to pass legislation in relation to
- **Legislation of the Scottish Parliament**, both primary and subordinate, in all "**devolved**" matters - areas in which the Scottish Parliament can competently pass legislation (i.e. not the matters reserved to the UK Parliament) – again, this will take the form of:

- primary legislation - Acts of the Scottish Parliament - and
- subordinate legislation, such as Scottish Statutory Instruments (SSI's)

• legislation of the European Union (see further below, at section 11).

Legislation from the UK and Scottish Parliament can be found on the official OPSI website www.opsi.gov.uk but care should be taken when referring to this site for a number of reasons:

- Often different sections of an Act come into force at different times, on specified dates or at the order of Ministers, so the Act as it appears may not be "law" on any given date, even if it has been passed (received Royal Assent).
- Similarly, changes are often made to Acts by later secondary legislation such as Statutory Instruments and these changes are not incorporated into the original text.
- Finally, "consolidating" Acts are sometimes passed which repeal, or replace, a number of previous Acts or an Act which has been amended on several occasions, thus rendering the previous law obsolete.

You may have access to subscription services such as Westlaw or LexisNexis. These are useful because they contain consolidated legislation and cross reference case law with legislation. You may also receive legal briefings on relevant matters, either in-house or through your professional association.

Lawyers specialising in a particular area of law will keep up to date with the various changes in the law and if a legal query arises in the property management context it is often better to seek legal advice at an early stage.

As mentioned above, one of the important sources of law in Scotland is known as the common law. There are some important common law matters relating to the holding of property which you should know about, although you should also be aware of the statutory law, some of which supplements or entirely replaces the common law. Law from both sources is outlined below.

3.3 *The common law in relation to how it affects individuals and common interests in property.*

(i) Third Party Enforcement of Rights (between co-feuars)

Under feudal law, feuars holding from the same superior (or over superior) with identical (or comparable) real burdens in their titles, had, under certain conditions, an implied right to enforce these burdens amongst themselves. This was *in addition to* the implied right of the superior to enforce the conditions or land obligations. Shared "real" burdens indicated the existence of a common feuing plan on the part of the common superior, and this was said to create a "mutuality of interest" among the co-feuars sufficient to support reciprocal rights of enforcement as between the co-feuars. It was thought that if an estate was held by the same superior, but different co-feuars, and was subject to common burdens, conceived for the benefit of the estate as a whole, that there was an obvious sense in allowing reciprocal enforcement because a co-feuar had an immediate and obvious interest in ensuring that his neighbour observed the common interest. As such, there developed a common law doctrine of "common interest". This was particularly important in the recent times when many superiors did not bother to enforce burdens at all, as it preserved the amenity of surrounding properties. The fact that co-feuars had more interest in the "common

interest" than a superior may have been one of the reasons underlying the recent legal changes which are referred to below.

There were conditions which had to be satisfied for reciprocal rights of enforcement. These reciprocal rights are known by the Latin phrase "*jus quaesitum tertio*" (or third party rights). These are as follows:

- the co-feuars must have held from the same superior
- the grants from the superior must have imposed on both the co-feuars identical burdens, or at least in some sense equivalent, because the burdens constituted the "common plan"
- The owner upon whom the burden rested must have had notice in his own title of the common feuing plan, to indicate to him that there may have been common rights of enforcement
- There must have been nothing in his title which was inconsistent with the idea of co-enforcement (such as a right reserved to the superior to waive a particular burden or burdens).

So-called "Third party" enforcement of rights i.e. by co-feuars, is not affected by the **Abolition of Feudal Tenure (Scotland) Act 2000** (see below for further discussion).

(ii) Third Party enforcement of rights (between co-disponees)

In principal, co-disponees are governed by the same rules as the common law rules applicable to co-feuars (in relation to the latter, however, see above and also the **Abolition of Feudal Tenure etc (Scotland) Act 2000**, below).

The right to enforce against other disponees may arise in two cases:

- where there is a single disposition of a piece of land which is later divided, creating two or more disponees holding from a single disponer. The burdens in the original disposition will be enforceable as between the disponees
- where a disponer makes subsequent grants of adjoining pieces of land subject to the same or equivalent real burdens.

(iii)Tenants

It should be noted that tenants have no rights to enforce, as it is only the owner of land who has rights of enforcement.

(iv) Enforcement – title and interest

You should be aware of recent judicial consideration of title and interest to enforce real burdens, which is dealt with below.

3.4 *The position prior to the introduction of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, The Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act.*

Three important pieces of legislation heralded the most important changes to Scots property law for more than a hundred years. To fully understand their importance it is essential to understand the position prior to their enactment.

The feudal system as outlined above was, for many centuries, the method by which land was held in Scotland. Prior to the Act, real burdens (i.e. land obligations or

conditions on land) in "feudal" deeds (such as restrictions on the use to be made of property) were enforceable by superiors. However, this increasingly came under criticism in the modern property market, particularly when feudal tenure was used by developers as another method of control over (and source of revenue from) property purchasers, extracting sometimes large sums of money to grant to consent for development of some sort. The **Land Tenure Reform (Scotland) Act 1974** abolished the right to create new feuduties and provided for redemption of existing ones on sale. Prior to the **2000 Act** it was estimated that probably less than 10% of properties remained subject to feuduty.

A summary of the arguments for and against the "old" system of feudal tenure was carried out by the Scottish Law Commission (SLC) and their recommendations which appear in their **Report on Abolition of the Feudal System (Scot Law Com No 168)** largely formed the basis of the new **Abolition of Feudal Tenure (Scotland) Act 2000** which is discussed in more detail below.

You should also be aware of the law prior to the **Title Conditions (Scotland) Act 2003** coming into force, i.e. the common law, which has now been replaced by the new legislation (see below). The Scottish Law Commission estimated that only around half of all real burdens affecting property in Scotland were imposed in feudal deeds. Equivalent real burdens can be and are created in ordinary dispositions. Under the common law the terms of a real burden had to be set out either in a conveyance of the property or in a separate document known as a "Deed of Conditions". These are quite common in relation to new build developments or developing of older properties which may be, for example, divided into a number flats. It is common in such situations for a Deed of Conditions to be prepared by the solicitors acting for the developer. This is essentially an added layer of conditions which must be satisfied by purchasers of the property. These purchasers may in turn become landlords, especially important given the increasing use of "buy to let" mortgages. Although the conditions contained in the Deed of Conditions relate to the purchaser of the property it is important for the property manager to be aware of their terms as they are also likely to be relevant to the tenants who are in actual occupation of the property. For example, there may be a prohibition in attaching satellite dishes to the property, there may be a condition prohibiting certain sorts of pets being kept. It is also commonplace for management of the property to be passed to a factoring company designated by the developer. You should take a look at some Deeds of Conditions and familiarise yourself with their terms.

Only an owner can burden land. Under the common law registration was required only against the "burdened" property, that is to say the property being sold, and if a search was carried out against a benefited property the burden would not necessarily be mentioned.

The terms of a real burden must be set out in full. It was rare under the common law for a real burden to take the form of any other type of obligation than "affirmative", that is an obligation to do something, or "negative", an obligation to refrain from doing something without consent. It was also possible under the common law, to create a real burden as a *self-standing* right to enter or make use of property. This could be to walk or drive over property, or to run a pipe through it. It is more usual for such rights to be constituted as positive "servitudes", which is a different kind of legal right.

The common law also allows redemption and reversion options to be constituted as real burdens. Pre-emption entitles the holder to first refusal in the event of the

property coming up for sale. The decision by the owner to sell is the only thing that can trigger the pre-emption. Redemption does not depend upon the decision of the owner. It is a right to repurchase triggered by a specified event such as death of an owner or the granting of planning permission. Reversion is similar, but does not necessarily require the payment of money or value. In terms of the common law a real burden must not be illegal nor contrary to public policy. **The Scottish Law Commission produced their *Report on Real Burdens* (Scot Law Com No 181)**, published on 26 October 2000 which formed the basis of the **Title Conditions (Scotland) Act 2003**.

You should also be familiar with the law prior to **Tenements Act 2004**, According to Scottish Executive research, tenements form over a quarter of the housing stock in Scotland. Common law rules governing the maintenance and management of tenements have developed over the centuries but are sometimes anomalous and do not cover all eventualities. Modern properties in a development are, more often than not, governed by a Deed of Conditions. However, when considering older properties it is necessary to look at the title deeds for each property in a building and often one set of deeds may be silent on the matter of concern. Where this happens the "common law" governed in what way matters should be dealt with. It was the default for all matters which were not dealt with in the titles. As well as being unsatisfactory, the process was also laborious and unnecessarily time consuming for owners who often wanted to get on with the repairs themselves rather than being tied up with searches in the Register of Sasines/Land Register.

The common law rules relating to tenements also demarcated ownership within a tenement, that is to say who owned what, again on a default basis i.e. only where the title deeds did not make a different provision.

There was also a common law doctrine of "common interest" which is outlined above.

The Scottish Law Commission produced the **Report on the Law of the Tenement (Scot Law No 162) on 25 March 1998**. The resulting legislation was the **Tenements (Scotland) Act 2004**.

3.5 *The position following the enactment of all the above legislation.*

(i) The Abolition of Feudal Tenure etc. (Scotland) Act 2000

Reform to the Scottish feudal system was a "devolved" matter which was dealt with by the Scottish Parliament. A number of proposals were put before the Scottish Parliament in relation to feudal reform and there was consequent legislation, the most important piece of which is the **Abolition of Feudal Tenure etc. (Scotland) Act 2000**. This Act brought an end to the Scottish feudal system on 28 November 2004 when the remaining sections of the Act came into force. The Act largely implemented the recommendations of the Scottish Law Commission Report referred to above. The Act's main purpose was to abolish the Scottish feudal system of land tenure in Scotland and to replace it with a system of **simple ownership**. Land previously held feudally was converted into simple ownership. Vassals become owners and superiors have disappeared. Indeed the titles "vassal" and "superior" have disappeared from Scottish land law after a thousand years. All remaining feuduties were extinguished as was any obligation to pay redemption money on a sale under the **Land Tenure Reform (Scotland) Act 1974**.

The **2000 Act** was a major piece of legislation. Consider that the Act provided for the repeal of 46 entire Acts, as well as over 300 sections and Schedules and many obsolete and unnecessary words in other Acts.

It is impossible to deal with the effect of the Act in detail for the purposes of this course, but the most important provisions are as follows:

- **Real burdens in feudal deeds**. As a general rule, real burdens in feudal deeds (such as restrictions on the use to be made of property) have ceased to be enforceable by superiors
- **Rights of enforcement of third parties**. However, rights of enforcement of third parties – for example owners of other flats in a tenement whose properties are protected by the burden - are not affected (as discussed above)
- **Preserved burdens.** Despite the general rule, some feudal real burdens will be preserved as ordinary real burdens. These will then be subject to the existing law on real burdens generally. They will be in the same position as real burdens created in an ordinary disposition. The preserved burdens will be classified in three categories:
    - neighbourhood burdens (where the right to enforce the burden is reallotted to other land),
    - conservation burdens and
    - maritime burdens.
- **Common facilities burdens.** The superior's right to enforce in another category - common facilities burdens - has been converted into a right for whoever owns the land intended to be protected by those burdens. In many cases, those owners have such rights under the present law, but for the case where they might not, this will protect them
- **Compensation.** There are some rights to compensation payable by former vassals to superiors for the loss of the right to feuduties (on the same basis as compensation is payable under the **Land Tenure Reform (Scotland) Act 1974**, which Act among other things prevented the imposition of any new feuduties from that date onwards). Compensation is also available for the loss of the right to certain real burdens which reserve development value to the former superior - where the price was reduced or waived altogether in return for the burden. Compensation is not payable for the loss of the bare superiority interest itself - and so also for the loss of the right to charge vassals for waivers of conditions which the superior will no longer have a right to enforce. The right to charge money for granting Minutes of Waiver was very lucrative for some superiors
- **Ancillary matters.** The Act also dealt with other ancillary matters. The Act provides for a prohibition on the granting of leases of non-residential land for a period exceeding 175 years (residential leases in Scotland are already restricted to a period of 20 years). It made new provision for conveyancing and the ownership of land in Scotland. Some of the reforms and repeals were not strictly consequential on the abolition of the feudal system.

Even after the abolition of the feudal system there were still restrictions on how an owner could use land. The planning and building control systems, for example, remain. There is further discussion of planning and building control at the end of these materials.

The Scottish Law Commission estimated that only around half of all real burdens affecting property in Scotland were in fact imposed in feudal deeds. Equivalent real burdens could be and are created outwith the feudal system in ordinary dispositions.

These non-feudal real burdens were unaffected by the 2000 Act which was concerned only with the consequences for feudal real burdens of the abolition of the feudal system of land tenure.

The Scottish Law Commission produced a Report proposing reform of the general law of real burdens as regards matters which have nothing to do with the feudal system - ***Report on Real Burdens*** **(Scot Law Com No 181)**, published on 26 October 2000. The result was the **Title Conditions (Scotland) Bill** which later became the **Title Conditions (Scotland) Act 2003**, which is dealt with in detail below.

Abolition of feudal tenure applied equally in urban and rural areas, perhaps having greater practical impact in the former. For example, the vast majority of council houses which were bought under the right to buy legislation were feued by local authorities when they were sold in order that the authorities could impose conditions on future use. Local authorities therefore had extensive superiority interests. Abolition of the feudal system did not address the land use difficulties which arise from the landlord/tenant relationship in rural areas. There is an essential distinction to be drawn between the "feudal" system which is a technical legal framework for ownership of land throughout Scotland and the rural land ownership structure characterised by large estates, which is often condemned as being "feudal" in nature. Such problems will be addressed by other elements in the overall land reform action plan.

Since the Act came into force amendments to the Land Register have begun to remove reference to obsolete feudal burdens and it will continue to be amended over time.

Under the general law, an obligation, once extinguished, is extinguished for all purposes. When feudal burdens are extinguished, it should therefore cease to be possible to sue in respect of past breaches. Superiors are prevented from attempting to enforce burdens which have been extinguished even if the breach occurred before the appointed day for abolition.

(ii) The Title Conditions (Scotland) Act 2003

(a) General

There is a close interaction between the Land Tenure (Reform) Act 2000 Act and the Title Conditions (Scotland) Act 2003.

Non-feudal real burdens, that is to say those imposed in ordinary dispositions together with all “converted” real burdens which were originally feudal after the abolition of feudal tenure were affected by the Act. The **Title Conditions (Scotland) Act** reformed the general law on all real burdens for the future and for all existing burdens, whether or not they were always non-feudal ordinary burdens or have survived feudal abolition by conversion into ordinary real burdens.

This Act (other than Part 6) came into force on 28 November 2004. This resulted in a significant clarification of the law. (Note that various changes were made by the **Tenements (Scotland) Act 2004**, section 25 and Schedule 4 – see below). A number of other minor amendments have been made to the Act and some are pending.

The Act largely implements the recommendations of the **Scottish Law Commission** ***Report on Real Burdens*** **(Scot Law Com No 181)** published in 2000. It provides a

re-statement and clarification of the law of real burdens. The Act stipulates rules for the creation, enforcement and extinction of real burdens, and special rules for community burdens and manager burdens. Burdens validly created under the old law remain valid burdens - the legal effect will remain the same. No valid burdens have disappeared as a result of the Act, though it provides a mechanism for getting rid of obsolete burdens. It has become easier to find out who has the right to enforce burdens.

The Act is in 11 parts and a summary of some of the important matters is as follows:

- Real burdens are defined (s1) and the terms “benefited property”, “burdened property” and “personal real burden” are introduced s 1(2)(a) and (b), s1(3) and section 122 (interpretation section)
- It reduces the number of outdated burdens by making it easier to discharge or vary them
- It creates a framework for the way in which individuals may impose their own controls on property.
- It provides default rules for a number of areas where property may not be fully regulated by title deeds. This is intended to improve the management of property in order to allow repair work to be carried out when required, which is an important part of property management.
- A 'sunset rule' (with the option of renewal) is being introduced for burdens over 100 years old in order that they can be terminated – ss 20-24
- It deals with burdens which apply to communities in the sense of groups of properties which have a common scheme of burdens. These communities have common or similar burdens which apply to all the units within them, and which can be mutually enforced. (Part 2)
- Rules are set out for conservation and other personal real burdens which are of public benefit – Part 3
- Enforcement rights implied by common law are abolished, but the Act provides a preservation procedure and recreates some of these rights with a statutory basis. In future it will not be possible to create implied rights.
- A variety of miscellaneous matters are dealt with in Part 5 including the power to create a new legal category of burden called a “manager burden” which will allow a developer to keep control of a group of properties while they are being developed.
- Provision is made for a model Development Management Scheme, based upon the Management Scheme B contained in the Law Commission's ***Report on the Law of the Tenement*** **(Scot Law Com No. 162).** The Scheme is not confined to tenements, and can be adapted for use in other developments with shared facilities.
- The legal boundary between servitudes and real burdens is clarified –
- The rules for pre-emption, and rights of reversion arising under various statutory provisions are modified
- The powers of the Lands Tribunal (discussed further below) are set out. The existing jurisdiction is restated, with some modifications
- Some provision is made in relation to compulsory purchase powers.
- the existing legislation on the ranking of standard securities is amended

The Act re-states, but does not change, the common law concerning real burdens. A real burden is defined as “an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land”. A real burden is an obligation affecting land or buildings. It is a condition of ownership which runs with the land. The word 'real' is used to distinguish this sort of obligation from a

'personal' obligation, such as a contract. A personal real burden is, despite the name, not a 'personal' obligation: it is a real burden and as such must be an obligation affecting land or buildings. A personal real burden is an encumbrance on land but, unlike other real burdens, is constituted in favour of a person rather than in favour of the owner of other land in that person's capacity as owner of that land. Personal real burdens are included in the section 1 definition of real burdens: "that is to say a conservation burden, a rural housing burden, a maritime burden, an economic development burden, a health care burden, a manager burden, a personal pre-emption burden and a personal redemption burden (being burdens constituted in favour of a person other than by reference to the person's capacity as owner of any land)" – section 1(3).

The land that benefits from the condition, and whose owner is able to enforce the *burden*, is called the "benefited property" – section 2(b). Except for personal real burdens which are limited to the special types of burden listed, there must always be a benefited property; and the holder of a burden is the person who for the time being is the owner of that property. Viewed from the position of the holder, a real burden is a real right. The benefited property must be "land", a concept which is also defined in section 122 as including "heritable property, whether corporeal or incorporeal, held as a separate tenement; and (b) land covered with water.

The benefited property will commonly be neighbouring land. The definition of 'land' does not generally include a superiority interest, the estate of *dominium directum,* however for the purposes of the definition of real burden does include the estate of *dominium utile*. This is to include feudal burdens created before the appointed day within the provisions of the Act. Following the abolition of the feudal system it will no longer be possible for real burdens to be created for the benefit of feudal superiorities. In terms of the **Abolition of Feudal Tenure (Scotland) Act 2000 Act**, not only do all existing superiority interests in land cease to exist but it becomes impossible to create a new feudal "estate".

The land subject to the burden will be known as the 'burdened property'.

There are specified exceptions to the rule that burdens must be in favour of other land. It will be possible in future to create burdens that directly favour a person without reference to a benefited property. These are personal real burdens. Personal real burdens represent a new category of right but the category is limited to the types of burdens set out in section 1(3), namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens, health care burdens, manager burdens, personal pre-emption burdens and personal redemption burdens.

All real burdens will be one of three "types" as specified in section 2: either **affirmative** burdens, **negative** burdens or **ancillary** burdens:

- obligations **to do** something (an affirmative burden), such as to use the property for a particular purpose, or to maintain a building.
- or obligations **to refrain** from doing something (a negative burden), such as to build on the property, or to use it for commercial purposes.
- It is sometimes necessary for a burden to reserve a right of access or use. This is not a right of access of itself: that would be a servitude. It is instead a right to enter or use a burdened property for a purpose "ancillary" to other obligations imposed by real burdens. For instance, a burden might oblige an owner to maintain property. An ancillary part to this burden could be to allow the benefited proprietor to access the property to inspect the maintenance

work. This will be a question of "effect" rather than clever wording which may be used to avoid creating a servitude right. In future if anything is in effect a servitude right it will only be possible to create this sort of obligation as a positive servitude, and any existing real burdens in this form will be converted into positive servitudes by the Act.

The *content* of the obligation is specified in section 3. Real burdens affect land. The "praedial" rule is re-stated. This rule provides that real burdens must affect, and relate to, a burdened property for the benefit of the benefited property. The burden must in some way relate to the burdened property. If the *only* link between the burden and the property is that the burden is imposed on the person who owns that property, the praedial rule is not complied with. The other aspect of the praedial rule is that the burden must benefit the benefited property. This second requirement of praedial benefit does not apply to personal real burdens as there is no benefited property in these cases. All real burdens, including personal real burdens, must comply with the first aspect of the praedial rule.

Special provision is made for community burdens (Part 2) so that the praedial test for a community burden will be satisfied if it confers a benefit on the community or any part of the community. In community burdens, each benefited property is also a burdened property. Taken together, each of these units forms the "community" which is being regulated by the burdens ('community' is defined as any units subject to community burdens). Certain burdens, such as for management structures and service charges, will clearly be in the community's interest, and the Act will accordingly make them praedial, regardless of their relationship with an individual property. The Act also allows for an exception for communities in special circumstances. In a normal housing estate a prohibition on occupation by residents over the age of 60 would probably not normally be praedial because it would not benefit the property. It would consequently be invalid. However, the special needs of certain types of community, such as a sheltered or retirement housing complex where the housing is specifically adapted for occupation by the elderly, would allow for an exception. This sort of condition would be for the benefit of the community as a whole. The terms of a community burden are allowed to be varied or discharged without the need for all holders to sign the deed of variation or discharge.

A right of "pre-emption" is the only type of option to acquire land that may be created as a real burden in the future (and not redemption and reversion) – section 3(5).

The Act re-states the rule of the common law that a real burden must not be illegal nor contrary to public policy – section 3(6). The illegality requirement would include a purported burden that attempted to breach race or sex discrimination laws. There are 3 main categories of public policy prohibitions:

- A burden cannot be repugnant with ownership, i.e. it could not be so restrictive that the value of ownership would be lost.
- a burden cannot form an unreasonable restraint of trade. There is no bar, however, on a general prohibition, for example from carrying on a business in a housing estate
- a burden must not create a monopoly.

The Act explains how a real burden is created – section 4. In summary, a burden is created by a deed (known as a 'constitutive deed') granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.

Like the previous law, a real burden is created by registration of a constitutive deed in the Land Register or recording of the constitutive deed in the Register of Sasines. However, there are some exceptions to deal with the previous practice. Under the previous law for instance, a builder might create a Deed of Conditions over an entire development, but choose to postpone the activation of the real burdens on each unit until it is sold. The sale of the unit is the subsequent conveyance: that is the point at which the burdens will affect that part of the development. The Act allows the continuation of this practice but by different means and also allows a more straightforward postponement to a specifically specified date. If the deed is silent, the burden will take effect immediately upon registration.

Unlike the previous law, which provided that a real burden must be contained in a disposition or a Deed of Conditions, it is now possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in section 4(2)(c).

As with the previous law, only an owner can burden land. Where property is owned in common, both (or all) *pro indiviso* owners must grant. If the deed containing the burden is a conveyance of the burdened property, the granter satisfies the requirement on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An owner "grants" a deed by “subscribing” it in accordance with section 2 of the Requirements of Writing (Scotland) Act 1995, in front of a witness, over the age of 16 and with legal capacity to witness the signing of the deed.

Both the benefited and the burdened property must be nominated and identified. With personal real burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created (section 4(2)(c)(iii). There is an exception in respect of community burdens where it is only necessary to identify the community and each unit in the community is both a burdened and benefited property (s4(4)).

Many burdens are given special names by the Act and such special names can be used in the constitutive deed instead of "real burden". Examples of these include community burdens, facility burdens, conservation burdens, maritime burdens and manager burdens – see section 4(3).

There must be dual registration of the constitutive deed (section 4(5)), unlike the previous system where only the deeds relating to the “burdened” property showed the burden. It is now required that registration occurs against both the burdened and the benefited property (or properties). Registration against the benefited property is excused where there is no such property (as with personal real burdens) or where the property is not in Scotland.

In certain circumstances real burdens can be created by the Lands Tribunal.

The creation of real burdens in a deed of disapplication of a Development Management Scheme is permitted – see Part 6. In this case the deed would require to be signed by all the owners of the burdened properties and it is permitted for the deed to be signed by the owners association.

Although the common law rule that the terms of a real burden must be set out in full in the constitutive deed has been retained, an exception to that rule is introduced. It should not be necessary to specify the amount payable towards an obligation to pay

some cost provided that some method is provided for calculating liability. This is applied to existing burdens. Although this has probably not changed the previous law, it removed an uncertainty. This provision is retrospective in order to ensure the validity of pre-Act burdens which made this sort of provision.

As with all legislation, always be aware that amendments can be made in later Acts, statutory instruments etc. In the case of the **Title Conditions (Scotland) Act** various amendments were made to it by the **Tenements (Scotland) Act 2004, section 25 and Schedule 4**. Some of these changes are as follows:

- Section 3(8) of the **Title Conditions (Scotland) Act 2000** provides that a person other than "the" holder of a real burden may not waive compliance with it. The reference to "the" holder implies that a burden could only be waived, mitigated or varied by all of the persons entitled to enforce it. It should, however, be possible for the title deeds to provide that a burden may be varied by *some* of the persons entitled to enforce it and not just all the owners. Paragraph 2 of schedule 4 therefore substitutes "a holder" for "the holder".
- Paragraphs 3 and 14 of Schedule 4 correct a possible technical problem that could have hindered the operation of the **Title Conditions (Scotland) Act** in relation to groups of related properties such as housing estates. A change is made to relax the requirements for the creation of new burdens after 28 November 2004 (the appointed day) but only where the burden would be a burden to which section 53 would apply. Section 53 applies to burdens imposed on groups of related properties. The change is designed to avoid issues arising as to the validity of such burdens and to make sure that all of the properties within a community (the housing estate) will be able to enforce the burdens affecting each unit against the others.
- Paragraphs 4, 5 and 20 introduce into the **Title Conditions (Scotland) Act** the same policy on liability for incoming owners set out in *sections 12* and *13* of, and schedule 2 to, this Act. The Title Conditions Act applies to all types of property, which is why separate (but identical) provision is required. Section 10 of the **Title Conditions (Scotland) Act** deals with affirmative burdens and the continuing liability of former owners. It provides for certain obligations to be enforceable against both the current owner and the owner at the time the obligation arose - in other words, action may be taken against either for payment, though there is a right of relief for the buyer against the seller. These paragraphs introduce the same notice procedure for the Title Conditions Act as under the Tenements Act for purchasers who are unaware of an outstanding liability due by the seller and who, after taking entry, may be faced with a bill for a share of a cost of work already carried out.
- Paragraph 4 also provides that section 10 of the **Title Conditions (Scotland) Act** will not apply where *section 12* of the **Tenements (Scotland) Act** (the liability of owners and their successors) is applicable in tenement property.
- Paragraph 6 brings the **Title Conditions (Scotland) Act** into line with the **Tenements (Scotland) Act** in relation to the calculation of the floor area of a flat. In particular, it makes it clear that the internal walls or other internal dividing structure will be included in the calculation but that balconies, lofts or basements are not unless the loft or basement is used for purposes other than storage.
- Paragraph 7 extends the provisions of the **Title Conditions (Scotland) Act** on community burdens to situations where there are two rather than four units.

- Paragraph 8 makes changes to section 29 of the **Title Conditions (Scotland) Act**, which deals with the power of the majority to instruct common maintenance. The changes will replicate the provisions of rule 3 of the Tenement Management Scheme. Parts of rule 3 provide procedures for the deposit and retention of monies. Similar procedures are found in section 29 of the **Title Conditions (Scotland) Act**. Paragraph 8 provides that both procedures will be the same. Paragraph 8 also makes it clear that where a scheme decision gives authority to operate a maintenance account, the authorisation must be to a manager or at least two other persons.
- Paragraph 9 disapplies parts of section 28 and sections 29 and 31 of the **Title Conditions (Scotland) Act** (which relate to community burdens) in relation to a community consisting of one tenement or where the development management scheme applies to the tenement. These sections deal with the power of a majority to appoint a manager, the power of the majority to instruct common maintenance and remuneration of the manager and, as regards tenements, are superseded by this Act. If the community (i.e. a group of two or more properties all subject to the same or similar burdens which can be mutually enforced) consists of just one tenement, then this Act will provide appropriate rules if the title deeds do not do so.
- Paragraph 10 amends section 33(1) and (2) of the **Title Conditions (Scotland) Act** which relates to majority variation and discharge of community burdens. It ensures that section 33(2) will apply even where a constitutive deed may allow specified owners to grant a variation or discharge and also authorise a manager to do so.
- Paragraph 11 amends section 35 of the **Title Conditions (Scotland) Act**. Subsection (1) of that section provides that variation and discharge of community burdens by owners of adjacent units is only available "where no such provision as is mentioned in section 33(1)(a) is made". Paragraph 11 will make both methods of variation and discharge available. In other words, it will be possible for adjacent owners to vary or discharge community burdens by using section 35 or by using provisions in the title deeds if these exist.
- Paragraph 12 relates to rural housing bodies. Section 43(5) of the Title Conditions Act enables Ministers to prescribe a list of bodies as rural housing bodies. These bodies will be able, when selling rural housing, to agree a right to repurchase the property in order to ensure that it remains within the rural housing stock.
- Paragraphs 16 and 17 make it clear that when the courts are considering the best interests of the owners they must consider the interests of the owners as a whole.
- Paragraph 18 removes subsection (9) of section 119 of the **Title Conditions (Scotland) Act**. This subsection purports to delay the full effect of sections 106 and 107 of the Title Conditions Act (which deal with the extinction of real burdens in situations involving compulsory purchase). These sections have been in force since 1 November 2003.
- Paragraph 19 changes the definition of "tenement" in section 122 of the **Title Conditions (Scotland) Act** to bring it into line with the definition in the **Tenements (Scotland) Act** – see below. It also removes the definition of "flat" which will now be construed by reference to the **Tenements (Scotland) Act**.

(b) Enforcement – title *and* interest of benefited proprietor

Once real burdens exist, the question of enforcement of such burdens may arise.

Section 8(1) provides that "A real burden is enforceable by any person who has both title and interest to enforce it".

In the first instance, a proprietor seeking to enforce a real burden must have title – which is normally on the basis that they are the "benefited proprietor" of the land.

The question of interest then arises. Section 8(3) provides that "a person has such interest if … in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property"

Recent judicial consideration has been given to the matter of interest to enforce real burdens, primarily focusing on the question of the interpretation to be given to the term "material detriment".

Briefly, the matter arose as a result of a proprietor choosing to run a bed & breakfast business from their house, which attracted some 250 guests per year. The burden in question was that the properties would be used only as a family home, with ancillary offices and that no business would be run from the properties. Neighbouring proprietors (the benefited proprietors) complained that in the circumstances of their small select semi-rural development the activities in the burdened property were a material detriment to the enjoyment of their properties. The resulting litigation was raised at Sheriff Court level *Barker v Lewis* 2007 SLT (Sh Ct) 48 and was then appealed to the Sheriff Principal Barker v Lewis 2008 G.W.D. 9-167 (Sh Pr).

The question for the court was one of statutory interpretation – what is "material detriment" as outlined in **section 8(3)** of the Act, given that this is what the benefited proprietor requires to show. The Sheriff found against the pursuers (who later became the appellants) finding that what was complained of was not, on the facts and circumstances of the case, a material detriment.

The case was appealed by the benefited proprietors on the basis that the Sheriff had applied too high a threshold by equating "material" with "substantial".

On Appeal the sheriff principal accepted that the true meaning of the word "material" in the particular context was "significant" or "of consequence" or "important". In so doing he considered that the Sheriff has been justified in finding that the detriment complained of, on the facts as found, was *not* material.

The sheriff principal said: "Much will depend on the nature of the burden and its breach, the nature of the neighbourhood, including issues of proximity of burdened and benefited properties, and no doubt other circumstances particular to the case under consideration, the question being whether in those circumstances the detriment, viewed objectively is of sufficient significance or import to persuade a court that it is proper to allow the benefited proprietor to enforce the burden."

The effect would appear to be that each case will have to be decided on its own facts. This position is little different from the common law approach prior to the 2003 Act.

(iii) The Tenements (Scotland) Act 2004

This Act is the third in the series of laws aimed to modernise and improve Scotland's property legislation. The Act largely implemented the recommendations of the **Scottish Law Commission Report on the Law of the Tenement (Scot Law No 162), published on 29 March 1998**.

The changes in the Act were generally welcomed. The main provisions of the Act (other than section 18 which relates to insurance) came into force on 10 and 28 November 2004 (SSI 2004/487).

Section 18 came into force on 24 January 2007 (SSI 2007/17). The Tenements (Scotland) Act 2004 Prescribed Risks Order 2007 (SSI 2007/16) which relates to insurance came into force on 1 May 2007. The question of insurance will be further dealt with below.

Tenements form over a quarter of the housing stock in Scotland. For the purposes of the Act, "tenement" is defined in section 26 as being a building or part of a building which comprises at least two related flats which are designed to be in separate ownership and are divided horizontally" (note that this definition has also been transposed into the **Title Conditions (Scotland) Act** – see above). Most tenement property is residential (though even in those cases there are commonly shops on the ground floor) but commercial properties such as office blocks also fall within the definition, as do large houses which have been converted into flats (although not semi-detached houses or terraced house as these are not divided "horizontally" and were never intended to form part of a single tenement). High rise blocks, "four in a block" and modern blocks of flats will also qualify as tenements, as well as the traditional sandstone or granite buildings of three or four storeys, so Agents should be aware that the statutory definition captures a much wider range of property than might be imagined.

Common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these are not comprehensive nor without anomaly. The development of the law on real burdens, however, has helped to impose obligations on successive owners to adhere to a detailed regime for management and repair of a tenement. These burdens are drawn up to suit the particular circumstances of the tenement. But not all title deeds are comprehensive and they do not always provide burdens to specify how the owners are to decide on matters of mutual interest. If title deeds make no provision on one matter, the common law will apply on that one matter. The common law acts as a background or default law and most tenements, particularly new tenements, will have a detailed system of management provided by the title deeds to the property. The common law will only apply where there is a gap in the title deeds. Therefore it is important to appreciate that this Act is essentially a ***default*** **scheme.**

The Act was intended to produce greater clarity in the law on tenements.

The Act makes provisions about the boundaries and pertinents of properties comprised in tenements and for the regulation of the rights and duties of the owners of properties comprised in tenements; to make minor amendments of the **Title Conditions (Scotland) Act 2003** (for which see above); and various connected matters.

The Act had two main objectives:

1. To clarify and re-state the common law rules which define and govern the ownership of the various parts of a tenement. It was intended that this would remove a number of uncertainties and anomalies in the previous common law.
2. To provide a statutory system of management for tenements.

The overall effect of this is that every tenement will have a management scheme and hence a mechanism for ensuring that repairs are carried out and that decisions are reached on other matters of mutual interest and concern. The reform was intended to facilitate repair work and should allow for many outstanding necessary repairs being carried out.

A summary of the main provisions is as follows:

- the common law rules which demarcate ownership within a tenement were re-stated
- the common law doctrine of "common interest" (as outlined above) was re-stated and codified by a restatement of the law
- a statutory right of access was provided for
- compulsory insurance was introduced and there is now an Order prescribing the risks which every tenement owner is obliged to insure against
- a Tenement Management Scheme was introduced as a default scheme

Ownership within a tenement

A number of new definitions were introduced:

- the "Tenement" is defined (see above)
- "flat" is defined in section 29 (this also replaces the definition of flat in the **Title Conditions (Scotland) Act 2003** – see above)
- The different areas which go to make up a tenement building are defined as "sectors", and this term is defined in **section 29**. The use of the term "sector" is a convenient way of describing the different areas which go to make up a tenement building. Under the heading of "sectors" are "flats" as well as areas such as roofspace. The term "sector" is used in the context of boundaries. In the definition of "sector", the reference to "any other three-dimensional space not comprehended by a flat, close or lift" is intended to make clear that boundaries are an issue only where the units are in separate ownership. For example, a broom cupboard within a flat would not be a sector for the purposes of the Act. Generally, the boundary between "sectors" is the middle of the structure which separates them (section 2(1)). If there is no sector next to another one, then the boundary will be where the tenement meets another tenement, or will extend to the ground or "solum" ("solum" is defined in section 29 as the ground on which the building is erected). If a structure "wholly or mainly serves one sector" such as the door to an individual flat, it is considered to be part of the flat – section 2(2)
- "title to the tenement" means any registered deed, such as a disposition, which affects any "sector" of the tenement *Section 1(2)* explains that the "title to the tenement" means any conveyance or reservation of property, or any title sheet comprised in the Land Register of Scotland which affects the tenement or any sector of the tenement. Paragraph (b) is included because under section 3 of the **Land Registration (Scotland) Act 1979**, title to

registered property is vested by registration and not by the conveyance or other deeds that gave rise to the registration

- "tenement burden" means any real burden (within the meaning of the Title Conditions Act, above) which affects the tenement or any sector of the tenement

The common law rules on ownership of different parts of the tenement are re-stated. Sections 1, 2 and 3 specify how boundaries and pertinents are to be determined. These provisions will apply to all tenements, whether existing or new. However, as with the previous law, section 1 provides that if the "title to the tenement" states otherwise then this will govern the position The importance of the new Act is that where neither the title, nor other legislation (such as the **Prescription and Limitation (Scotland) Act 1973**), sets out the boundaries of a flat or another sector of a tenement *then* sections 2 and 3 will apply to determine the boundaries and pertinents of a sector of a tenement.

The common law rules relating to the top and bottom floors of a tenement are re-stated in sections 2(3) and 2(4), namely that the boundary of the top floor flat extends to include the roof over that flat and the boundary of the bottom flat extends to include the solum under that flat. The boundary of the close includes the roof over and solum under the close. The close includes the passage, stairs and landings where they provide common entrance to two or more flats. *Subsection 2(6)* restates the common law rule that ownership of the airspace above the building goes with ownership of the solum. Where, under the titles, the solum is the common property of all of the owners in the tenement, the airspace is likewise common property. *Subsection 2(6)* is qualified by *subsection 2(7)*. If the roof of the building slopes, ownership of the triangle of airspace lying between the surface of a sloping roof and an imaginary horizontal plane passing through the highest point of the roof, goes with the ownership of the roof and not with the ownership of the *solum*. This is important where the top floor flat wishes to build a dormer window into the airspace. Where the title deeds provide that the roof is common property, then the triangle of airspace is also common property.

Section 3 deals with the pertinents to tenement buildings. These are the parts of the tenement building which are not within the boundaries of individual flats. The ownership of these parts of the building requires to be apportioned among the various flats. As with section 2, the rules in *section 3* will only apply where provision for ownership is not made in the title deeds or in any other enactment. Under *subsections 3(1)* and *3(2)* the owners of all the flats which obtain access by way of a close or a lift (where the lift allows access to more than one flat) will have a right of common property in the close and lift. Both "close" and "lift" are defined in *section 29(1)*. *Subsection 3(5)* explains that the rights of common property are held in equal shares. *Subsection 3 (3)* provides for the ownership of land adjoining the tenement building. It sets out that any land pertaining to a tenement building will be owned by the flat or flats nearest to that land or piece of land. This rule does not apply to a path, outside stair or other piece of land that acts as a means of access. *Subsection (4)* deals with any other part of the tenement which is not provided for in *subsections (1) to (3)*. Examples given are a path, outside stair, fire escape, rhone, pipe, flue, conduit, cable, tank or chimney stack. Ownership of these residual parts is allocated according to a service test. Where a part of a tenement serves one flat, under *subsection (4)(a),* it will be a pertinent of that flat only. Where two or more flats are served by a part, a right of common property in that part will attach as a pertinent to those flats. The shares of common property amongst those owners whose flats are served by the pertinent will be equal, regardless of the extent of service. *Subsection (5)* apportions rights of

common property into equal shares, except in the case of a chimney stack. If a chimney stack is considered common property under the provisions of the Act, then shares will be apportioned according to the ratio which the number of flues serving a flat bears to the total number of flues in the stack. "Chimney stack" is defined in *section 29(1).*

Statutory Management Scheme – "default" scheme

The second purpose of the Act was to introduce a statutory management scheme called the Tenement Management Scheme which now acts as a **default** management scheme for all tenements in Scotland (this is set out in section 4 and schedule 1 to the Act).

The Tenement Management Scheme contains 9 rules which provide a system of management and maintenance in tenements if this is not provided for in the title deeds. The rules are as follows:

Rule 1. (section 4(3)) Scope and Interpretation. The provisions of Rule 1 may be used to determine other provisions of the Scheme. Not every part of the tenement is to be managed under the Scheme. The whole basis of the Scheme is the new concept of scheme property. This does not affect the ownership of a tenement or its parts, but sets out in statute the main parts of the tenement in which owners share an interest. If a part of the tenement is not scheme property, then it will not be subject to the maintenance regime in the Tenement Management Scheme.

Rule 2 (section 4(3)) Where the tenement burdens provide a procedure for making decisions and that procedure applies to all flats in the building, then the procedure in the title should be used (under *subsection (4)*). In this case rule 2 would not apply. Where there is no procedure in the tenement burdens or the procedure does not apply to all the flats, then rule 2 of the Tenement Management Scheme will apply. The Scheme will allow the owners in a tenement to make decisions by a simple majority vote (more than 50%).

Rule 3 (section 4(5)) gives a list of matters on which scheme decisions can be made. It will apply where there is no alternative provision made by the tenement burdens. Rule 3.3 sets out specific monetary limits which, when exceeded, will require that written notice is made to each owner and that money is deposited into a maintenance account decided upon by the owners. These figures will need to be updated from time to time to take account of inflation. *Subsection (12)* accordingly gives Scottish Ministers the power to substitute new sums by order made by statutory instrument (*section 32).*

Rule 4 deals with liability and apportionment of scheme costs. If an owner or owners are not liable for the entire liability (i.e. 100%) of scheme costs under the provisions in the tenement burdens, then rule 4 of the Scheme, which allocates liability and apportionment of costs, will apply under *section 4(6).* The reference is to "liability" rather than amounts because burdens in title deeds are unlikely to provide for actual amounts and if they did so, the amounts specified would quite quickly bear little relationship to the actual cost of work to scheme property due to cost of living increases. In considering whether the entire liability of a scheme cost has been apportioned among the owners, account is also taken of any liability to be met by someone other than an owner.

Rule 5 deals with special cases in relation to scheme costs where an owner is unable to pay and the costs must be redistributed. *Section 4(7)* provides that rule 5 will apply where the burdens in the title deeds do not make equivalent provisions.

Rule 6 ensures that a procedural error will not invalidate any decision made for a tenement unless the title deeds for the tenement provide for how irregularities are to be treated (section 4(8).

Rule 7 provides for emergency work. It will not apply where there is an alternative provision in the tenement burdens. Paragraph (b) makes sure that any existing provision on apportioning liability will not be overridden.

Rules 8 and 9 deal with the enforcement of scheme decisions and notification requirements, Where any provision of the Scheme applies, Rules 8 and 9 will apply to supplement the provision (under *section 4(10)*). While the enforcement measures under rule 8 will always apply where a Scheme rule has been applied, the application of rule 9 is subject to any alternative provision in the tenement burdens under *subsection (11).*

The Tenement Management Scheme also introduces the concept of "scheme property". This comprises the main parts of a tenement that are so fundamental to the building as a whole that they should be managed and maintained in accordance with the management scheme of the tenement. This will not, however, affect the ownership of the different parts of the building which remains unchanged. The Tenement Management Scheme also contains default provisions on emergency repairs and the apportionment of costs.

Disputes may arise and decisions can be challenged. Section 5 provides the possibility of making an application to the Sheriff for annulment of certain decisions made by the owners according to the procedures of the particular management scheme applying to the tenement. The management scheme could be set out in the burdens in the title deeds, the Tenement Management Scheme or a combination of the burdens and the individual rules of the Tenement Management Scheme (see *section 27*). *Section 5* will not apply, however, where the development management scheme operates within a tenement. An owner (either a new owner or an owner who was not in favour of the majority decision at the time it was taken) has the right, under *subsection (1),* to make a summary application to the Sheriff Court for the annulment of that decision. The defender for the purposes of the action will be all the other owners. Section 6 gives the Sheriff power in relation to disputes relating to the proper operation of the management scheme. There is a right of appeal to the Court of Session on a point of law.

Common interest

Section 7 abolishes the common law rules of common interest as they apply to tenements. This section should be read with *sections 8* and *9* which restate the common law in statutory form. Section 8 introduces a duty to maintain so as to provide support and shelter – it is a positive maintenance obligation on the owners and also on tenants occupying the property. The prohibition can only be enforced by other owners directly affected by the breach. Section 9 is the related negative obligation on owners to refrain from doing anything which would interfere with that support or shelter.

Rights of access

Statutory rights of access apply where an owner requires access for certain purposes. *Section 17* introduces a right of access to parts of a tenement that are individually owned, provided that access is required for one of eight reasons. When a flat is owned in common, any of the owners may exercise the right of access under *section 28(5)*. In tenements governed by the development management scheme, s*ubsection (2)* provides that the right of access may also be exercised on behalf of the owners' association. To exercise these rights the owner must give reasonable notice to the owner/occupier of the part to which access is to be taken. If necessary the right may be enforced under *section 6* by application to the sheriff court.

Costs, Apportionment and Insurance

Section 11 is intended to ensure that there is a set of rules which will determine when liability for certain costs ("relevant costs") arises, and that these rules will apply irrespective of whether the liability for that expenditure arises under the burdens in the title deeds, rule 4 of the Tenement Management Scheme or under the general provisions of the Act itself.

Section 12 deals with the apportionment of liability for repair and other costs when a flat is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a flat.

Section 18 imposes an obligation on the owners of all flats within a tenement to insure their flats and any pertinents attached. Under *section 33* there is an exception for the Crown. "Owner" is defined under *section 28* to mean an owner of a flat or a heritable creditor in possession. *Subsection (1)* imposes the basic obligation to insure and specifies that insurance should be for the reinstatement value. Section 18 was brought into force on 24 January 2007 and the Order showing the prescribed risks which must be insured against by tenement owners came into force on 1 May 2007 (**Tenements (Scotland) Act 2004 (Prescribed Risks) Order SSI 2007/16**). The risks are as follows:

The risk of damage to a flat or any part of a tenement building attaching to that flat as a pertinent caused by:

a) fire, smoke, lightning, explosion, earthquake;
b) storm or flood;
c) theft or attempted theft;
d) riot, civil commotion, labour or political disturbance;
e) malicious persons or vandals;
f) subsidence, heave or landslip;
g) escape of water from water tanks, pipes, apparatus and domestic appliances;
h) collision with the building caused by any moving object originating outside the building;
i) leakage of oil from fixed heating installations; and
j) accidental damage to underground services.

Amendment of the Title Conditions (Scotland) Act 2003

The Title Conditions Act is amended in accordance with schedule 4 of the Act. For the detail of the amendments, see above.

3.6 *Tenants rights as an occupier within a communal building or development*

It should be remembered that without tenants being prepared to occupy and pay rent, the function of the property owner or developer is meaningless and defunct!

It is the capacity of the owner or developer to generate a profit from the arrangement which keeps the whole exercise going.

The manager should see the relationship of owner or developer (and manager) on the one hand, and tenant on the other as a partnership. In general what is good for one party should be good for the other and the manager should always strive to achieve this.

The first point of reference should always be the agreement under which the tenant occupies the property – the tenancy agreement. Frequently, but not always, each tenancy agreement within a building would contain identical terms and conditions - but this is not always the case. For instance, where there is more than one owner in a block of flats, or tenancy agreements have been entered into at different times over a long number of years, there may easily be very differing tenancy agreements with wide variations in the terms and conditions. It goes without saying that many problems may arise where there are tenancy agreements with significant differences in the terms and conditions under which each tenant occupies. With various, or more than one owner, no assumptions can or should be made – in other words check the precise terms of each and every tenancy agreement.

At the outset the owner or developer has an obligation to provide 'subjects' (legal term in Scotland for the house, flat or property including garden) for the tenant that are reasonably fit for the purpose for which they are let. The corollary of this is that there is an obligation on the owner or developer to carry out repairs if defects arise once the tenant has moved into the premises.

The owner or developers principal obligation is to keep premises 'wind and watertight'. The main exceptions to this obligation on the owner or developer are where the damage has been caused by an "Act of God" e.g. a flood or hurricane; where it is caused by the action of a third party; or the damage has been caused by the tenant's own negligence (which would be an instance of where the tenant is liable to carry out remedial works).

The owners or developers obligation does not arise until the tenant has drawn the defect to the attention of the owner or developer. The owner or developer is not in breach of the tenancy contract until the owner or developer has been notified and failed to act. There may well be a specific provision in the lease dealing with notification requirements by the tenant and the time within which the owner or developer has to respond and deal with the defect or disrepair once it has been notified. If there is no specific provision in the tenancy agreement as to the time in which the owner or developer would be deemed to be in breach of contract, then if notification is made and the owner or developer does not carry the repairs out within a "reasonable" time – which will depend upon the type of defect, its urgency and the nature of the repairs which are required – the owner or developer will be liable in damages to the tenant.

Note that if the premises are rendered dangerous by the defect, and the defect falls within the owner or developers' repairing obligation set out in the lease, the owner or developer may be liable in damages to anyone who is injured or whose property is

damaged as a result - which would include not only the tenant but also anyone else who comes onto the property. This is potentially quite a liability to quite a wide body of persons.

Always watch for "contracting out" of the owner or developers repairing obligation which is more common in commercial and industrial leases within the Full Repairing and Insuring [abbreviated to FRI] lease. In some cases the lease itself will specify that the owner or developer is not to be responsible for repairs, and that the tenant is to be wholly responsible and have to attend to these. In this event the owner or developer could only be liable for damages in very exceptional circumstances.

If repairs are required to communal areas then it is necessary to first look at the tenants lease to determine who has to bear the cost of such repairs. If the responsibility for repair is clearly that of the owner or developer then the owner or developer must instruct such repairs. If responsible, and the owner or developer fails to carry out the repairs then the tenant can force the owner or developer to execute the works necessary. If the repair work was urgent and the owner developer does nothing within a 'reasonable' time, the tenant could carry out the works and sue the owner or developer for the costs involved.

3.7 *The appointment of a manager*

a) The procedure - either by the owners or a developer

An important part of the duties of an owner or developer of property is the appointment of someone to manage the property on their behalf. The quality of the property investment can be enhanced enormously by economic, efficient and effective management. The skills brought to the task of management can improve the return on any property investment quite considerably. The appointment can be made verbally or in writing. This follows the various methods of creating a normal contract. An offer and acceptance are essential. It goes without saying that any appointment should be made in writing. The big advantage of this is the existence of an audit trail. If a dispute arises at a later stage, it is simply a matter of looking at the words used in the appointment. If an appointment has been made verbally then the terms of the appointment may be open to dispute.

b) The manager's term of office

It is good practice not to have an open ended appointment but includes a provision which states that it is for a fixed period of, for example, one, three or five years.

c) The manager's rights and obligations (contractual or otherwise)

It is the responsibility of the manager to act on behalf of, and in the interests of, the owner or developer.

The extent of a manager's authority normally rests on the contract of appointment with the owner or developer. The manager has no authority (except perhaps in an emergency, and then only to the extent needed to deal with that emergency) to do anything which is not expressly, or by implication, contained in the contract of appointment with the owner or developer. Whilst an agent or manager has implied authority to do whatever is incidental to, or ordinarily necessary for carrying out the duties committed to the manager, it is not good practice to rely on that. It is therefore crucially important that the manager checks the drafting of the proposed contract of

appointment carefully, before it is entered into, to ensure that all of the powers required by the manager are explicitly covered in the draft and that the manager only assumes the responsibilities with which the manager is comfortable.

If after entering into a contract the manager discovers that additional powers are needed by the manager then these should be sought immediately from the owner and a minute of amendment entered into if the owner or developer agrees to grant the additional powers. This has the effect of giving the additional powers as though the powers had been contained in the original contract of appointment, which may be very many years old. Note carefully that with advances in technology, building techniques and changes in the law, a draft contract which was suitable, and covered 'everything', ten or fifteen years ago may be grossly deficient today, and leave the manager exposed to liabilities not in contemplation at that earlier time. These liabilities may be civil or criminal (or both). Especially worrying is the possibility of criminal liability arising from some act or omission of the manager which may result in the manager being prosecuted for an offence (as an individual) with a penalty of a substantial (or in some instances unlimited) fine or worse still, a lengthy prison sentence – clearly not to be recommended and very embarrassing for the family!!

Civil liability may arise where the manager is sued in the Courts for damages. This might arise because the manager has not done something which had been agreed to be done in the contract of appointment, or alternatively where the manager had done something agreed to be done in the contract of appointment but had done it badly or negligently. The manager is bound to exercise due skill and care in all that he does for the owner or developer.

For example, if the manager considers that some improvement to a property is required to comply with current legislation (Houses in Multiple Occupation, Health and Safety), then he should recommend to the owner or developer that it be carried out. If the owner or developer refuses to implement, then the manager should consider 'rescinding' (or cancelling) the contract with the owner or developer. This is important as the manager may be held liable (including as an individual) for any failure to comply with the law with the consequences noted above.

d) The manager's responsibility for Health & Safety

The appointment should specify that, to the extent allowed by law, the manager assumes the owner's or developer's responsibility for health and safety. This is extremely important, as shortcomings on the part of the manager could lead to a criminal charge and conviction, or civil liability being directed at the owner or developer.

You should be aware of the general Health and Safety law affecting properties, specifically where liability rests on the manager. A number of important areas are dealt with more fully below.

e) The manager's responsibility for Data protection etc

The Data Protection legislation lays a responsibility on those holding personal information of various types. The relevant legislation is the **Data Protection Act 1998.**

One of the purposes listed is "Property management" which is defined as "The management and administration of land, property and residential property and the

estate management of other organisations". The requirements of the Act would apply to any property agency handing data.
The data protection rules should be considered if you are engaged in block management.

The main requirement for those the Act applies to is to notify the Information Commissioner's Office that you or your organisation is a "data user". Notification is a statutory requirement and every organisation that processes personal information must notify the Information Commissioner's Office (ICO), unless they are exempt. Failure to notify is a criminal offence.

All public and private organisations are legally obliged to protect any personal information they hold. The Data Protection Act doesn't guarantee personal privacy at all costs, but aims to strike a balance between the rights of individuals and the sometimes competing interests of those with legitimate reasons for using personal information. It applies to some paper records as well as computer records. Your organisation should consider the information it holds. The ICO recommends that you consider:

- Do I really need this information about an individual? Do I know what I'm going to use it for?
- Do the people whose information I hold know that I've got it, and are they likely to understand what it will be used for?
- If I'm asked to pass on personal information, would the people about whom I hold information expect me to do this?
- Am I satisfied the information is being held securely, whether it's on paper or on computer? And what about my website? Is it secure?
- Is access to personal information limited to those with a strict need to know?
- Am I sure the personal information is accurate and up to date?
- Do I delete or destroy personal information as soon as I have no more need for it?
- Have I trained my staff in their duties and responsibilities under the Data Protection Act, and are they putting them into practice?
- Do I need to notify the Information Commissioner and if so is my notification up to date?

Registration is updated on an annual basis. You can consult www.ico.gov.uk for more information. It has helpful information such as "good practice" notes. Your office may carry out an audit to assess compliance with Data Protection and there is more information on this available on the website.

f) The procedures for the termination of the manager's appointment.

The contract under which a manager is appointed should include provision for termination of the contract in certain circumstances. The contract will automatically terminate at the end of the fixed period (if there is one) specified in the letter of appointment, or if there is a procedure for the owner or developer to serve notice, or if the manager fails in some material way to comply with or breaches the terms of the contract.

g) Interpretation of the contract terms and conditions

It is extremely important that there are clear procedures for resolving disagreements

as to the meaning of words, phrases and paragraphs in the contract. Whilst it is common for the original parties to know and understand the rights and obligations of the owners or developers on the one hand and manager on the other, changes in ownership, personnel, legislation and the property being managed can lead to misunderstandings. It is good practice for the contract of appointment to have a procedure for disputes to be referred to a third party for decision or determination. So that disputes as to legal meanings in the contract of appointment are referred to a solicitor appointed on application by either party to the President of the Law Society, or if the dispute is on valuation and other property matters, on application for the appointment of an arbiter to the Chairman of the Royal Institution of Chartered Surveyors in Scotland. As such procedures cost money, and sometimes lots of it, careful drafting of the contract is essential.

3.8 *Housing (Scotland) Act 2006 - Mandatory Licensing of Houses in Multiple Occupation (HMO's) and compulsory Landlord's Registration in terms of the Antisocial Behaviour etc (Scotland) Act 2004*

Agents must be aware of the key provisions of the **Housing (Scotland) Act 2006**, some of which are already in force. The Act received Royal Assent on 5 January 2006. The Act

- makes provision about housing standards
- confers a right to adapt rented houses to meet the needs of disabled occupants
- provides for the giving of assistance by local authorities in connection with work carried out in relation to houses
- requires certain information to be made available on the sale of houses
- regulates the multiple occupation of houses and certain other types of living accommodation
- makes provision about mobile homes
- makes provision about matters to be considered by local authorities when assessing suitability of persons to act as a landlord
- and connected purposes.

Sections 190 and 191 came into force on 5 January 2006 at the time of Royal Assent. Section 190 gives the Scottish Ministers the power to make incidental, consequential, transitional, or saving provisions. Section 191 contains provisions on the making and approval of orders and regulations arising from this Act. Sections 176 and 177 which relate to the private landlords' registration scheme (dealt with in detail below) were brought into force by the first commencement order on 29 January 2006. Further commencement orders can be found on the OPSI website.

Section 192 and Schedules 6 and 7 deal with amendment and repeal of existing legislation .These provisions came into force on September 3, 2007 for provisions specified in SSI 2007/270 art.3 but are not yet in force otherwise . Agents should check periodically to see what sections have come into force by way of Scottish Statutory Instruments (SSIs) passed by the Scottish Parliament.

The main purpose of the Act is to address problems of condition and quality in private sector housing (although some provisions also relate to the social rented sector). Owner occupation is now the largest tenure and the whole private sector, including private rented housing, amounts to over 70% of Scottish housing. The findings of the 2002 Scottish House Condition Survey showed the extent of these problems. For example, in the owner-occupied sector 27% of houses and 40% of flats had at least one element in a state of urgent disrepair (which means that, if repair is

not carried out, the fabric of the building would deteriorate further or health and safety would be placed at risk).

The Act is in 10 sections. Some relevant provisions are highlighted below.

(i) Statutory Repairing Standard – Part 1 Chapter 4

From 1 September 2007 private landlords have a duty to ensure that the houses they rent to tenants meet the new '**repairing standard**' which is set out in **section 13(1) of the Housing (Scotland) Act 2006 (the 2006 Act)**.

Section 12 sets out the tenancies to which the repairing standard applies. It will apply to all tenancies with certain exceptions. The repairing standard applies to most tenancies in the private rented sector.

Section 13 outlines the definition of the repairing standard. Subsection (1) sets out the criteria to be met if a house is to meet the repairing standard. (1) A house meets the repairing standard if -

a) the house is wind and water tight and in all other respects reasonably fit for human habitation,
b) the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order,
c) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,
d) any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order,
e) any furnishings provided by the landlord under the tenancy are capable of being used safely for the purpose for which they are designed, and
f) the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire.

Subsection (2) requires that, in determining whether a house is fit for human habitation, regard should be had to whether, and to what extent, the house fails to meet building regulations in force in the area. Subsection (3) states that the standard of repair of the structure and exterior of the house should have regard to the age, character and prospective life of the house and the nature of the locality. Subsection (4) means that gas, water and electricity supplies which are the landlord's responsibility but are outside the house are also covered.

Landlords' duties to repair and maintain a property are set out in **section 14**. Landlords have a duty to ensure that the house meets the repairing standard. They must ensure that work is carried out at the start of the tenancy so that the house meets the standard. Landlords, or their Agents, must carry out a pre-tenancy inspection of the property to identify any work required to ensure that the house meets the repairing standard. Managing agents should advise landlords of this requirement. The landlord must tell the tenant of any work needed to meet the standard (**section 19**).

Landlords or their Agents must also make their tenants aware of the repairing standard prior to the start of the tenancy. There is a recommended standard form of letter to tenants which includes details of the repairing standard the options open to the tenant if they feel that the property does not meet the standard.

The duty to meet the repairing standard applies at all times during the tenancy, but this latter duty only applies where the landlord is notified by the tenant of a problem or the landlord otherwise becomes aware that work is required. This work should be carried out within a reasonable time and must include making good any damage caused in carrying out the work.

Common property is also covered under the Act. **Section 15** details how the repairing standard applies to flats or other situations where the house forms part only of the premises. Subsection (1) makes clear that the reference in the repairing standard to the structure and exterior of the house includes any part of the building in which the landlord has an interest. This has the effect of including common property in the assessment of the repairing standard in relation to the structure and exterior. In terms of subsection (2), the landlord is only obliged to carry out work that will have an effect on the parts of the premises that the tenant is entitled to use.

Section 16 excludes from the landlord's duty under the repairing standard any work where the tenant has the responsibility for the work and the house is let for a period of more than three years. In addition, where the need for work under the duty arose from the tenant's action, the duty would not apply. The duty under the repairing standard does not include rebuilding or reinstating a house that is damaged or destroyed or work on anything that the tenant is entitled to remove from the house. The section also provides that the landlord has not failed to comply with the obligation where he has tried to carry out the required work, but cannot obtain rights to do so.

Section 17 prevents contracting out from the landlord's obligation under **section 14(1)** through the terms of a tenancy or other agreement between a landlord and tenant, unless consent has been obtained from the sheriff under **section 18**.

Section 18 provides that the landlord's duty to repair and maintain the property may be varied or excluded by order of the sheriff, on application from landlord or tenant. This can be done only if the sheriff considers it reasonable and both parties consent.

Section 22 outlines the right of a tenant, who believes that his or her landlord has not complied with the repairing standard duty, to apply to a new body known as the Private Rented Housing Panel to seek a determination as to whether the landlord has complied with their duties under the repairing standard. An application can only be made to the Private Rented Housing Panel if the tenant has informed the landlord of the need for work to be done.

(ii) Private Rented Housing Panel

The Private Rented Housing Panel (PRHP) was established on 3 September 2007 to assist landlords and tenants resolve their differences primarily in relation to rents issues and repairs issues. The new body superseded the Rent Assessment Panel for Scotland (RAP). The date of the new body coming into existence coincided with section 13 (1) of the Housing (Scotland) Act 2006 coming into force. The relevant subsidiary legislation is **The Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007 SSI No 173.**

If the tenant feels that the property does not comply with the repairing standard, they must make the landlord aware and the landlord has a “reasonable” time to deal with the issue. If that does not resolve the issue, there is a simple procedure for tenants to make an application online to have a dispute resolved without the need for going to

court. The matter will either be decided by a Committee or by referring the dispute to Mediation.

The PRHP can make an order requiring a landlord to carry out work and it is an criminal offence if the landlord does not do so. The landlord cannot re-let the property while an order is in force.

The panel has a website **http://www.prhpscotland.gov.uk/prhp/1.html**
There is helpful guidance for landlords which managing agents must also be aware of. The website also contains a searchable database of decisions although at present these only relate to Rent issues as no Repairs decisions have been published.

(iii) Tenancy Deposit Scheme

Part 4 of the 2006 Act relates to Tenancy Deposits and provides that the Scottish Ministers have the power to approve a scheme or schemes and enact Regulations to set up a scheme regulating deposits paid by tenants in relation to entering into a lease of living accommodation in the private rented sector (**section 121**). **Section 120** defines "tenancy deposit" and "tenancy deposit scheme" for the purpose of this Part.

At present there is no compulsory tenancy deposit scheme in Scotland, such as that which operates in England and Wales under Regulations which came into effect there in April 2007. In the English scheme deposit monies are protected in an authorised scheme and alternative dispute resolution services must be offered. Under such a scheme the landlord can either pay the deposit into the scheme account with an authorised holder (custodian scheme) or retain the deposit but pay insurance premiums to the scheme (insurance backed scheme). Calls have been made for such a compulsory scheme to be introduced in Scotland with a free alternative dispute resolution service in the event of disputes. Organisations such as Shelter prepared a briefing for MSPs in June 2008 in advance of a debate on the matter, urging them to use their powers under the **2006 Act** and introduce such a scheme. On 18 June 2008 the Scottish Parliament debated S3M-1865 in the name of Claire Baker. The Parliament was concerned that the withholding of deposits unreasonably continues to be a problem for tenants in the private rented sector. They noted that the private rented sector provides over 230,000 homes to households in Scotland, some 8% of all households, including families, students, migrant workers and young professionals and further noted that many tenants, on leaving a tenancy, rely on the return of their deposit to pay the upfront deposit and rent for their new property and that withholding a deposit unfairly can lead to hardship, debt and ultimately homelessness. They highlighted recent research by St Andrews University Students' Association that found that 24% of students there have had unjustified deductions made from their deposits and 28% have faced unreasonable delays of more than 28 days in returning their deposits. They acknowledged the successful introduction of the tenancy deposit protection scheme in operation in England and Wales which ensures protection for both landlords and tenants, and believes that powers already on statute in the Housing (Scotland) Act 2006 could be used to further a deposit protection scheme for Scotland, building on landlord registration and accreditation initiatives already in place. It should be noted that ARLA has communicated with the Scottish Parliament suggesting that they do not need to "reinvent the wheel" by combining the scheme with landlord registration and should simply follow the English model by providing a number of custodian and insurance backed schemes to enable landlords and managing agents to select which scheme to use. Watch this space!

(iv) Houses in Multiple Occupation (HMO's) – Part 5

Part 5 of the 2006 Act deals with licensing of Houses in Multiple Occupation (HMOs) and states that they must be licensed by Local Authorities. The system of licensing was previously founded in secondary legislation under the Civic Government (Scotland) Act 1982 (Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000 and later amendments in 2002 and 2003) which was introduced from October 2000. The 2006 Act has re-enacted the system in primary legislation, with some changes to its details (In terms of Schedule 6 Part 2 the Act the previous Orders will be revoked when the 2006 provisions come into force).

In terms of section 125 the 2006 Act a house is an HMO if it is occupied by 3 or more persons who are not all members of the same family or of one or other of two families and they are sharing one or more basic amenities of toilet, bathroom and kitchen facilities. If a person has exclusive use of an en-suite bathroom or their own kitchen they are not treated as sharing that basic amenity. "Living accommodation" may include accommodation where the shared facilities are in different buildings, for example where there is a central refectory for several blocks. People count as occupants only if the accommodation is their only or main residence. However, accommodation occupied by a student during term time is regarded as that person's only or main residence. Patients in hospital are not counted as occupants of the hospital. Section 128 defines the meaning of "related" for the purposes of HMO licensing. The definition includes married, unmarried and same-sex couples, and stepchildren and foster children, as well as blood relatives.

Section 124 of the 2006 Act requires every house in multiple occupation (HMO) that is not exempted to be licensed. The licensing of HMOs is dealt with by local authorities. A licence for an HMO authorises its holder and any agent named on the licence to allow the HMO to be occupied in accordance with the licence conditions.

Section 126 sets out seven types of exemption from the licensing requirement.

- The first relates to owner occupiers. An HMO is exempted if it is occupied only by the owners, members of their families, and any other persons who are not related to the owners and are members of no more than two other families.
- The second exemption applies where the HMO is provided as part of a service registered in certain categories under **Part 1 of the Regulation of Care (Scotland) Act 2001**. This excludes those categories of care accommodation where the Care Commission is responsible for inspecting the property as well as the service.
- The third exempts forces accommodation,
- the fourth exempts prisons and related institutions.
- The fifth exemption is where the occupants are members of a religious order, mainly occupied in prayer, contemplation, education or the relief of suffering, plus no more than two people who are not members of the order.
- The sixth exemption is where the landlord's rights and duties have been transferred to a local authority under section 74 of the Antisocial Behaviour etc (Scotland) Act 2004, in order that the local authority can take steps to prevent antisocial behaviour by the tenants.
- The final exemption is where the HMO is owned by a small housing co-operative. This removes an anomaly where, if a group of people own the house they occupy jointly, they are exempt from licensing, but if they form a

corporate body which owns the house, they would otherwise require to be licensed.

Ministers can by order add, remove or vary the descriptions of categories of HMOs which are to be exempt.

It is a criminal offence to operate an HMO without a licence. To do so exposes landlords to a fine.

You should consider carefully whether any properties which you manage require HMO licences. You should also be aware that the application and decision process can take months.

(v) Private Landlords' Registration Scheme – Part 8

Part 8 of the 2006 Act contains miscellaneous provisions. These include developing the landlord registration provisions in the **Antisocial Behaviour etc. (Scotland) Act 2004** by giving Ministers powers to issue a Letting Code, which is a code of practice for landlords and their Agents. It also provides that the Code, together with the nature of any agency arrangement, should be taken into account by local authorities when deciding whether a landlord is a fit and proper person to be letting houses. Section 175 of the 2006 Act relates to matters which are relevant to deciding whether a person is fit and proper to be a landlord.

Section 176 makes further amendments to the **Antisocial Behaviour etc. (Scotland) Act 2004**. The reference to unlawful discrimination as part of the fit and proper person test is altered so that it relates to all current forms of unlawful discrimination, rather than specific forms. A local authority is required to include in the register of landlords the fact that a house is subject to a repairing standard enforcement order and to remove the reference when the order is revoked or the work completed. This corresponds to the period during which it is illegal for the landlord to re-let the house without the consent of a private rented housing committee. Public access to information contained in a local authority's register of private landlords is controlled, so that the access is geared to the purposes for making that information available to the public and does not support other undesirable purposes such as trawling the internet-based register. Another amendment prevents an abuse by ensuring that a person whose application is refused cannot re-apply immediately and thus let lawfully while the new application is considered. Only the owner and the immediate landlord of the occupier are to be subject to the fit and proper person test. An agent of the immediate landlord would also be subject to the test, but not intermediate landlords.

Sections 176 (which amends the **Antisocial Behaviour etc. (Scotland) Act 2004**) and 177 (which amends the **Housing (Scotland) Act 2001**) of the **Housing (Scotland) Act 2006** came into force on 29 January 2006 (**The Housing (Scotland) Act 2006 (Commencement No. 1) Order 2006, NO 14 (C1)**

The **Antisocial Behaviour etc (Commencement and Savings) Amendment Order 2005** extended the original deadline for registration (no 553 ch 27) from 15 November 2005 to 31 March 2006. **The Antisocial Behaviour etc (Commencement and Savings) Amendment Order 2006** further extended the deadline for registration to 30 April 2006. Since 30 April 2006 almost all private landlords (with a few exceptions) are required to register with their local authority, to ensure that they are a "fit and proper person" to let property. It will be an offence to let any house without being registered. An online system for local authorities to receive applications and

maintain their registers, at www.landlordregistrationscotland.gov.uk . Most local authorities also now have information available for landlords, and paper application forms if required.

The local authority must be satisfied that the landlord is a fit and proper person to let property, before registering them. To be registered, owners and their agents must be *fit and proper* to let residential property. Local authorities must take account of any evidence that the person has:

a) Committed any offence involving fraud, dishonesty, violence or drugs
b) Practised unlawful discrimination in connection to any business
c) Contravened any provision of the law relating to housing, or landlord and tenant law, and the person's actions, or failure to act, in relation to any antisocial behaviour affecting a house they let or manage, and must take account of the fact and nature of any agency arrangement.

In addition to the information provided on the form, the local authority will also take account of any other relevant information they hold about the applicant. They will make a balanced judgment on the basis of all the available information, there is no automatic refusal.

If an owner lets property in more than one local authority area, the authorities will share information to ensure they have all relevant details, but each authority will make its decision independently.

If a property is jointly owned by more than one individual, each individual will need to register.

You can also register if you do not own any property, to check that you will be considered fit and proper before you invest in property to let.

In some cases the owner of a property leases it to an organisation or person who then acts as the "landlord" for the occupiers. For example, a private owner may lease a house to a company which lets it out to its employees, or to a charity which lets it to people in need. The lessee may also use an agent to manage the tenancy. In these cases the owner needs to register and the "landlord" is treated as an agent. The agent managing the tenancy must also be declared.

Owners must declare any agents that they use to manage their property. An agent may be a professional such as a letting agent or solicitor, or a friend or relative who looks after the property, arranges repairs, collects rents and so on. Agents may also register in their own right if they wish. If an agent acts in relation to more than 2 properties, it is cheaper for them to register separately.

If an owner use a professional agent, he or she may already be registered. Owners should ask them for their reference number, which can be entered into the system when prompted. There will be a separate reference number for each local authority the agent is registered with.

Agents are not legally obliged to apply for registration, but they still have to be assessed as "fit and proper" by the local authority. To do this, the authority needs to obtain the same information and charge the same fee as if the agent applied for registration. The online system therefore treats all agents the same.

An agent can enter all the details for an owner but the owner is legally responsible for making sure that they are registered, that the information is correct, and the local authority is notified of any changes to their details.

Exemptions

Exemptions apply to properties rather than to people. If **all** of a landlord's properties in a particular local authority area are covered by one or more of the exemptions, he or she does not need to register with that authority. If some of his or her properties are exempt, the other properties must still be registered. A property is exempt from registration if it is:

a) the only or main residence of the landlord, where there are not more than 2 lodgers
b) let under an agricultural tenancy and occupied by the agricultural tenant
c) let under a crofting tenancy
d) occupied under a liferent
e) used for holiday lets only
f) regulated by the Care Commission, in certain categories
g) owned by a religious organisation and occupied by a leader or preacher of that faith
h) occupied only by members of a religious order
i) let to members of the landlord's family only
j) held by an executor
k) possessed by a heritable creditor
l) owned by a local authority or Registered Social Landlord

If owners are unsure whether an exemption applies to them they should contact the local authority where the property is located for further advice.
Properties subject to an HMO licence also have to be included on the register, but licensed landlords will be automatically entered on the register by the licensing authority. They must declare any additional non-HMO properties they own.

Since 30 April 2006 it is an offence for anyone to own residential property in Scotland which is let, if they are not registered with the relevant local authority, or have made a valid application to register, unless they are covered by an exemption.

It is not an offence to let property if you have submitted a valid application for registration which has not yet been processed by the local authority. An application is valid if you have completed all the required information accurately, and paid the appropriate fee.

The system makes sure that all landlords meet minimum standards and will remove the worst landlords from the sector. It allows tenants and neighbours to identify and contact landlords of private rented property, and provide information on the scale and distribution of the sector in Scotland for the first time.

More detailed information about landlord registration is available from the Scottish Executive's Better Renting website. www.betterrentingscotland.com. This site provides information on the legal rights and responsibilities of landlords and tenants, and advice on best practice.

Information on the legislation underlying the requirement, and how the detail of the scheme has been developed and consulted on, is provided on the Scottish Executive website www.scotland.gov.uk.

Local authorities will also have powers to take action against landlords who fail to manage their property so as to minimise antisocial behaviour from tenants. There is further information on anti-social behaviour below.

Scottish Ministers have powers to regulate on various aspects of how landlord registration and antisocial behaviour notices will operate in practice, and to issue guidance to local authorities. Ministers are clear that, while landlord registration provides a very powerful tool to deal with bad landlords, the system should be as light-touch as possible to minimise the impact on the majority, who provide a good service for their tenants.

If you are searching to see if a landlord or property is registered, be aware that only approved registrations appear on the register. It can take local authorities some time to process all the applications they receive. If a landlord or agent is not on the register for the authority area, you can contact the local authority to check whether an application for registration has been made.

(vi) Antisocial Behaviour etc (Scotland) Act 2004, as amended

You have seen the provisions of the Housing (Scotland) Act 2006 which amend the Antisocial Behaviour etc (Scotland) Act 2004 as it applies to landlord registration. You should be aware of the 2004 Act in more general terms. Much of the 2004 Act came into force on 28 October and 1 December 2004. Parts of the Act have now been repealed or amended by the 2006 Act.

The Act gives local authorities new powers in relation to dealing with antisocial behaviour, but also places new duties upon them. Such as the duty to prepare a strategy, jointly with the Chief Constable, to deal with antisocial behaviour.

The local authority is given in Pt 5 significant new powers in relation to noise nuisance. These include the issuing of warning notices, fixed penalty notices, and entry into premises for seizure of items such as hi-fis.

Part 7 introduces provisions whereby the local authority is able to issue antisocial behaviour notices against recalcitrant landlords. However, you should be aware that the provisions go well beyond what you might expect and extend not only to tenants or occupants of premises but also to any visitors of the tenants on those premises engaging in anti-social behaviour.

Part 7 of the Act focuses on requiring a landlord to deal with antisocial behaviour which is going on within their tenancies and requires them to take such action as is specified in the antisocial behaviour notice introduced by s 68 to abate the antisocial behaviour complained of.

Where that antisocial behaviour continues, the local authority then has certain sanctions that can be imposed, including under s 71 a no payment of rent order, which the local authority can apply to the sheriff to obtain. This would if granted, deprive the landlord of the right to charge rent for the property.

A further power is granted under s 74 to the local authority that would allow them to seek a management control order from the court. If the management control order comes into effect that would mean that the local authority would take over the management and control of the premises for a period of up to a year and in effect the council would stand in the shoes of the landlord.

An alternative to seeking a management control order would be to invoke the powers created by s 78. Section 78(2) allows the local authority to take such steps as it considers necessary to deal with antisocial behaviour described in a previously served antisocial behaviour notice and to bill the landlord for any costs incurred thereby. Also, in terms of s 79, any landlord who fails to take the action specified in the notice will be guilty of an offence.

This, potentially, does place significant additional burdens on the local authority as these orders have to be obtained by the courts, which would imply additional resources for councils' legal services departments. Furthermore, there has been some criticism about the fact that a no payment of rent notice could in fact be seen to be rewarding an antisocial tenant, rather than punishing him/her.

The management control order does impose a fairly substantial additional burden on the local authority, as the local authority would in effect take over all the roles and responsibilities of the landlord, not just to deal with the antisocial behaviour but all aspects of the tenancy, including landlords obligations to repair etc. There is now a right to recover costs from the landlord if rent has been paid to him, in terms of s 74(4).

These provisions of the 2004 Act are a major departure from the previous legal regulation of landlords across Scotland. Since the coming into force of Parts 7 and 8 of the 2004 Act there have been major problems in implementation for councils with a significant private rented sector given the significant burdens imposed by Parts 7 and 8 respectively.

(vii) Right to Adapt Rented Houses – Chapter 7

You should also be aware of **Chapter 7 of the Housing (Scotland) Act 2006** which contains a right to adapt rented houses. It has been in force since 4 December 2006. The sections apply to any tenancy of a house let for human habitation.

In terms of **section 52(2)** "The tenant in a tenancy to which this section applies may carry out any work in the house -

(a) which the tenant considers necessary for the purpose of making the house suitable for the accommodation, welfare or employment of any disabled person who occupies, or intends to occupy, the house as a sole or main residence, …"

However, subsection (3) provides that "the tenant is not entitled to exercise the right set out in subsection (2) without the consent of the landlord, which must not be unreasonably withheld."

The tenant must propose the work which he requires to carry out. Managers should be aware that the landlord's decision must be issued within one month.

There is further detail about disability discrimination below.

(viii) Provision of Information on Sale of House – Part 3

Section 98 of the Act, which is not yet in force, provides that "A person who is responsible for marketing a house which is on the market must possess the prescribed documents in relation to the house".

From 1 December 2008 Scotland will be introducing a scheme known as The Home Report. It will vary significantly from the HIPs (Home Information Pack) scheme which has already been introduced, in restricted terms, in England and Wales.

The Scottish Home Report will be a compulsory system. Take up on the previous voluntary scheme was very poor.

House sellers will have to commission a home report before they put their property on the market and make it available to anyone who is interested in buying the property.

The Home Report is a pack of three documents:

- a Single Survey
- an Energy Report and
- a Property Questionnaire

You can see examples of what these documents will look like at www.hipsdirect.com.

Single surveys

In Scotland the Single Survey will be implemented as a compulsory requirement on sale, from 1 December 2008.

The Single Survey contains an assessment by a surveyor of the condition of the home, a valuation and an accessibility audit for people with particular needs.

Energy Report / EPCs

The Energy Report contains an assessment by a surveyor of the energy efficiency of the home and its environmental impact. It also recommends ways to improve its energy efficiency.

In Scotland all properties must have an Energy Report for sales on or after 1 December 2008 (to coincide with the single seller survey).

An EPC is a document which states the energy efficiency of a building based on the standardised way that the building is used. Carbon Dioxide (CO2) ratings are shown in bandings from A to G, with A being the least polluting. For dwellings (as opposed to non-domestic premises) cost-based ratings are also shown with bandings from A to G to indicate the least running costs. The main focus of the EPC is the amount of CO2 that is estimated to be released from the building. The performance of the building is benchmarked against current building standards and recommends cost effective improvements. The EPC must be fixed to the building and will be valid for a period of up to ten years (subject to being sold or rented in that time). The EPC will give owners better information about the carbon dioxide emissions from their

buildings. They include simple cost-effective home improvement measures that will help save energy, reduce bills and cut carbon dioxide emissions.

You should be aware that the requirement for an EPC extends beyond properties which are being sold after 1 December 2008. EPCs are already required for all new buildings constructed after 1 May 2007.

However, over the next year existing buildings will also require an EPC. Buildings including

- homes
- public sector buildings
- business premises

when:

- constructed
- sold
- rented out

will also require an EPC.

The Scottish Government through Scottish Building Standards has entered into a protocol for the issue of EPCs for existing buildings on Scotland. All EPCs for existing buildings must be issued under the umbrella of the protocol. Further information can be obtained from www.sbsa.org.uk .
In accordance with the timetable below, EPCs will be required for existing domestic buildings in Scotland and existing non-domestic buildings in Scotland.

Category	**Date of Introduction**
Construction	Introduced on 1 May 2007
Sale (dwellings)	1 December 2008*
Sale (non-dwellings)	4 January 2009
Rental	4 January 2009
Public buildings	Must be on display by 4 January 2009

*Introduction to align with the Single Survey

Managers should therefore be aware of the requirement for an Energy Report / EPC for all rentals on or after 4 January 2009.
Managers should ensure that after 4 January 2009, all properties being rented out after that date have a valid EPC and that it is displayed somewhere in the building.

Property questionnaire

The Property Questionnaire is the third requirement of the Scottish Home Report. It is completed by the seller of the home. It contains additional information about the home, such as Council Tax banding and factoring costs that will be useful to buyers.

3.9 *The methods of resolving disputes between owners and/or the managers - arbitration, Sheriff Courts, Lands Tribunal for Scotland, Scottish Land Court and Court of Session.*

This section deals with Scottish courts with a "civil" jurisdiction (as opposed to a criminal one), the Lands Tribunal for Scotland and the Scottish Land Court, as well as methods of alternative dispute resolution, the most common in practice being arbitration (which must be contracted into by the parties to the dispute). Most disputes about rights to land (for example, disputes over ownership or succession) are dealt with by the ordinary courts: the Sheriff Court or the Court of Session.

(i) Sheriff Courts

In Scotland there are regional Sheriff Courts which deal with both civil and criminal matters. They have a wide jurisdiction to deal with civil matters, which would include many matters arising in relation to property. Each Court is presided over by a Sheriff. Both Advocates (Counsel) and solicitors appear to represent parties in the Sheriff Courts.

Some statutes specifically provide for reference to a Sheriff on issues arising out of the statutory provisions. For example, there are provisions for disputes and challenges under the **Tenements (Scotland) Act** (above) to be referred to a Sheriff, with a right of Appeal on points of law to the Court of Session.

There is a searchable database of opinions on www.scotcourts.gov.uk. Not all decisions of the Sheriff Courts are reported. It is only where there is a significant point of law or particular public interest that the details will be published. (The earliest such case is dated September 1998.)

(ii) Court of Session

The Court of Session, Scotland's supreme civil court, sits in Parliament House in Edinburgh as a court of first instance and a court of appeal. An appeal lies to the House of Lords. The origins of the court can be traced to the early sixteenth century. The court presently consists of judges who are designated "Senators of the College of Justice" or "Lords of Council and Session". Each judge takes the courtesy title of "Lord" or "Lady" followed by their surname or a territorial title. A judge has normally been an Advocate and then a QC (Queens Counsel) for many years before appointment to the legal bench. The court is headed by the Lord President, the second in rank being the Lord Justice Clerk.

For the purposes of hearing cases, the court is divided into the Outer House and the Inner House. The Outer House consists of 24 Lords Ordinary sitting alone or, in certain cases, with a civil jury. They hear cases at first instance on a wide range of civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review. The judges cover a wide spectrum of work, but designated judges deal with intellectual property disputes. Special arrangements are made to deal with commercial cases.

The Inner House is in essence the appeal court, though it has a small range of first instance business. It is divided into the First and the Second Divisions, of equal authority, and presided over by the Lord President and the Lord Justice Clerk respectively. Judges are appointed to the Divisions by the Secretary of State after consulting the Lord President and Lord Justice Clerk. Each division is made up of five Judges, but the quorum is three. Due to pressure of business an Extra Division of three judges sits frequently nowadays. The Divisions hear cases on appeal from the Outer House, the Sheriff Court and certain tribunals and other bodies. On occasion, if

a case is particularly important or difficult, or if it is necessary to overrule a previous binding authority, a larger court of five or more Judges may be convened.

Usually a case will be presented by an Advocate, who is also referred to as "counsel", but a case may also be presented by a solicitor-advocate. Advocates are members of the Faculty of Advocates and have a status and function corresponding to that of a barrister in England. Advocates once had an exclusive right of audience in the Court of Session but, since 1990, they share that right with solicitor-advocates. Solicitor-advocates are members of the Law Society of Scotland. They are experienced solicitors who obtain an extension of their rights of audience by undergoing additional training in evidence and in the procedure of the Court of Session. In addition a practitioner from another member state of the European Union may appear for a client in the circumstances prescribed by the European Communities (Services of Lawyers) Order 1978. An individual who is a party to a case may conduct his own case but a firm or a company must always be represented by counsel or by a solicitor-advocate.

The decisions of the Court of Session are reported in Session Cases (cited as 1999 S.C. 100), Scots Law Times (cited as 1999 SLT 100) and Scottish Civil Law Reports (cited as 1999 SCLR 100). Decisions since the winter term of 1998 are available on the Opinions page of www.scotcourts.gov.uk.

The first point of contact for the property manager, however, would be a solicitor, who would discuss the nature of the dispute and whether or not there was an “arbitration” or other “ADR” clause in the contract (see below) before going on to consider whether the matter should be dealt with in the Sheriff Court or Court of Session, and instructing an Advocate if necessary.

(iii) Alternative Dispute Resolution (ADR)

ADR refers to any method of resolving an issue capable of resolution by litigation in the civil courts without resorting to the courts.

(a) Arbitration

The most common example is Arbitration. If the parties have agreed, either by inserting a clause in their contract, or by a separate agreement, that the matter should be determined by arbitration, then their agreement is binding. The dispute must be heard by an arbitrator who is normally appointed by the parties or sometimes by reference to a member of a professional body, such as the Chairman of the Royal Institute of Chartered Surveyors in Scotland (RICS). An arbitrator will normally be a person skilled in the particular area in which the dispute arises. Arbitrators come from many walks of life, such as engineering and surveying and bring their technical expertise although they also go through many years of training in legal matters as well as arbitration procedure before they are appointed as an arbitrator. By agreeing to go to arbitration, the parties voluntarily deny themselves recourse to the courts or to another method of alternative dispute resolution. The agreement to go to arbitration is often, perhaps usually, contained in a contract concluded between the parties possibly years before they come into dispute. The advantage of arbitration is that the arbitrator's decision or "award" is final and binding without further court hearing of the issues. An award may be enforced like a court decree. The Chartered Institute of Arbitrators has a website at www.arbitrators.org.uk.

Reform to Arbitration law in Scotland is proposed in the form of the Arbitration (Scotland) Bill which was published in June 2008 and was at the Consultation stage in August 2008. The Bill will reform and consolidate the law of arbitration which is currently outdated and incomplete. The Bill will put the vast majority of the general Scots law of arbitration into a single statute. The aim is that in future anyone in Scotland, or anyone seeking to do business in Scotland, will be able to find in one place the principles governing the law of arbitration in Scotland in language which can be readily understood. You can check the progress of the Bill at http://www.scotland.gov.uk/Publications/2008/06/26134341/3

(b) Adjudication

You should also be aware of other forms of Alternative Dispute Resolution. One of these is Adjudication, although it may not be something you come across in practice as it is restricted to construction contracts. It was created 10 years ago by statute. On 1 May 1998 **section 108 of the Housing Grants, Construction & Regeneration Act 1996** came into force. It provides the statutory right to adjudicate "at any time" in relation to a dispute under a construction contract. It is a speedy process, with an adjudicator's decision being issued within 28 days of the referral (if the referring party insists on it). The decision of the adjudicator has interim binding effect but parties are still free to refer the matter to litigation at the outcome of the process. The idea underlying adjudication in construction disputes is that the relationship between the parties can be preserved and that the working relationship can continue. Although this is not always the case it is certainly more likely than in cases where litigation or arbitration becomes necessary. The CIArb can nominate Adjudicators for construction disputes.

(c) Mediation

Mediation is also a growing form of Alternative Dispute Resolution and is commonly used in many spheres with great success. It has a growing role in commercial disputes. There are a number of consumer schemes which allow for mediation as a method of resolving disputes. As you have already seen, the Private Rented Housing Panel allows for mediation in the first instance in disputes between landlords and tenants in respect of repair work. Some standard forms of contracts are now including mediation as a first port of call. Unlike some other forms of alternative dispute resolution the decision of a mediator is not binding and the option is always there to refer the matter to court. However, the aim is for the matter to be dealt with at the stage of mediation. Like adjudication the hope is that the relationship between the parties can be preserved. The CIArb has a Panel of Mediators.

(d) Negotiation

Another form of dispute resolution is negotiation. This is similar to mediation in that it facilitates discussion between the parties, but ultimately is not binding on them. It may assist in bringing matters to a resolution.

(e) Other forms of ADR

There are also a number of consumer redress services which are available to millions of consumers and thousands of businesses. They have been designed to settle complaints and disputes privately, quickly and at low cost without having to go to court. They may comprise arbitration, mediation, negotiation, or a combination of methods of alternative dispute resolution. Within the Housing and Property Sector a

number of these schemes are available. For example, in relation to **Home Removals** there is an arbitration service which applies to applications for arbitration made about disputes between members of the British Association of Removers (BAR) and their clients in connection with the removal and or / storage of goods. Before arbitration can begin the parties must attempt to settle the dispute through the conciliation procedure offered by the BAR. If the conciliation procedure fails to resolve the dispute the parties may proceed to arbitration. There is a **Kitemark Scheme for Electrical Installation Work in Dwellings** which is a conciliation and arbitration service for consumers in dispute with BSI registered electrical installation specialists operating under British Standard 7671.

Knowledge of the existence and availability (in some cases mandatory application) of alternative dispute resolution may assist you, as a property manager, to deal with any disputes which arise without immediate resort to litigation.

(iv) The Lands Tribunal for Scotland

This Tribunal was established in 1971 and currently sits at George House, 126 George Street in Edinburgh. The main authority for operation of the Tribunal is to be found in the Lands Tribunal Act 1949 although numerous Acts of Parliament and Scottish Parliament have conferred additional areas of jurisdiction which are outlined below. Section 1(1)(a) set up the Lands Tribunal for Scotland separate from a tribunal for the remainder of the United Kingdom.

The Lands Tribunal for Scotland is presided over by a panel comprising legal and chartered surveyor members who have recognised expertise in their respective fields. The President has the status of a High Court Judge and has the judicial title 'Lord'. The current President is Lord McGhie, who is also a Chairman of the Scottish Land Court (there is a close relationship between the two).

The website for the Lands Tribunal for Scotland is http://www.lands-tribunal-scotland.org.uk/

The Tribunal determines a wide range of questions relating to:

- Valuation of land. Under the **Land Reform (Scotland) Act 2003**, the Tribunal has jurisdiction to determine appeals in relation to the valuation of land that may be subject to pre-emptive rights of purchase by community bodies. Under the **Agricultural Holdings (Scotland) Act 2003,** the Tribunal has similar jurisdiction in relation to valuation of farms to be sold to sitting tenants.
- The discharge or variation of restrictive land obligations – this was originally under section 1 of the **Conveyancing and** Feudal **Reform (Scotland) Act 1970** but that jurisdiction has been replaced and expanded under the **Title Conditions (Scotland) Act 2003** which came into force on 28 November 2004**.** Reference should be made to **Part 9, ss90 onwards** (see above) The jurisdiction now applies in relation to various *title conditions*, mainly real burdens or servitudes. The Tribunal can now in some cases determine questions as to validity, applicability or enforceability of title conditions. There is now power to grant unopposed applications without further procedure. There is a new approach to expenses in some cases. The Tribunal can also now consider applications by benefited proprietors to renew (or vary) burdens in certain cases, where the burdened proprietor has executed new statutory rights to execute and register notices of termination or variation

and discharge, for example under the "sunset" rule (at least 100 years since the deed containing the burdens was recorded) or in relation to "community burdens" (burdens imposed on more than one property under a common scheme).The factors relevant in considering applications for variation and discharge (or renewal) are now contained in Section 100 of the **Title Conditions (Scotland) Act 2003**. There are now ten factors which the Tribunal may take into account. The substantive approach taken by the Tribunal to such issues has not varied greatly.

- Under the terms of the **Abolition of Feudal Tenure (Scotland) Act 2000**, referred to above, the Lands Tribunal for Scotland may be asked to reallot a real burden on occasions when a superior is unable to come to an agreement with a vassal to preserve a burden, or where valid feudal burdens imposed to protect valued amenity interests are not saveable as ordinary non-feudal burdens under the new arrangements. For example, the building on the superior's land may be more than 100 metres from the land subject to the burden. Alternatively, a superior may own an area of ground on which he intends to build a retirement home, but he has not yet built anything on his piece of land and so the property does not qualify under any of the heads which are laid down in the **Abolition of Feudal Tenure (Scotland) Act 2000**. There is a further opportunity for a superior to save a particular burden as an ordinary non-feudal real burden which would otherwise be extinguished by introducing an element of judicial discretion. If agreement cannot be reached with the vassal, the superior will have a right to apply to the Lands Tribunal for Scotland for an order to save a real burden in favour of land owned by the superior as an ordinary non-feudal real burden. The Lands Tribunal would have power to make an order in favour of the superior if it was satisfied that there would be substantial loss or disadvantage to the applicant if the burden was not saved. The section makes it clear that the superior will not be allowed to maintain any such burden unless various specified requirements have been gone through. This would then protect a range of cases, including general amenity or diminution in value. The Lands Tribunal was already used to applying the "substantial loss or disadvantage test" in relation to the amount of compensation which it was entitled to award for the variation or discharge of all real burdens under section 1 of the **Conveyancing and Feudal Reform (Scotland) Act 1970** (now see the **2003 Act**). In addition, the **2000 Act** provides that even if a feudal burden is saved, to enforce the burden in the future the former superior will have to show interest to enforce in the same way as someone who benefits from a burden imposed in an ordinary disposition. The "substantial loss or disadvantage" test would involve the need to show a genuine and practical interest, and is intended to catch cases where there is a real interest to enforce and not the type of case where a superior does not have land in the vicinity at all and has no real interest in enforcing the burdens. The Lands Tribunal's decision will be final.
- Disputed compensation on compulsory purchase of land. The Tribunal has authority under several Acts of Parliament to resolve questions of disputed compensation. The two main pieces of legislation are the **Land Compensation (Scotland) Act 1963** and the **Land Compensation (Scotland) Act 1973**. Typically references to the Tribunal deal with claims following compulsory purchase of land, or compensation for depreciation caused by public works — for example, a new by-pass may benefit the public but reduce the value of property near it. The Tribunal also has jurisdiction to consider claims for compensation arising from coal mining subsidence: see

the **Coal Mining (Subsidence) Act 1957** and the **Coal Mining Subsidence Act 1991**.

- Appeals against the Keeper of the Registers of Scotland under the **Land Registration (Scotland) Act 1979** Section 25 of the Land Registration (Scotland) Act 1979 confers on the Tribunal the authority to hear appeals against decisions of the Keeper in relation to the registration of title to land. This jurisdiction can give rise to cases involving complex questions of property title as well, for example, as cases involving simple disputes as to boundaries. The Tribunal may have to determine levels of indemnity to be paid by the Keeper in respect of errors in the title sheet, or the amounts of expenses that the Keeper is obliged to pay to Applicants under section 13 of the Act.
- Tenants' right to purchase. Part III of the **Housing (Scotland) Act 1987** (as now amended by the **Housing (Scotland) Act 2001,** and with amendments pending in the **Housing (Scotland) Act 2006)** empowers the Tribunal to deal with a variety of references and disputes related to the rights of public sector tenants to purchase their homes. You can look at **section 71** of the 1987 Act for a starting point. The statutory provisions are somewhat complex and there are various timetables that must be observed. However the Tribunal has a power to take over the negotiation and stand in the shoes of any recalcitrant landlord. It has a right to determine whether a particular person has the status of "secure tenant". This may, for example, involve decisions as to whether the house is tied up with the tenant's employment, or is part of a larger unit, or part of a sheltered housing complex. The Tribunal may be asked to decide on disputes between parties as to what would be appropriate conditions in any missives. In relation to flatted property, in particular, disputes often arise as to which bits of garden ground go with each flat. The Tribunal may be called upon to decide.
- Valuation Appeal Committees can refer complaints to the Tribunal over non-domestic rating assessments under the valuation acts and regulations. Valuations for rating (non-domestic premises). The Tribunal is empowered by an amended provision of the **Lands Tribunal Act 1949 Section 1(3)** to deal with appeals against rating assessments. It does so in accordance with procedures laid down in the appropriate Rating and Valuation Regulations.
- The Tribunal can also act as arbiter where a reference is brought jointly by disputing parties. **Section 1(5)** of the **Lands Tribunal Act 1949** allows the Tribunal to act as arbiter under a *reference of consent*. This means that where both sides agree, any dispute can be referred to the Tribunal. Parties from time to time choose to make use of this provision in relation to disputes that mainly involve valuation of land. Sometimes parties have come before the Tribunal wrongly assuming that they are following a statutory procedure in relation to claims over land taken by compulsory purchase. However, where the land has actually been sold by agreement even under the shadow of compulsory purchase, the Tribunal has no formal jurisdiction. Applications have been able to continue as if they were a reference to the Tribunal as arbiter. A reference under this section is a private reference and parties are entitled to request that proceedings be heard in private.

The Tribunal works in much the same way as a Court. The Tribunal Clerk and his staff

- receive applications in appropriate form from an applicant;
- arrange for issue of an Order inviting any other interested parties to put in written Answers (objections or representations to an application);

- arrange Orders guiding and controlling the procedures.

The Tribunal itself, that is, the Members of the Tribunal

- conduct Hearings to take evidence and submissions for the parties;
- give a written decision on the case, based on the evidence put before the Tribunal by the parties.

The aim is to minimise formality and delay. But some formalities are unavoidable in the interests of justice and fairness to ensure that parties know clearly where they stand.

(v) The Scottish Land Court

The Scottish Land Court is a Court of law. Its present powers are derived mainly from the Scottish Land Court Act 1993, as amended. The Court's jurisdiction is set firmly within the context of Scottish farming. It has authority to resolve a range of disputes, including disputes between landlords and tenants, in agriculture and crofting. The jurisdiction of the Scottish Land Court is mainly in respect of agricultural properties (farms) and properties subject to crofting tenure. Whilst the name of the Court is the Scottish *Land* Court, the Court does not have universal jurisdiction to deal with *all* matters relating to land. In particular the Court does not have any jurisdiction to deal with the question of ownership and heritable title to land (which are dealt with by the ordinary courts, i.e. the Sheriff Court and the Court of Session), nor does the Court have any jurisdictions in relation to urban subjects.

The Court is based in Edinburgh, at George House, 126 George Street, Edinburgh, alongside the Lands Tribunal, but holds hearings throughout Scotland.

The Court has a Chairman, who has the same status as a Court of Session judge (Lord McGhie, President of the Lands Tribunal); and three Members of Court, who are experienced in farming and crofting matters.

The SLC can be called upon to settle numerous types of dispute between landlord and tenant.

The website for the Scottish Land Court is http://www.scottish-land-court.org.uk/.

The following examples of the Court's statutory jurisdiction indicate the kind of disputes which the Scottish Land Court can deal with.

Prior to the passing of the **Agricultural Holdings (Scotland) Act 2003**, most disputes about agricultural holdings were referred to statutory arbitration. However the effect of the 2003 Act was to amend the **Agricultural Holdings (Scotland) Act 1991** and now confers wide powers on the Court to determine, for example, whether a tenancy of an agricultural holding exists or has been terminated, or any question of difference between the landlord and tenant of a holding. However matters relating to the question of who is entitled to succeed to the estate of a deceased person or the validity of a bequest are not included within these powers. In addition, the Court has jurisdiction to hear and determine any matter relating to a short limited duration tenancy or a limited duration tenancy. They can also vary the rent in a limited holding tenancy if it is equitable to do so. Specific powers were given to the Court in terms of **section 84 of the Act of 2003**, for example, to grant a decree of interdict or removal.

Under the **Crofters (Scotland) Act 1993** (as amended by the Crofting Reform etc (Scotland) Act 2007) the Court has, for example, jurisdiction

- to determine whether a holding is a croft within the terms of the 1993 Act
- to determine the extent and boundaries of a croft
- to determine a fair rent for the croft
- to authorise a landlord to resume (that is, to take back) croft land or common grazings for a reasonable purpose
- to determine rights of access
- to authorise a crofter to acquire a heritable title to his croft from his landlord.
- to determine an appeal against an assessment under section 3B as to a valuation decided by a valuer appointed by the Land Court

In short, the Court

- receives applications from a party (or parties) involved in a dispute
- issues orders guiding and controlling the proceedings
- conducts hearings to take evidence and hear the arguments of the parties to the dispute
- gives a written decision on the case
- reports decisions in the Scottish Land Court Reports and other publications.

3.10 *Employment law including rights of company staff and staff employed on behalf of others*

Apart from staff employed by contractors, property managers may employ staff directly including building managers, receptionists, porters, cleaners, gardeners and caretakers. They may also manage staff who are employed by the landlord. There is a wide body of UK and European law covering employment. It is a question of law whether somebody is an “employee” and important legal consequences follow.

It must be clear who the employer is. A court may determine that the management organisation is the true employer, even though it is nominally the landlord. To determine this, questions might be asked as to who:

- has day-to-day control?
- pays salaries?
- provides administration?
- issues contracts etc?
- signs contracts?
- interviews?
- appoints?
- has power to dismiss?
- has their letterhead on correspondence with the employee?

Employee Rights

Employment protection rights (which also cover the recruitment stage) are embodied in legislation and set out in contracts of employment. It is important to be aware that:

- employees must be provided with a statement of the terms and conditions of their employment including hours, remuneration, start date, and holiday entitlement
- equal opportunities apply covering such factors as gender, race and whether staff are full-time or part-time
- temporary staff can acquire employment rights and become permanent employees
- benefits in kind to employees must be clearly defined e.g. uniform allowance paid outside of the salary and a tax return about such benefits (P11D) must be made by the employer
- the status of the employer may determine whether VAT is chargeable or not on salary costs which are recoverable through the service charges
- staff may occupy property belonging to the employer as part of their job and this needs to be covered in the employment contract (see "service occupancies" mentioned above, as distinguished from leases).

Property managers must have clear procedures covering recruitment, employment, grievance & disciplinary issues and they should

- check insurance relating to the employment of staff
- have documentation, such as letters of appointment, that is clear and up to date
- make a note of all actions, including relevant conversations, particularly if a dispute is anticipated
- ensure that there are clear health & safety policies
- train staff for the duties they must perform
- consider methods of communication with staff, some of whom may not have English as a first language.

Property managers who do not have in-house personnel staff can take out insurance protection policies that give access to a legal advice helpline for personnel issues.

On any issue concerning employees, IF IN DOUBT, ALWAYS CONSULT A SENIOR MANAGER, who can then refer the matter to a Solicitor specialising in employment law.

3.11 *Introduction to company law*

Some property management organisations may choose to structure themselves as limited companies rather than partnerships.

Property managers may also find that a landlord with a large number of properties chooses to form a private limited company (normally for tax and administration reasons) rather than to let them all out privately (which would be taxed under the Land and Property section on the landlord's Self Assessment Tax return). Such companies may place additional demands on the manager as some will not have their own legal or other professional advisers or the members ready and willing to shoulder their responsibilities under company law.

All companies are subject to UK company law. They must hold annual general meetings, appoint directors, maintain a register of shareholders (if a company limited by shares), produce company accounts (which are totally separate from service charge accounts) and send returns to Companies House. Many of these obligations are routine but failure to carry them out can result in penalties and fines with the ultimate sanction that a company be dissolved (leading to major complications when individual properties later come to be sold).

Property managers often take on some of the administrative functions of a Company dealing with rental properties and may even provide the company secretary. Such a role should be clearly set out and is distinct from the role of managing a property on behalf of the company. In all circumstances the company should be strongly advised to take out directors and officers liability insurance.

Under the **Housing (Scotland) Act 2001 Part 3**, which was brought into force on 1 November 2001, limited companies are eligible for registration as "social" landlords, if they wish to grant a Scottish secure tenancy (also defined under that Act). However, this only applies to companies who are non profit-making and must also have certain specified purposes one of which must be housing, although it may be engaged in other activities as provided for in the Act. See also **The Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2001 (SSI 2001 No 326)** and **The Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2002 (SSI 2002 No 411)** enacted in terms of **s57(2) of the 2001 Act** which designated a number of limited companies which were housing associations to be registered as social landlords.

3.12 *Introduction to Insurance law relating to the provision of services by managers and Financial Services Authority (FSA) compliance*

The running of any business, large or small, involves substantial risks. Some of these risks can be insured against. The administration of property is just another business and there are a number of risks which can be insured against.

Fire insurance, liability, and latent defects and consequential loss insurance are some of the risks which may be insured against with fire insurance for buildings and contents being the most common. The choice of which additional risks to opt for may become a cost-benefit analysis, while although it is possible to insure against almost any risk, such a business would make little profit. In normal circumstances it is probably prudent to insure against flooding and burst pipes. The list of insured risks for an occupied property may also include explosion, storm and tempest, aircraft, earthquake, impact, riot and civil commotion and malicious damage.

Insurance can be arranged through an intermediary such as an agent or a broker.

The buildings in which a business, be it a shop or other commercial premises, is housed, often constitute their major asset and the largest proportion of where their capital is directed. If the properties are held on lease then there is almost always an obligation on the tenant to insure the premises. It is vital to ensure that such premises are adequately protected against the various risks, such as those referred to above.

The method of valuation for insurance purposes is reinstatement value i.e. the cost of replacing the asset should it be totally destroyed.

It is prudent to include in the insurance cover for consequential loss of rent payable for the period during which the building is unusable or only part usable while being built or repaired.

It is also prudent to take out a policy which indemnifies the owner/tenant of property against any damages awarded by a court or agreed to any third party arising out of acts of negligence or omission by the owner/tenant.

Note section 18 of the **Tenements (Scotland) Act 2004** provides for compulsory insurance for reinstatement value. It came into force on 24 January 2007 and the Order showing the Prescribed Risks which must be insured against by tenement owners came into force on 1 May 2007. See Section 4 above.

You should also be aware of the **FSA Regulations on General Insurance 2005**, from 15 January 2005. This followed on from the Treasury increasing the FSA's powers in 2001 to include insurance sales and administration.

The Regulations cover knowledge and expertise required in handling general insurance enquiries and placing of business. There is a procedure that insurance agents are allowed to operate under. For example, the Regulations introduced a rule requiring an intermediary not to agree to hold money as agent of an insurer unless it has entered into a written agreement with the insurer to that effect.

You should speak to management within your office about the procedures for arranging and maintaining policies of insurance.

3.13 *Introduction to basic European Law affecting property ownership and management in Scotland*

As mentioned above, in relation to sources of law in Scotland, as well as the common law and Acts of the UK and Scottish Parliament, regard must also be had to European Law. Fundamental European law is found in the "Treaties" established by the European Communities. On a day to day basis, the mass of Community legislation is found in Regulations, Directives and Decisions from the communities.

Regulations, made by the Council of Ministers of the EU, are directly applicable in Scotland.

Other legislation such as "Directives" and "Decisions" are issued to Member States and meant to be given effect to by the UK/Scottish Parliaments by the enactment of their own legislation, which should not be at variance with the nature and purpose of the European legislation (although this is not always achieved in practice).

Much of the domestic health and safety law flows from Europe. Some of these Regulations are outlined below.

You should also be aware of The European Convention on Human Rights (ECHR) taken together with the Human Rights Act 1998 and the Scotland Act 1998, between them bring into the Scottish Legal Framework the "human rights" embodied in Schedule 1 of the ECHR. These rights include the right to a fair trial.

The Convention rights do not automatically take priority over Scots law but there are certain avenues for seeking "disapplication" of any national legislation, as well as any Acts of such bodies as the Scottish Ministers which is thought to be at variance with

the Convention. Such matters are known as declarations of incompatibility and must be raised through the Courts. The first port of call in such a case would be a solicitor specialising in this area of work.

3.14 *Introduction to Health and Safety Law affecting property ownership and management in Scotland*

As outlined above, Scots law (as with other legal systems within member states) is being influenced to a great extent by legislation emanating from Europe. Much of this legislation relates to Health and Safety law. As Scotland is not a member state in its own right, but part of the UK, the implementing legislation which is passed often extends to the other parts of the UK as well as Scotland. A number of important pieces of UK legislation applying to Scotland are outlined below.

(i) Control of Asbestos Regulations 2006

Control of Asbestos Regulations 2006/2739

The Regulations came into effect on 13 November 2006 other than Regulation 20(4) which came into force on 6 April 2007.

They form part of the scheme of Regulations enabled by the Health and Safety at Work Act 1974 and implement various European Council and Commission Directives.

Although asbestos is no longer imported or used, there is nonetheless still cause for concern. It is thought that about half a million non-domestic premises contain some form of asbestos.

The Regulations impose a "duty to manage" which is based on the principles of assessing and managing risk to protect workers and members of the public. It requires dutyholders to find out whether the premises contain or may contain asbestos, to assess the risk from such materials, and take action to manage that risk.

The Health and Safety Executive have produced: "L127: The management of asbestos in non-domestic premises" which provides practical guidance on Regulation 4 of the *Control of Asbestos Regulations 2006*. This Code of Practice re-issues, substantively unchanged, the guidance contained in the earlier copy. In particular it applies to those who have responsibilities for the maintenance and repair of non-domestic premises where asbestos-containing materials are or are likely to be present in those premises. The aim is to protect workers who may come across asbestos in the course of their day-to-day activities. However, this should also result in the protection of any other people who may be at risk from the potential release of asbestos fibres into the air.

There is a requirement to check that no asbestos exists within a building, whether the building is old or new.

A survey is required for residential premises and you should check your office procedure in relation to protection from asbestos.

(ii) Work at Height Regulations 2005 as amended

Work at Height Regulations 2005 as amended by the Work at Height (Amendment) Regulations 2007/114.

The 2005 Regulations came into effect on 6 April 2005. The 2007 Regulations came into force on 6 April 2007. They form part of the domestic health and safety legislation enabled by the Health and Safety at Work Act 1974. The Regulations give effect to a European Directive concerning the minimum safety and health requirements for the use of work equipment by workers at work.

The Regulations affect any worker working above ground level or other voids. "Work at height" is defined as:

- work in any place, including a place at or below ground level;
- obtaining access to or egress from such place while at work, except by a staircase in a permanent workplace, where, if measures required by these Regulations were not taken, a person could fall a distance liable to cause personal injury;

As well as applying to employers engaging employees in work at height, they could apply to a property manager engaging any other person "under his control", "to the extent of his control".
The Regulations:

- impose duties relating to the organising and planning of work at height *(*reg.4*)* ;
- require that persons at work be competent, or supervised by competent persons (reg.5);
- prescribe steps to be taken to avoid risk from work at height *(reg.6 and Sch.1)*;
- impose duties relating to the selection of work equipment (reg.7);
- impose duties in relation to particular work equipment (reg.8 and Schs 2 to 6);
- impose duties for the avoidance of risks from fragile surfaces, falling objects and danger areas (regs 9 to 11);
- require the inspection of certain work equipment and of places of work at height *(* regs 12 and 13 and Sch.7*);*
- impose duties on persons at work (reg.14);
- provide for exemptions from certain provisions (regs 15 and 16); and
- amend, repeal or revoke certain enactments (regs 17 to 19 and Sch.8).

A risk assessment should always be carried out, the work should be carefully planned and carried out by competent people.

The thrust of the WAH Regulations is planning and assessment by the employer of "work at height". In terms of organisation and planning: (1) Every employer shall ensure that work at height is –

- properly planned;
- appropriately supervised; and
- carried out in a manner which is so far as is reasonably practicable safe, and that its planning includes the selection of work equipment

and (3) Every employer shall ensure that work at height is carried out only when the weather conditions do not jeopardise the health or safety of persons involved in the work.

The competence of the person being engaged for the job must also be assessed.

Reasonable precautions must be taken to prevent accident while working at height.

You should consider your firm's potential liability e.g. instruction of window cleaners.

You should be aware that the Health and Safety Executive has the power to bring prosecutions for non-compliance with the Regulations.

(iii) The Control of Substances hazardous to Health Regulations 2002

These regulations can be found in **SI 2002/2677** and came into force on 21 November 2002, re-enacting, with modifications, the Control of Substances hazardous to Health Regulations 1999 (SI 1999/437), which was repealed. The Regulations implement European legislation and form part of domestic Health and Safety law under the Health and Safety at Work Act 1974.

We usually associate legionella with larger water systems, eg in factories, hotels, hospitals and museums, and cooling towers, but they can also live in smaller water supply systems used in homes and other residential accommodation. Note that all premises with a water system are now within the scope of the revised ACOP. Also, recent research shows that legionella does occur in smaller domestic systems.

It is a legal requirement to have a **legionella risk assessment** of all cold and hot water systems. The legionella risk assessment report will identify any risks as well as any remedial action necessary to meet current standards and legal requirements.

There is a revised HSE Approved Code of Practice. *Legionnaires' disease. The control of legionella bacteria in water systems. Approved Code of Practice and guidance* L8 (Second edition). This approved code of practice (ACoP) and guidance gives practical advice on the requirements of the Health and Safety at Work etc Act 1974, and the Control of Substances Hazardous to Health 1999, concerning the risk from exposure to legionella bacteria.

There is also guidance in the form of "Legionaires: Essential Information for Providers of Residential Accommodation". This provides helpful guidance for managing agents and landlords in the private renting sector and housing associations amongst others.

As a provider of such accommodation you may already be aware of your responsibilities to ensure that the risk from exposure to legionella in your premises is properly controlled.
Ask yourself:

- If a boiler, tap or shower head breaks/leaks who is responsible for getting it repaired?
- If it is you, then you need to be aware of the legal requirements in this guidance.

Even if you have passed on responsibility for maintaining your property, through an agreement with a third party, you cannot delegate these responsibilities.

The ACOP has been recently updated. Important changes that were made to the ACOP and guidance include:

- keeping records for a minimum of five years;
- water treatment companies and consultants must show their service is effective;
- recommended guidance linked to the appropriate sections of the ACOP;
- details on all aspects of risk assessment control;
- inclusion of tables which detail the monitoring requirements for cooling towers, and hot and cold water systems

In short, you are required to:

- **Assess**: You must carry out a risk assessment to identify and assess potential sources of exposure. This will require testing of stored cold water supplies. It should be possible for you to assess the risk yourself, but if you do not feel you have the right skills, you can obtain help and advice from a qualified professional
- **Implement system**: You must then introduce a course of action to prevent or control any risk you have identified. Introduce proper controls, which could include disinfection of the system - you will need to refer to the ACOP for guidance on the action you should take.

Even if you decide that the risks are insignificant you should review the assessment periodically.

You should be aware of the possibility of legionella and consider whether and when risk assessments need to be carried out in premises which you manage.

(iv) Management of Health and Safety at Work Regulations 1999, as amended

These Regulations form part of domestic Health and Safety Law and implement European legislation. They are enabled by the Health and Safety at Work Act 1974. Management of Health and Safety at Work Regulations 1999/3242 came into effect on 29 December 1999. There have been a number of amendments since then so always make sure that you are consulting an amended, up to date version of the Regulations or take professional advice from somebody who is experienced in this area.

From April 2006 the Regulations have been amended by the **Management of Health and Safety at Work (Amendment) Regulations 2006/438**. These regulations amend reg.22 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations"), which concerns civil liability for breach of the duties imposed by those regulations.

The Regulations covers a considerable number of areas relating to work carried out on buildings.

At the outset a **Risk assessment may require to be carried out** to make a suitable and sufficient assessment of –

- the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
- the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking.

Be aware of the Regulations and take professional advice where appropriate.

(v) Construction (Design and Management) Regulations 2007

The full title is the **Construction (Design and Management) Regulations 2007/320**

These implement a European Directive and came into force on 6 April 2007. They fall under the scheme of regulations enabled by the Health and Safety at Work Act 1974.

The key aim of *CDM 2007* is to integrate health and safety into the management of the construction project

The Regulations require various 'dutyholders' to implement the aims of the Regulations.

Under *CDM 2007,* clients are made accountable for the impact their approach has on the health and safety of those working on or affected by the project. They will have substantial influence and contractual control over a project. A "client" is defined as "a person who in the course or furtherance of a business seeks or accepts the services of another which may be used in the carrying out of a project for him or carries out a project himself".

The client could be an individual, partnership or company and includes property developers or management companies for domestic properties. As such local authorities, housing associations, charities, landlords and other businesses who own or have control over domestic property, will be clients rather than 'domestic clients' (i.e. a person who has work done on their own home or the home of a family member, that does not relate to a trade or business). A domestic client has no duties under *CDM 2007.*

It may not be immediately obvious who is legally the client and there can sometimes be more than one client involved in a project. The Approved Code of Practice to the Regulations states that 'to avoid confusion, this needs to be resolved by those involved at the earliest stage possible'.
Where doubts continue, it is recommended that all possible clients 'appoint one of them as the only client for the purposes of *CDM2007* ' as, if not, they run the risk that all will be considered to carry the client's duties under the Regulations.

Regulations 9 and 10 contain specific matters in relation to the client's duties for *all* construction projects summarised below:-

- They allow sufficient time for each stage of the project, from concept onwards

- There are reasonable management arrangements in place throughout the project to ensure that the construction work can be carried out, so far as is reasonably practicable, safely and without risk to health.
- Contractors have made arrangements for suitable welfare facilities to be provided from the start and throughout the construction phase.
- Any fixed workplaces which are to be constructed will comply, in respect of their design and the materials used, with any requirements of the *Workplace (Health Safety and Welfare) Regulations 1992*.
- Relevant information likely to be needed by designers, contractors or others to plan and manage their work is passed to them. In addition, for construction projects that are notifiable to the HSE, clients must:
- appoint a CDM Co-ordinator to advise and assist with their duties and to co-ordinate the arrangements for health and safety during the planning phase;
- appoint a Principal Contractor to plan and manage the construction work;
- ensure that the construction phase does not start until the principal contractor has prepared a suitable health and safety plan and made arrangements for suitable welfare facilities; and
- make sure that the health and safety file is prepared, reviewed, or updated ready for handover at the end of the construction work (and kept available for any future construction work or to pass on to a new owner).

A new role of the "CDM co-ordinator" is created to 'provide the client with a key project advisor in respect of construction health and safety risk management matters'. This role will only be required where the project is notifiable. Notification will be required if the construction project is likely to last longer than 30 days or will involve more than 500 persons' days of construction work. (The ACoP gives guidance about how this is to be calculated).

The client must ensure that a co-ordinator is appointed until the end of the construction phase of the project, although the actual company/individual carrying out the role can change. Where no such appointment is made, the client themselves will be deemed to be the CDM co-ordinator and accordingly will 'be subject to the duties imposed by the regulations on a CDM co-ordinator'.

Clients are required to provide project-specific health and safety information to the co-ordinator so that this may be passed onto prospective contractors and designers. The co-ordinator should check the information to ensure that it is complete, advise the client if there are any significant gaps or defects, and ensure these are filled by commissioning surveys or by making other reasonable enquiries.

Even if a boundary wall is being taken down and re-built at a property which you manage, you may find that the Regulations apply.

This is a senior management issue but you should make yourself familiar with the Regulations.

(vi) Fire Safety Scotland Regulations 2006 and Fire Scotland Act 2005

The Fire Safety Scotland Regulations 2006/456 came into force on 1 October 2006 and implement various European law provisions. The Regulations make provision in connection with the carrying out of assessments to identify risks in respect of harm caused by firre, and the review of those assessments. They also make provision about fire safety in relevant premises (as defined in **section 78 of the Fire (Scotland) Act 2005 (asp 5)** ("the 2005 Act")). The Regulations should be read alongside the **Fire**

(Scotland) Act 2005. The Act received the Royal assent on 1 April 2005 but the provisions have been brought into force at later dates, with Part III of the Act coming into force on 1 October 2006 alongside the Regulations. Part III of the 2005 Act sets out the rules relating to fire safety within buildings. The duties not only apply in an employer/employee situation but also to a person who has "control to any extent over premises" (section 54) so can apply to the property manager as well as the owner of the premises, depending upon the terms of appointment.

The regulations introduce a general duty in relation to non-employees to take such fire safety measures as is reasonable to ensure the safety of persons lawfully on the premises and in the vicinity in respect of harm caused by fire, and a duty to carry out an assessment to identify risks to safety in respect of harm caused by fire. The Regulations impose a number of specific duties in relation to the fire safety measures to be taken. These duties include:

- ensuring that routes to emergency exits from relevant premises and the exits themselves are kept free from obstruction at all times (Regulation 13).
- ensuring that the premises and any facilities, equipment and devices provided in respect of the premises are subject to a suitable system of maintenance and are maintained in an efficient state, in efficient working order and in good repair (Regulation 16).

Under s 72(3) of the 2005 Act it is an offence to fail to comply with a requirement or prohibition contained within regulations 3 to 23 which puts a relevant person (defined in section 79 of the 2005 Act) at risk of death or serious injury, in the event of fire. There is a "due diligence" defence if you can show that all reasonable precautions were taken and due diligence was exercised.

You should be familiar with the Regulations as well as the Act and how they apply to the properties which you manage.

3.15 *Disability Discrimination Act 2005*

The Disability Discrimination Act 2005 is one of a package of measures aimed at tackling discrimination on various grounds. You should be aware of the provisions of this Act which may affect you as a property manager. Firstly, there are provisions relating to "provision of services" which may affect your business generally i.e. the Act controls your own business premises etc and the *way* in which you let and manage other premises on behalf of the owners. There are also provisions directed towards a "controller of let premises" which you must be aware of. These relate to the rights of the occupier once those premises have been let, if that person has a disability.

(i) Service providers

The definition of 'service provider' is quite broad: it includes most organisations that deal directly with members of the public. A service provider is any organisation that provides goods, facilities or services to the public, whether paid for or free, no matter how large or small the organisation is e.g. housing associations, estate agents and private landlords. If an organisation provides a service to consumers, it also needs to avoid discrimination in how it provides that service. This includes discrimination on the grounds of:

- disability

- gender
- race
- religion or belief
- sexual orientation

Most organisations involved in housing are service providers, including private landlords, estate agents, housing associations, local authorities, property developers and property management companies. The Disability Discrimination Act makes it illegal to discriminate against people on grounds of disability when you let, sell or manage property. **Section 19(1) of the 2005 Act** provides that it is unlawful for a "provider of services" to discriminate against a disabled person:
"(b) in failing to comply with any duty imposed on him by s.21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;"
"(2) Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, it is the duty of the provider of that service to take such steps as is reasonable, in all the circumstances of the case, for him to have to take in order
to -

(a) remove the feature;
(b) alter it so that it no longer has that effect;
(c) provide a reasonable means of avoiding the feature; or
(d) provide a reasonable alternative method of making the service in question available to disabled persons."

In general, it is unlawful for anyone responsible for renting or managing a residential or commercial property to discriminate against someone on the grounds of their disability in:

- refusing to rent the property to the disabled person
- setting the terms of rental that they offer
- dealing with a list of people who need a particular type of property
- providing or refusing to provide the disabled person with access to benefits or facilities
- carrying out repairs or renovations, or
- evicting the disabled person or subjecting them to some other harm, such as harassment.
- Where consent is needed for property to be let or sub-let, it is unlawful for a person whose consent is required to discriminate in withholding that consent.

As a service provider you have to make 'reasonable adjustments' for disabled people, such as providing extra help or making changes to the way you deliver services to ensure that disabled people are not disadvantaged when using the services. The concept of "reasonable adjustments" is dealt with more fully below.

(ii) Controllers of let premises and reasonable adjustments

In terms of the 2005 Act it is made unlawful for a "controller of let premises" to discriminate against a disabled person. A "controller" covers the landlord or rental manager.

You have already seen the a disabled tenant has a right to ask the landlord for consent to make adjustments to a property in terms of **section 52 of the Housing (Scotland) Act 2006**. This right has its basis in the **Disability Discrimination Act 2005**.

A disabled person may make a request for reasonable adjustments to be made to a property. Under the **2005 Act**, landlords or rental managers are bound by the requirement to make reasonable adjustments for disabled people.

The duties on 'controllers' do not require them to take any steps which would consist of or include the removal or alteration of a physical feature

Physical features include:

- any feature arising from the way the property is designed or constructed
- any feature of any approach to, exit from or access to the property
- any fixtures in or on the property
- any other physical element or quality of any land that is part of or comprised in the property.

A landlord will not be able to unreasonably withhold consent if a disabled person wishes to make an alteration to premises where the purpose of the alteration is disability related (*e.g*. altering doorways or a lavatory).

A grant towards the cost of making the adjustments may be available to the owner in certain circumstances (it is means tested) so you should explore whether or not they are eligible.

There are limited circumstances in which the duty to make reasonable adjustments does not apply to the provision of housing. The restrictions on discrimination in renting a property do not apply to 'small properties'. 'Small properties' are those in which some of the accommodation (excluding storage or access areas such as shared hallways) will be shared with the owner, or a near relative of theirs, who lives and intends to continue living there. The term 'near relative' is defined by law as meaning husband and wife, civil partners, parents, grandparents, children, grandchildren, brothers and sisters, including half- and step-brothers or sisters (relationships can be the result of marriage, civil partnership or adoption). A 'small property' that fulfils the criteria above is also exempt from the duty to make reasonable adjustments if it is, or was, the only or principal home of the person who wants to let it. This exception does not apply if an agent is used to let the property.

If a disabled person is renting a property, the landlord or rental manager has a duty to provide auxiliary aids and services if these would enable the disabled person, or make it easier for them, to enjoy the property or use any benefit or facility that they are entitled to use as part of renting the property. But the landlord or manager only has to do so if two conditions are met:

- the aid or service must be of little or no use to the disabled person unless they are renting or occupying the property, and
- without the aid or service it would be impossible, or unreasonably difficult, for the disabled person to use or enjoy the property or any related benefit or facility that they are entitled to use.

Some examples of possible auxiliary aids and services include:

- removing, replacing or providing furniture, furnishings, materials or equipment
- replacing or providing signs or notices
- replacing taps or door handles
- replacing, providing or adapting door bells or door entry systems
- changing the colour of a surface (such as a wall or a door).

An example is given by the Equality and Human Rights Commission, the UK body with various aims including trying to eliminate all forms of discrimination:

"A person with arthritis who rents a furnished flat finds it very difficult to get out of the chairs in the flat because they are too low. He asks his landlord to change one of the chairs for a higher more suitable one. The landlord agrees and finds a chair in another of his flats that the disabled person can easily get out of. This is likely to be a reasonable step for the landlord to have to take."

A Code of Practice was promulgated by the Disability Rights Commission but this organisation is now part of the Equality and Human Rights Commission which is a UK wide body. There is a Scottish branch. You can find out more about all forms of discrimination on the website which is www.equalityhumanrights.com.

3.16 *Development and alterations to property*

As a manager you should be aware that you may be involved in instructing or managing works which require building warrants or planning permission.

(i) Building (Scotland) Act 2003 and Building (Scotland) regulations 2004

The **2003 Act** sets out the framework for a new building standards (formerly building control) system in Scotland. It replaces the **Building (Scotland) Act 1959**. The hierarchy of building regulations is amended to simplify compliance with European obligations The standards themselves are prescribed in regulations, supported by technical standards for compliance with these regulations.

The **Building (Scotland) Regulations 2004/406**, as amended, apply to construction, conversion and demolition of buildings and also to the provision of services, fittings and equipment in or in connection with buildings. **Section 5** prescribes the functional standard for buildings and they cover a wide subject area. The Regulations came into force on 1 May 2005.

You should be aware that certain works will require a building warrant. **Section 8 of the 2003 Act** sets out when a building warrant is required and makes it an offence not to have one when it is required or to deviate from the work authorised by the warrant. Section 8 applies to "any person on whose behalf the work is being carried out" so if the work is instructed by the property manager they could be responsible as well as the owner of the building.

Remember to check if a building warrant is required for the proposed works in the property and make the necessary applications in conjunction with the property owner – work without warrant can lead to prosecution for an offence.

(ii) Planning etc. (Scotland) Act 2006

The **Planning etc. (Scotland) Act 2006** came into force on 20 December 2006. Sections have been brought into force by a number of SIs and there are still some sections which are not yet in force. If in doubt, you should consult a planning specialist for advice.

The 2006 Act made some quite significant changes to the **Town and Country Planning (Scotland) Act 1997**. Parts of the **2006 Act** (such as "Development Plans" replace completely parts of the 1997 Act whereas other sections of the 1997 Act are only amended by the later one, so both need to be read in conjunction with one another.

The two tier system of plans has been abolished and replaced with a one tier system except for Edinburgh, Glasgow, Dundee and Aberdeen, where the two tier system will continue. It is hoped that streamlining the plans will allow planning strategy to be kept more up to date and allow for greater certainty in the planning process. a new planning hierarchy is introduced. The hierarchy will consist of national developments, major developments, local developments and minor developments. Delegated legislation (such as Statutory Instruments) will describe classes of development (except for national developments) and assign them to a particular category

It is likely that as property managers you would be involved in only local and minor developments. Minor developments, will consist of those falling within the permitted development regime. Permitted Development is classes of development which would require planning permission but are permitted as being the result of inclusion on a list. You should check if the proposed works are permitted development.

The sort of situation in which you, as property managers, might have to consider whether planning permission was required, could be re-doing a roof on a property. The planning system may restrict changes in the materials to be used for the work e.g. with slated roofs, you may not be able to instruct work to replace slates with tiles.

Enforcement and penalties can be quite draconian and ultimately cost the developer a lot of money if the work is stopped, he is issued with a fine, or he is ordered to restore things to their former position.

Planning law is a huge and specialised area and you should take advice from a professional to see if the proposed work requires planning permission.