

COMMON REPAIR PROVISIONS FOR MULTI-OWNED PROPERTY: A CAUSE FOR CONCERN

THE PROVISIONAL REPORT TO THE ROYAL INSTITUTION OF
CHARTERED SURVEYORS AND BUILT ENVIRONMENT FORUM
SCOTLAND

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REPORT STRUCTURE

The question this report attempts to address is what are the current arrangements for ensuring that common repairs are undertaken within flatted property in Scotland, and are they working?

In order to answer this question, the report first explains the changed circumstances brought about by the demise of a previous policy approach that focused primarily on eradicating sub-standard housing, to one whereby owners, rather than the State, are expected to take responsibility for maintaining their own property. This policy shift was heralded in by the recommendations of the Housing Improvement Task Force (HITF) (HITF, 2003). These emerged after a protracted period of operating a linked set of provisions for intervention established by the Cullingworth Report (1968), which set in place a framework for first defining, then tackle Below Tolerable housing, using compulsorily improvement powers and the subsidising of improvement and repair. The focus of both official reports has been on traditional, pre-1919 tenements, although flatted property encompasses a far broader range of property from conversions, to four-in-a-blocks, through to post-war and modern apartment blocks of various ages and construction types.

The HITF recommendations, which sought to encourage owner responsibility in common repairs, have been the focus of housing reforms over the last 15 years. A substantial number of incremental reforms have taken place, from changes in the legal nature of property ownership, through to the introduction of the Home Report, to wide-ranging reforms in private renting and the regulation of landlords, their agents and property factors. Given the significance of these reforms, it is worth taking time to consider them, and trace their development within a detailed debate about the reforms necessary to ensure owners manage and maintain their property.

In undertaking that exercise particular attention is focused on the Tenement (Scotland) Act, 2004 and its role in reforming the common law to help ensure there is a fall-back position to ensure that tenements are maintained in the interests of all owners and the wider public. Consideration is then given to property management and factoring reforms, which were designed to ensure a degree of regulation over such services, given that they are critical to organising and executing repairs for a significant number of people living in flats. The reforms focused on local authority intervention are then considered given that their role changed from, in essence, forcing owners to undertake the necessary repairs, to that of encouraging them to do so. The loss of resource to help facilitate such action on the part of owners is a critical consideration here, as is the legacy of expectation on the part of owners that the Council will step in and sort things out when they cannot, for whatever reason. Consideration is also given to the work of conservation trusts, and the pioneering role they have played in Stirling in helping to support property owner repair and maintenance historic buildings by providing an independent survey service to determine the works needed before owners adopt a regular maintenance regime.

The report concludes with a brief discussion of the proposed reforms that have been emerging, given that the ambition that owners to take responsibility for undertaking common repairs has proved somewhat challenging, as evidenced by the issues and concerns outlined by this report. The second stage of this work is to take the report, and its critique of the proposed reforms, back out to practitioners and stakeholders and seek their opinions both on the presented analysis of the problems, and on the suggested reforms, so that at the end of this process a more strategic approach to addressing this issue can emerge. After nearly two-decades of incremental change it is time to adopt a focused and evidence-informed strategic approach.

BACKGROUND

For whatever reason, Scotland seems reluctant to address the serious disrepair problem re-emerging within our built environment. Put simply, Scotland's private housing stock is deteriorating and quite literally falling apart because of a lack of regular and on-going maintenance and repair. While house prices may in certain places be at an all-time high, that is not a reflection of the actual quality of the property being purchased. As far back as 2010 the Scottish House Condition Survey reported that almost 60% of all dwellings had disrepair to 'critical elements' of their fabric, over half of which were in need of urgent attention (Scottish Government, 2011). These cover building elements critical to ensuring weather tightness, structural stability and preventing the deterioration of the property. This figure rose to over three-quarters (76%) for 'traditional dwellings', pre-1919 property which accounts for almost half a million homes across Scotland, over 90% of which are in private tenure (Scottish Government, 2011). The latest figures, although recording a slight improvement, still suggest that just under half (48%) of the entire housing stock now has disrepair to 'critical elements', rising to two-thirds (67%) for all pre-1919 dwellings (Scottish Government, 2017). Further, 5% of the pre-1919 stock is described as requiring extensive repair, which is defined as being a serious/urgent repair that covers more than 20% of the building (Scottish Government, 2017).

Part of the explanation for this slight improvement has been the requirement, on the part of social landlords, local authorities and housing associations, to ensure that property they let meets the Scottish Housing Quality Standard (SHQS). The quality standards expected in the private rented sector, the Repairing Standard and for owner-occupation, the Tolerable Standard, are far less onerous, and do not require to be met by a defined date, which for the SHQS was 2015. On-going work by the Scottish Government to harmonise these differing housing quality standards has yet to report. Similarly, in respect of energy efficiency standards, determined by the Scottish Government's legal commitment to meeting EU Climate Change Directives, while social housing is expected to conform, the expectations for both private renting and owner occupation have still to be set down.

Yet, given this context and the need to ensure the quality and standards of the existing stock against the background of a slow rate of new housing additions, there is, surprisingly, no national strategy to address the deteriorating condition of the private housing stock. In its draft strategy document on future housing policy priorities, which is currently out to consultation with stakeholders, this issue fails to merit a single mention (Scottish Government, 2018). Within the social housing sector, housing conditions have, by-in-large improved, as a result of setting in place the SHQS in 2004. This has achieved a 90% compliance rate, albeit three years after the 10-year compliance deadline passed in 2015. As this report illustrates, whilst there have been a good number of legislative initiatives, policy reviews and no end of reports offering remedies to a particular aspect of this property maintenance problem, there still remains no strategic engagement with the challenge of safeguarding the condition of privately-owned property.

To better understand the current situation in relation to tackling disrepair in private flatted property it is necessary to look back at the two quite distinctly different ways that this has been pursued over the last 50 years:

'Sticks and Carrots' - The focus here was primarily on tackling the legacy of slum housing conditions, via the targeted use of capital grants backed up with strong enforcement powers. The legislative approach was drawn-up following the publication of the famous Cullingworth Report of 1968, which set down the first comprehensive housing quality standard, the so-called tolerable standard, which determined whether a property

constituted a slum or not. The targeting of improvement works, to address the housing that was found to be Below the Tolerable Standard (BTS), was first set down in the Housing (Scotland) Act, 1969. The limitations of these measures produced a quick legislative refinement with the advent of the Housing (Scotland) Act, 1974, which replaced Housing Treatment Areas (HTAs) with Housing Action Areas (HAAs). These provisions then ran for just over 30 years, until their abolition by the Housing (Scotland) Act, 2006. By in large, this policy approach proved highly successful given the demise of both BTS housing and overcrowding (Robertson and Bailey, 1996).

'Ownership with Responsibility' - Under this approach, with the marked reduction in BTS housing, there was felt to be less need for both 'sticks and carrots'. In place of the HAAs with their compulsory improvement powers and the enhanced improvement and repair grants, came a new set of arrangements, termed 'Schemes of Assistance', whereby local authorities could decide for themselves what sort of support they should provide to owners of property in disrepair. The underlying principle here is that responsibility for repair and maintenance now lies solely with the owners of the property.

The current arrangements for addressing disrepair, in large part, emanate from the recommendations made by the Scottish Executive's HITF (HITF, 2003). Its central theme was to ensure that owners themselves, rather than the State, took responsibility for maintaining the common elements in multi-owned flatted property. In this new world, where slum property had all but been eradicated, home-owners needed to step-up and take responsibility for their own property.

A reformed 'Law of the Tenement', the common law provisions covering such matters, was then in the process of being legislated for, as part of a wider property reform package abolishing feudal title, Scotland being one of the last places in Europe still to have a feudal land law. This was considered to be a useful complement, as it offered a legal framework to encourage the establishment of owners' associations and their organisation of common property maintenance and repairs.

Of course, at that time, immediately prior to the 2007 Global Financial Crisis owner-occupation was still growing, within what was termed 'the cheaper end' of the housing market. Now we are witnessing an unprecedented growth in private renting. In addition, within popular tourist destinations, most notably Edinburgh and the Scottish Highlands, a new form of private renting has emerged, so-called short-lets (Indigo House, 2017). Thus, following the Financial Crisis, a far more complex ownership pattern has arisen within flatted properties. It is also within this stock that an acceleration in property disrepair is occurring. Both the tenure profile and legislative framework has changed over the last two decades, so what have been the results?

POLICY CONTEXT

Scotland currently has over half a million residential properties, the majority of which are still flats, where responsibility for maintaining the common fabric of the building is a shared responsibility amongst all the owners. A flat is legally defined by section 29(1) of the Tenements (Scotland) Act, 2004 as including: “any premises whether or not (a) used or intended to be used for residential purposes; or (b) on the one floor” of a “tenement”. In terms of section 26(1), “tenement” means “a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which (a) are, or are designed to be, in separate ownership and (b) are divided from each other horizontally.” A wide range of property types are, therefore, captured within this definition. These include not only traditional sandstone tenements, but also four-in-a-block housing, modern apartments, lofts and so-called conversions, where a larger house has been broken-down into a number of flats. Further, certain terraces and semis, and even some detached properties in a suburban setting, which are not flats, can also share responsibility for the up-keep of common elements such as gardens, paths and boundary walls. Each of these properties has mutual management and maintenance responsibilities, either specified in the title deeds, or by default under the common law, should they be missing, or prove inoperable.

The Scottish Housing Condition Survey (2016) states that 48% of Scotland’s homes have ‘Disrepair to Critical Elements’, what was previously termed not being ‘wind and watertight’. That figure rises to 67% for pre-1919 homes, largely, but not exclusively the traditional tenement structures, and constitutes 58% for inter-war housing. ‘Extensive Disrepair’ is evident, but not as prevalent, at 6% nationally, 5% for the pre-1919 properties and 3% for the inter-war stock.

The prevalence of disrepair to ‘critical elements’ has long been associated with age of construction. However, although dwellings built after 1964 are less likely to fall within this category, the 48% figure mirrors the current national average. The data also shows a degree of improvement in the condition of older dwellings, those built between 1919 and 1944. Here levels of ‘critical disrepair’ decreased by 9 percentage points to 58%, while levels of ‘critical’ and ‘urgent’ disrepair decreased by 13 percentage points to 27%. The reasons for this change are not explained, but may have something to do with recent investments in social housing stock in order to meet the SHQS.

Table 1: Nature of Disrepair from Scottish House Condition Survey, 2016

Nature of Disrepair	Scotland - all housing stock	Pre-1919 stock	1919-44 stock	1945-64 stock	1965-82 stock
Disrepair to critical elements	48	67	58	60	48
Urgent disrepair	28	37	27	30	22
Extensive disrepairs	6	5	3	5	2

(Note: Only 2% of total housing stock is now Below Tolerable Standard, yet 48% is in disrepair)

Table 2: Disrepair to Critical Elements, Urgent and Extensive Disrepair in %, by Dwelling Age and Location, 2015 and 2016

	Age of dwelling					Location		
	Pre 1919	1919-1944	1945-1964	1965-1882	Post 1982	Urban	Rural	Scotland
<i>Dwellings with any Critical Repair</i>								
2016	67	58	60	48	20	48	49	48
2015	68	67	60	49	26	52	51	52
<i>Dwellings with Critical and Urgent Repair</i>								
2016	37	27	30	22	9	24	25	24
2015	39	40	35	25	10	28	27	28
<i>Dwellings with Critical, Urgent & Extensive Repair</i>								
2016	5	3	5	2	1	3	2	3
2015	8	7	6	3	1	5	4	5

Source: SHCS (2016) Table 45.

The robustness of the house condition data is, however, now being called into question. There is a concern that the SHCS is no longer based on a sufficiently large sample size to produce reasonably robust estimates for issues that, crucially, affect small sub-groups within the population and, in particular, BTS rates at a local authority level.

In this context, it is worth noting that the sample size employed by the SHCS has fallen significantly. The three-year sample, for all 32 Scottish local authorities is now under 8,300, down from 15,000 from the previous survey. So aside from City of Edinburgh Council and Glasgow City Council, total achieved samples are now so low one should be wary of putting too much store on any apparent changes, especially for either BTS or over-crowding figures, since say 2012-14, especially for tenures other than owner-occupation, even for the two main cities.

This is most likely compounded by the fact that BTS properties (and potentially overcrowding) has historically been highly clustered, being found in particular neighbourhoods, if not streets within Glasgow. The current sampling strategy could, therefore, not credibly be expected adequately to address this issue within its adjusted sampling frame. Further, it needs to be borne in mind that certain elements of the BTS measure cannot be fully quantified within the focus of this technical survey, for example, water quality. It is also the case that the core focus of the recent SHCS has been on energy efficiency and fuel poverty considerations, rather than physical condition, given this represents a critical focus of policy at present.

As already noted, in the past, tenements with flats that failed to meet the 'tolerable standard', or lacked 'standard amenities' were subject to statutory action by local authorities, requiring them to be improved, demolished, or dealt with by a combination of these approaches. Local authorities could therefore declare a HAA for either improvement, or demolition. In the case of undertaking improvements such a declaration allowed the authority to enhance the improvement grants offered to cover up to 90% of 'approved costs'. This gave owners an incentive to remedy the physical failings of their properties. Similarly, in the past, repair grant aid was also made available at enhanced rates to help remedy 'serious disrepair'. HAA declarations declined markedly after 1996, when housing capital funding underwent a significant cut back. (Robertson and Bailey, 1996; Bailey and Robertson, 1997). A decade later they were abolished entirely, being replaced by 'Housing Renewal Areas', new area measures which do not automatically attract grant funding, given that local authorities are now free to offer whatever advice and support they consider appropriate.

Two official reports helped to frame two quite distinct policy approaches to addressing the physical problems associated with instigating common repairs on multi-owned flatted property.

Cullingworth Report (1968) – sought to address slum housing, by first determining a housing quality standard, the tolerable standard, and then setting in place a ‘sticks and carrots’ policy approach that eventually led to the declaration of HAAs, which compelled owners to bring their property up to the tolerable standard, within a fixed time period. To help in this task owners were automatically offered enhanced improvement grants, a form of capital subsidy. The emphasis here was on compelling the owners to undertake the needed improvement works, with the help of financial support, or if necessary by compulsion whereby the work was undertaken by the council, and the owners charged for that work.

Housing Improvement Task Force (2003) – following the marked reduction in below tolerable housing, as a consequence of the success of the above legislation, this second report set itself the task of putting in place a range of measures which would address the problem of disrepair, without automatic recourse to capital grants. The majority of the proposals outlined by the HITF have now come into being, as a result of concerted legislative action over the past 15 years. The emphasis here has been on withdrawing subsidies to home-owners, while trying to ensure that they take responsibility for the proper management and maintenance of their properties.

Cullingworth Report

Fifty-years ago, a system to address what had become a critical problem of slum housing was eventually put in place. This response was largely focused on small flats, without basic amenities, in serious disrepair. The common elements of what had been very basic property, in terms of space and amenities, had not been maintained over a protracted period and were literally falling down.

The solution to this problem had two elements, the stick, strong local authority compulsory powers to address BTS housing, and the carrot, financially attractive improvement (and then shortly afterwards repair and environmental) grants. The BTS housing measure, drawn up by the Cullingworth Report, was a basic measure which defined a “slum”. Local authorities were then legally obliged to survey all housing within their boundaries against this measure, and then make clear how they proposed to address those that were BTS.

This arrangement took time to be put in place, as it involved first addressing the short-comings of the Housing (Scotland) Act, 1969, and then coming up with new ways to address its failings under the Housing (Scotland) Act, 1974. This entire reform exercise, from 1966 through to 1974 was collaborative, in that the then Scottish Office, local authorities, other public agencies and universities worked together on solutions. The exercise was evidence-based, working through practical experiments in places like Oatlands, Govan, Springburn in Glasgow, and Fountainbridge and Gorgie in Edinburgh, to develop technical solutions capable of transforming slums into modern housing.

In time, the emergent legislative framework, in time, ensured that right across Scotland different authorities were able to tackle BTS housing, in ways that best suited them, and it proved extremely successful (Robertson and Bailey, 1996; Bailey and Robertson, 1997). In Glasgow community-based housing associations became the council’s renovation agents, whilst in Edinburgh it was the Council’s co-ordinated use of improvement grants to private owners that was the preferred approach. On the back of this focus on eradicating BTS housing, a massive renovation grants programme was spawned to improve the common parts of Scotland’s pre-1919 tenement stock, primarily focussed on Glasgow and Edinburgh, and to a lesser degree Clydebank and Paisley, given their substantial stocks of such housing. Other cities such as Aberdeen, Dundee, Stirling and Inverness were slower off the mark, and disrepair became a bigger issue proportionately, as a result.

This combined programme constituted a massive and sustained public subsidy, but the then Conservative Government was happy to support it, given its focus was on the growing owner-occupied market emerging within this tenemental housing stock. Given the physical improvements, lenders were now happy to fund mortgages in places they had previously 'red lined'.

However, once the slum issue dropped to manageable numbers the Scottish Office tired of the project, and sought to cut back on both housing association and renovation grant expenditure. This process of change really started to bite in 1996, although its planning had been on-going over the previous 10 years. Addressing the severe disrepair in council housing had become the new focus of policy. For a while, this could be achieved via stock transfer, the switching of council housing to a housing association landlord, which often brought with it capital debt write-off, private borrowing and thus new investment which could then be sustained by the dramatically transformed cash flow. The introduction of the Scottish Housing Quality Standard (SHQS) then set in place a new basic housing quality target for all social landlords, as they now found themselves termed. Private housing was, however, left subject to the mid-1960s slum clearance measure as a quality benchmark.

Housing Improvement Task Force

The HITF (2003) set itself three objectives:

- to provide advice on how to find out what exactly your repair and maintenance responsibilities are;
- to inform you about the role that property managers can play in organising the necessary repair and maintenance work to your building; and
- to provide basic advice on how to resolve particular repair and maintenance problems when they arise.

The core objective was to undertake a comprehensive review of housing policy, as it related to the condition of private sector housing across Scotland. This was the first such review since the Cullingworth Report (1968). Crucially, it noted that: *"In the years since then, the private sector has changed substantially. Owner-occupation is now the largest tenure in Scotland, while the private rented sector has declined in size and become more diverse. Significant inroads have been made into tackling the problems of "unfit" housing in the private sector but new problems have emerged"*. It went on: *"Our starting point has been the belief that the responsibility for the upkeep of houses in the private sector lies first and foremost with their owners and that there is a need for greater awareness and acceptance by owners of this responsibility. Our recommendations are intended to achieve this by influencing the operation of the housing market; improving cooperation between owners; reshaping assistance to owners and modernising the housing role of local authorities generally; and by encouraging and, if necessary, requiring owner-occupiers and private landlords to increase their expenditure on repair and maintenance"*. Its proposals, based on two years of discussions and debates with a broad range of stakeholders and interested parties were as follows.

Housing quality standard issues: Revise the Tolerable Standard, bring in a Repairing Standard for PRS housing and introduce the Scottish Housing Quality Standard across all tenures.

Improving operations of the housing market: Argued for the implementation of the Home Report, with physical survey and an energy rating.

Facilitating common repairs: The report stated: *"this requires effective mechanisms for getting agreement between owners on what work needs to be done, deciding the respective contributions from each owner and ensuring that they all meet their share of the cost. We also believe that it is necessary to ensure that there are effective arrangements for managing the property, so that*

communal repair and maintenance requirements are identified and work carried out, and for ensuring that there are adequate arrangements for insurance of communal parts of the building”.

Here the HITF relied on the Scottish Law Commission recommendations for the Law of the Tenement reforms, which were implemented by the 2004 Act. Further, they also wanted to improve: *“the ability of owners to recover costs from unco-operative owners and recommend that local authorities should have powers to act as a ‘backstop’ when genuine difficulties occur, but in a way that avoids them simply becoming the automatic recourse of individual owners faced with repair problems”.*

Under this heading the HITF also recommended powers to require owners to establish property management arrangements, linked to a proposal for a statutory power to require owners to put in place maintenance plans. They also envisaged a role for local authorities to encourage this development.

Finally, the HITF also recommended new arrangements for the accreditation of property managers in partnership with the industry, local authorities and consumer interests and that the scope of community mediation schemes should be extended to include disputes between owners.

Public Sector Intervention: Here there were three recommendations: direct intervention by using powers to compel owners to undertake works; assistance to owners in undertaking such works; and strategic planning of interventions to achieve policy objectives. This also involved, however, removing the link between statutory notices, or orders and mandatory grants; ensuring that services like ‘care and repair’ and other assistance for those with particular needs were made available nationally, for all who need them; and providing powers to local authorities to offer a wider range of practical assistance, other than subsidy, including advice, assistance with accessing finance or organising work and provision of equity-based loans.

Improving standards within the PRS: The proposal here was to create a new Private Rented Housing Tribunal from the then Rent Assessment Committee arrangements, to support tenants in enforcing their landlord’s repair and maintenance obligations and, where appropriate, apply sanctions to landlords who failed to properly maintain their property. The HITF took the view that where the condition of a property was such that it affected the health, welfare or wellbeing of a tenant, the local authority should have the power to serve a notice and require the necessary works be carried out. Although they also argued for a review of the operation of the assured tenancy regime, it did not think it appropriate to attempt to impose a single, national, regulatory framework on all private landlords, preferring to let local authorities develop their own schemes.

[Legislative actions arising from HITF recommendations](#)

Somewhat surprisingly, the HITF recommendation have been the basis of almost all Scottish housing legislative reform over the last 15 years. Surprisingly, because the remit of the HITF was in respect of encouraging owner responsibility in the pursuit of common repairs, whereas the resulting legislation adopted a wider housing remit.

- Private landlord registration, was introduced as part of the **Anti-Social Behaviour etc (Scotland) Act, 2004**. A revised Houses in Multiple Ownership licensing scheme, was introduced by the **Housing (Scotland) Act, 2006**, Part V Licensing of Houses in Multiple Occupation. This relates largely to bedsits, or flats where a more than three people share use of the accommodation, and was partly a response to the tragic deaths of two students in a basement flat in the Woodlands district in Glasgow.

- In relation to housing quality standards the SHQS was introduced in 2004, but only for social housing. The Repairing Standard came in under the **Housing (Scotland) Act, 2006**. Complaints about landlords not adhering to this standard are now considered by the newly created First Tier Tribunal (Housing and Property Chamber), given its inherited role in relation to both private tenancies and repairs.

The precursor body, the Private Rented Housing Panel (PRHP) had been created under the 2006 Act, again in line with the recommendations made by the HITF. Only owner-occupation has not been subject to housing quality standard review, although the Tolerable Standard has recently been revised in relation to electrical wiring and insulation standards. The Scottish Government has initiated work to try and realise bring the ambition of having one quality standard, across all Scottish housing tenures, but information on current progress has proved hard to locate.

- Further changes in relation to landlords meeting the Repairing Standard obligations were added in the **Private Rented Sector (Scotland) Act, 2011** which also refined the landlord registration criteria and introduced the need for landlords to provide a tenants' pack, detailing their statutory rights under the tenancy, which included the Repairing Standard and how to appeal to the PRHP should a tenant consider their landlord is not meeting their statutory requirement with respect to repairs. The subsequent **Housing (Scotland) Act, 2014** allows the Scottish Ministers to extend elements of the Repairing Standard, with landlords being obliged to meet that revised standard, allowed third party applications to the PRHP (now Tribunal) so that local authorities could now pursue repair issues tenants might have felt unable to take up with their landlord. Further, this later Act also introduced the registration of all letting agents. The legislation also placed on a statutory footing Enhanced Enforcement Areas, designed to deal with poor environmental standards, overcrowding and anti-social behaviour within particular areas of private rented stock. These measures have, so far, only been used in the Govanhill district of Glasgow, where there have been serious housing quality issues arising from gang masters using certain landlords to house a migrant labour force.
- **Home Report** which comprises of a physical survey, an energy audit and valuation was introduced in 2008, in part, to: *"to improve information about property conditions, therefore providing an incentive for repair or maintenance works to be carried out in advance of sale, or identifying areas where improvements could be made after purchase"*. The Energy Performance Certificate (EPC) was legal requirement, under EU legislation introduced also in 2008 (EC, 2010).

It is worth noting, however, and it is an issue that will be returned to later, that a recent review of the Home Report system noted that in order: *"to limit surveyor liability, the writing in the Home Report was often 'neutral' or 'bland' and contained too much caveating"*.

- The **Housing (Scotland) Act, 2006** also introduced the 'Scheme of Assistance', which replaced private sector home improvement and repair grants. This Act also repealed the HAAs powers which had allowed local authorities to tackle BTS housing since 1974. The core aim of the 'Scheme of Audit', as noted earlier, was to encourage home-owners to take responsibility for the condition of their homes, and to ensure that private housing in Scotland is kept in a decent state of repair.

While home-owners are primarily responsible for their own property, under their title deed, local authorities still retain statutory powers to maintain and improve the general condition of private sector housing within their area. If an owner needs help to look after their home, the 'Scheme of Assistance' powers allows local authorities broad discretionary powers to provide assistance by offering advice and guidance, practical help, or through direct financial assistance by way of grants or loans. But crucially it is for the local authority to determine what assistance is made available on the basis of local priorities and budgets.

In 2016-17, councils provided householders with 173,050 '*instances of help*'. In 156,175 cases (90%) this was in the form of non-financial assistance, a broad category which includes website hits and the provision of leaflets and advice. Total spending across Scotland that year was £31.8 million. As part of that 5,967 grants were paid out to fund property adaptations for disabled households, which totalled £22.8 million, leaving just £9 million for grants to owners. Back in 2010-11 total spend was £48.9 million, of which £22.4 million was for adaptations, so £26.5 million went on owners' grants. (Scottish Government, 2018b). Grants to owners have thus fallen by two-thirds in the last 8 years, whereas the adaption spend, in cash terms, has been relatively stable. The right of private tenants to carry out adaptations to their home, is also supported by the 'Scheme of Assistance', and as this programme overall often has community care implications it is often given priority.

In 2017-18 available total spend fell slightly to £29.7m, and again the vast majority was spent on disabled adaptations, at £21.9m. So only £7.9m was for other assistance, of which the lion's share at £5.2m was spent in Glasgow.

- Revised local authority powers in relation to disrepair, under the **Housing (Scotland) Act, 2006**, gave local authorities the power to take action where: "*housing is sub-standard, in order to bring it into and keep it in a reasonable state of repair (which must at least meet the tolerable standard); or the appearance or state of repair of houses is adversely affecting the amenity of the area, to enhance it*".
- A reformed PRS tenancy came in under the **Private Housing (Tenancies) (Scotland) Act, 2016**. This provides for an open-ended tenancy that can only be extinguished by the landlord under a set of statutorily prescribed grounds, thus replacing the previous Short Assured Tenancy that typically offered a six-month tenancy. It is hoped that with enhanced security of tenure provisions tenants will be better placed to insist that their rights in relation to the repairing standard and the general condition of the property can be enforced. The new tenancy also requires landlords to detail all the statutory rights which had been required under the previous tenants' pack provisions.
- In response to the recommendation to establish a single, national voluntary accreditation scheme for property managers in Scotland in partnership with the industry, local authorities and consumer interests, Scottish Government support of the **Property Factors (Scotland) Act, 2011**, a private members Bill set in place an accreditation scheme for factors composed of three main elements: a compulsory register of all property factors operating in Scotland; a code of conduct that sets out minimum standards of practice to which all registered property factors must comply; and a route for redress through the Homeowner Housing Panel (now also incorporated into the First Tier Tribunal, Housing and Property Chamber). Home-owners are able to apply to the Tribunal if they believe that their factor has failed to comply with the code of conduct, or otherwise failed to carry out their factoring duties. Its operation is currently being reviewed.

- ‘Missing shares’ provisions in the **Housing (Scotland) Act, 2014** now allows housing associations to undertake and pay for repair works in a common repair scheme where an owner for whatever reason is unable, or unwilling to participate. This power was only brought into force in October 2018 following a required consultation exercise (Anna Evans Consultancy, 2016). In such cases, the work is carried out on the property, with the owner being billed. The cost here also carries an administrative fee to cover the association’s cost. If the bill is then not paid, the association can place a repayment order on the property for the outstanding debt. The provisions of the 2014 Act do not allow for the charging of interest on this debt, though the 2006 Act provisions do, as is detailed in the later more detailed discussion of these provisions. Local authorities were newly given such powers under two separate pieces of legislation, the first being section 4A of the **Tenements (Scotland) Act, 2004**, to which was inserted by section 85(1)(a) of the Housing (Scotland) Act, 2014 and the second being section 50 of the **Housing (Scotland) Act, 2006**.

Although there is some legislative overlap between these two provisions, broadly speaking, the section 4A power can be used where there has been an owner decision under the Tenement Management Scheme or title deed, but does not require a maintenance account to have been set up by the owners, whereas section 50 requires a maintenance account to have been set up.

- There was also a recommendation that there should be a requirement to have a compulsory common building insurance for all new flatted blocks, but that was fudged within the Law of the Tenement reforms, in that insurance is required for all flats irrespective of age, but that does not need to be via a block insurance policy. Individuals can, under the **Tenements (Scotland) Act, 2004** ask to see their neighbours’ individual insurance policies to check the level of cover, but this appears both naive and unfit for purpose.

It has perhaps not been fully appreciated just how important the HITF has been in framing housing legislation over the past 15 years. Further, it also appears that there has, in large part, been something of a political consensus in relation to these reforms. The HITF was established by the Labour / Liberal administration but its agenda has been taken up and further developed since 2007 by the three subsequent SNP administrations.

The other conclusion to be drawn from this legislative listing is that while improving common repair and maintenance may have been the driver of policy development, many of these reforms have a somewhat tangential connection with that issue. The ending of feudal tenure, which was a core achievement of the first Scottish Parliament, has implications for common repairs, but it clearly embraced far more than simply that. Similarly, the introduction of the Home Report, or tenancy reforms in the private rented sector, have common maintenance links, but again the focus is broader. Over time, awareness of the heritage of many of these reforms has been lost. Addressing common repair matters initially drove this policy agenda, but that issue was but one part of a broader reform package. The need for a strategic focus on addressing common repairs matters has been lost sight of along the way. Further, the ad hoc and fragmented nature of policy-making has also delivered a series of reforms that touch on trying to improve common repair matters, but not in a coherent or planned way. So, despite this plethora of reforms, all of which have tried to address one aspect or another of common repair, the impact on the ground has been fairly negligible. If anything, matters have got worse. Statutory powers without the backing of enhanced grant subsidy have resulted in the demise of major repair works. Further, the hope that home-owners would step up and fill that gap, after accessed advice has not been realised. Why has this been the case?

TENEMENTS (SCOTLAND) ACT 2004

Historic context

This Act constituted the last part of a major legislative programme addressing property law reform, which came into force in November 2004. As noted above, the HITF saw this as putting in place a management regime which would support owners to maintain their property. The then First Minister, Donald Dewar had made repealing feudal property law a priority for the first administration of the Scottish Parliament. This was accomplished through passing three Acts: the Abolition of Feudal Tenure etc. (Scotland) Act, 2000, the Titles Conditions (Scotland) Act, 2003, and finally the Tenements (Scotland) Act, 2004.

Reforming the Law of the Tenement had followed the recommendations set out in the long-awaited 'Report on the Law of the Tenement' (SLC, 1998). The Scottish Law Commission had embarked on examining this issue back in the mid 1980s (SLC, 1990). The long reform timeframe was because the common law relating to tenements was inextricably tied into the broader body of property law reform.

The common law rules governing the maintenance and management of tenements have developed since the 17th Century, but these were neither comprehensive, nor without anomaly (Adam, 1978; Gretton and Steven, 2017). The development of the Law on Real Burdens, however, had imposed obligations on successive owners to adhere to a detailed regime for the management and repair of a tenement. Such burdens were drawn up by conveyancing solicitors to suit the particular circumstances of a tenement development, or when a flat was sold-off by the landlord to a new owner, a so-called 'break-off title'. Real burdens always took precedence over the common law rules, as is still the case today. It is only when the real burdens are silent, or defective in some way, that owners can default to the general law. Reforming the Law of the Tenement was an attempt to ensure that the default provisions were better able to address common management and maintenance issues.

It is also worth noting that within Glasgow, and the West of Scotland more generally, title deeds were often complemented by a deed of conditions, in effect, a secondary deed that set down management rules for the block. The reason for this localised practice, common from the 1880s to outbreak of World War One, was that as tenements were funded primarily by a series of small investors, it was generally the factors who were responsible for bringing investors and builders together, and then managing the resulting properties on behalf of these investors (Adam, 1978; Sim, 1998). The deed of condition thus allowed factors to operate a more comprehensive and uniform management operation.

In other places in Scotland, with larger landlord holdings, as opposed to a series of small investors, day-to-day management was in the hands of these larger business entities and, hence, the need to set down a more standardised management code was deemed unnecessary. However, with the break-up of flats into home-ownership, a process that took place throughout the later part of the 20th century, problems started to arise. While the deed of conditions and factors stayed in place in the West of Scotland, ensuring that tenement management system could still function, the lack of standardised title deeds arising from the various Edinburgh break-off titles, plus the absence of property factors, resulted in greater complexity for these flat owners, and as such an increased reliance on common law remedies. It was also the case that earlier tenement blocks, most notably the new Town development in Edinburgh did not have specified management arrangements detailed in the title, so were always reliant upon the common law. Further, in Edinburgh it is not uncommon for flats, within the same block, to have quite different title conditions depending on when the break-off deed was drafted and by whom, given custom and practice in such matters

differed, and has changed over time. Similar problems have arisen in relation to council house sales, in that practices differed between local authorities, and then, with local government re-organisation in 1996, a number of authorities were brought together, practice was then standardised (Russell and Welsh, 1998; Welsh, 1999). Again, local authority solicitor practices also differed between authorities and similarly altered over time.

There is a popular and long-held misunderstanding that tenements are a collective entity, given all the owners share a building, but that is not the situation in law. The original Law of the Tenement was based on the Law of Common Interest, but crucially not on common ownership (Rennie, 2004). In essence, the common law had developed certain rules about protecting support, shelter and natural light within the tenement structure, for the benefit of all, under the umbrella term of 'common interest'. What the Tenements (Scotland) Act, 2004 did was to replace these provisions by similar statutory obligations, so that any owners of any part of the tenement building that provides support or shelter must maintain that part.

Given this, and a long-standing concern in Scots law that co-ownership demands unanimity in decision-making, which is difficult to achieve, common property has always been very limited, with only really the common stairs, the roof above and the solum (ground) immediately below the stairs, being common. That said, as Rennie (2004) noted: *"Most title deeds change the rules of ownership to make things like the roof, solum, garden and outside walls, passages, stairs and services common and this is by far the best method of dealing with matters. But the variation of the common law rules may be inadequate, the maintenance obligation may be unclear or inconsistent and there may be no management scheme to deal with matters of common repair"*.

Titles can, and do make for separate provisions, but they do so in a variety of different ways. Titles also suffer from becoming dated, and thus inoperable in practical ways over time. At its simplest, certain terms or approaches failed to keep up to date. Calculating the share of cost by use of the rateable value was standard drafting in many titles, but with the abolition of rates heralding in the introduction of the Community Charge, and its subsequent replacement by the Council Tax, this approach became redundant.

In most other jurisdictions, there is a statutory code for tenemental, or flatted properties (Bailey and Robertson, 1997b; Robertson, 2006). What, in effect, the 2004 Act provides is a form of statutory code, but in a less radical form because it opted not to apply rules right across the board, no matter what existing titles might say, but rather only applied them where the existing titles were silent, or inoperable, but with one quite notable exception.

The 2004 Act thus provides a statutory structure for the maintenance and management of all tenements, if this is not provided for within the existing title. In addition, it provides a Tenement Management Scheme (TMS) in order to help owners make decisions about maintenance and management of the block, but crucially only where the title is silent or inoperable. In 2005, the Scottish Executive provided a comprehensive user guide to these provisions.

Defining a tenement

The 2004 Act starts by defining a tenement as being 'a building, or part of a building which comprises two related flats at least two of which (a) are, or are designed to be, in separate ownership; and (b) are divided from each other horizontally' (s 26 (1)). A property divided vertically is considered a terrace, not a tenement. This broad definition, is designed to capture the broad range of flatted properties, whether a modern purpose built apartment, traditional Victorian tenements, ex-council or SSHA flats or larger older properties now converted into a number of

individual flats. Further, when determining whether flats are related, regard must be given to the existing title and any burdens which treat the building, or any part of it, as if it were a tenement (Gretton and Steven, 2017).

Sectors, boundaries and pertinents

The 2004 Act then sets out its two core ambitions: firstly, to codify the common law rules in respect of tenement law, as noted above, and, secondly, to set down the Tenement Management Scheme. Mirroring the common law it was up-dating, the legislation relies on common ownership very sparingly. As previously mentioned, there is good reason for this given common ownership requires unanimity in decision-making, and that has a tendency to give rise to disputes (Gretton and Steven, 2017). Thus, again the starting point is that individual owners have exclusive ownership of their flats and then rules are provided to deal with 'sectors', 'boundaries' and 'pertinents'. As Rennie (2004) neatly puts it, tenement law "*favours exclusive ownership of each part of the tenement, slice-by-slice and floor-by-floor, with a common interest in those parts of the tenement which are part of a particular slice but which provide either support or shelter for the whole building*".

Consequently, under section 2 of the Act the tenement is divided up into 'sectors', which means by each flat, any common stair, close or a lift and, finally, any other three-dimensional space such as a cellar. The boundary between each of the different 'sectors' is normally 'the median of the structure that separates them', namely, the centre line, or mid-point. The 'boundary' between two flats is the mid-point between them, whether at the ceiling, or floor. The division between the flat and the close or common stair, which is defined as a 'pertinent' given all flats take access from it, is also taken as the mid-point between the walls. All external walls are, therefore, owned exclusively by the 'sector' in question, so in the case of the front wall, it is owned in sections by all front facing flats. In terms of section 3 ownership of a top floor flat includes ownership of the roof above it, and similarly ownership of a ground flat includes the solum, the ground on which the building is erected, that lies below the ground floor flats. In the case of the close, only the roof above and the solum below it, is defined as being common.

'Pertinents', as noted above, primarily refers to the close, the connecting passage, stairs and landings within the building which constitutes a common access to two or more of the flats. If a main door flat does not access via the common stair, then it is excluded from ownership of this 'pertinent'. The ground around the flat, such as the back green or back court, belongs to the flat adjacent to it, but there are exceptions, such as paths, any outside stair, or the means to access other sectors of the building. Other examples of 'pertinents' are fire escapes, rhones, pipes, flues, conduits, cables, tanks and chimney stacks. Where such parts serve more than one flat they are common property to those flats. Shares in common property are normally of equal size, but in the case of chimney stacks the actual share depends on the ratio of the number of flues serving the chimney to the total number of flues in the stack (2004 Act, s 3; Gretton and Steven, 2017). What this categorisation exercise does is to define key parts of the tenement building as 'scheme property', as these become the elements subject to the Tenement Management Scheme provisions.

Tenement Management Scheme

The 2004 Act ensures that all tenements have in place a scheme for management and maintenance. At June 2009, the Tenement Management Scheme applied to all 830,000 tenement flats in Scotland (Xu, 2010). That was prior to the advent of the Development Management Scheme becoming available, the provisions of which are detailed later. That said, for the reasons already well outlined, not all tenements will have the exact same scheme. The relevant scheme, for a particular tenement property, will thus do one of following:

1. operate to the rules set out in its Title Deed;
2. operate to the rules set out in the Tenement Management Scheme;

3. operate to the rules set out in Development Management Scheme;
4. operate under a combination of 1) and 2) above.

Again, the Tenement Management Scheme arrangements can only apply if the property's title deed provisions do not make other arrangements, or are defective in some way, or if agreed by all owners as an alternative.

The Tenement Management Scheme only applies to the parts that fall within the definition of 'scheme property'. This, firstly, means the strategic parts of the building, which at common law had been the subject of 'common interest' obligations, namely:

1. The ground on which the tenement is built, the solum
2. The foundations
3. The external walls
4. The roof (including supporting structures such as rafters)
5. Any mutual gable wall shared with an adjoining building, to the centre line
6. Any other wall, beam or column that is load bearing

These parts do not have to be co-owned, in terms of the title, to be 'scheme property'. A top floor flat, which under the common law had sole ownership of the roof above, now finds the whole roof is nonetheless taken to be 'scheme property'. The idea here is that the whole roof should be treated as a single entity, but again only if the titles have nothing to say on the matter. What this default rule does, is that if the title deeds are silent, then liability for the roof is not based on the long-standing common property understanding, understanding in relation to the section above the close but rather there is equal liability for maintenance of the whole roof (unless the flats are disproportionately different in size where liability is by floor area). In effect, this is the only nod to a statutory code approach which is common practice in other legal jurisdictions.

The second definition of 'scheme property' includes parts of the building that are owned in common, such as the close. Thirdly, it also includes any part of the building which is maintained under a real burden by two or more flats.

The main decisions that require to be taken relate to maintenance. Scheme decisions can be made by a simple majority of the flat owners, though again, if the title deed set a higher threshold, such as two-thirds, then this would apply. The first such decision might be to undertake an inspection to determine what maintenance works are required. The word "maintenance" is critical here, and the Act makes specific mention of: *'repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance'* (TMS rule 1.5). There has always been a distinction in the law between maintenance and repair and what is deemed to be an improvement. That said, the dividing line can be contentious, as a repair may not properly address a problem that an improvement might.

Once a decision is made to undertake maintenance, then the majority need to instruct the work, and then decide on either an owner or manager to instruct and manage that work. A scheme decision can then require all owners to deposit their share of the estimated costs in advance, in an interest-bearing bank or building society account. Who holds and manages that account is left unspecified, but in factored properties, it is the manager that offers such a service. Self-factoring blocks tend not to have a bank account, with payments often sorted out on an ad hoc basis.

There is no requirement for a formal meeting to be held. If an owner feels that a repair requires to be carried out they can go around the tenement owners and see if the majority agree. All owners need to be consulted, and each flat has one vote. Though the vote does not need to be in writing, it is considered advisable to have all the owners' positions stated in writing before instructing any repair works. If a formal meeting is held then 48 hours' notice must be given, and again any decision needs to be on the basis of a majority of owners, not just a majority of those who attended the meeting.

After a decision is made all owners need to be formally informed of that decision, in writing, and then that decision cannot be implemented for 28 days, in order to allow any owner who opposes to lodge a challenge at the Sheriff Court. The Sheriff has to be satisfied that the decision is not in the best interests of all owners, or prejudicial to one, or more of the owners. Where the decision is not successfully challenged, then it then becomes binding on all owners and their successor.

Scheme costs are those that arise from scheme decisions to carry out maintenance, or costs incurred in undertaking the management. Again, as with this entire piece of legislation, it is again subject to the titles. Where the real burdens detail scheme costs, then these must take precedence, but where the real burdens are silent on such matters, or are either defective or partial, then the Tenement Management Scheme rules can then be applied.

Normal apportionment is equal shares, but again, there are other possibilities. If part of the property is common, then liability is by share of ownership. Further, if it is not owned in common, but the floor area of the largest flat in the building is more than one and a half times greater than the smallest, liability is then in proportion to floor area.

In the case of an emergency repair, any owner is entitled to instruct, or have remedial work carried out. Emergency work is defined as being: *'work which, before a scheme decision can be obtained, requires to be carried out to scheme property (a) to prevent damage to any part of the tenement, or (b) in interests of health and safety'*.

Similarly, where an owner has an obligation, set down in the title, to maintain a specific element of the building, for the benefit of all other owners, then these costs are shared, and that responsibility is also enforceable by the other owners. Further, given its importance, no scheme decision is required provided the part in question is scheme property, or property that must be maintained by virtue of the real burdens. Costs on the share basis can be recovered from all the other owners, as if a scheme decision had been made. This duty to maintain, does however, have to be reasonable, so due regard to the age and condition of the building and cost is taken. Consequently, in the case of a dilapidated building, it does not apply. Finally, if action to ensure support, shelter or light is not undertaken by the responsible owner, then a claim of negligence or nuisance can be made.

Other scheme decisions include arranging for insurance and the appointment, or dismissal of a manager, or factor. Section 18 of the Act has a requirement for insurance, to address the 'prescribed risks of fire, smoke, lightening, explosion, earthquake storm, flood, theft, rioting, vandalism, subsidence, and damage from water or oil leakage'. Again, if the real burdens state that a common policy must be used, or a scheme decision is made to have one, then that would apply. That said, there is no requirement for a common block insurance to be in place. It is thus possible for a set of separate individual policies to address this requirement. In such cases, all owners have the right to ask other owners to see if such cover exists in their policy. The 2004 Act also allows for the appointment and/or dismissal of a manager by a majority of owners within the tenement.

The consensus on the value of this reform is that we find ourselves in a better place than previously. There is clearly a benefit in having a definition of 'scheme property' which overrides ownership issues. Where title is silent, flawed or inoperable then this definition offers owners a course of action to resolve a maintenance issue. As Rennie (2004) acknowledged at the time, it: "*provides for sensible, but not radical reform*". However, his contention that the management scheme should help persuade neighbours to avoid the sort of difficulties that have arisen in the past, where owners simply dig their heels in, or ignore the requirement for maintenance was somewhat optimistic. The Act perhaps also presumes that owners are resident, and thus easily contactable. However, given the recent dramatic shift in ownership patterns within tenements, and the shift from owner-occupation to private rental, that is less likely to be the case. As was noted earlier, this tenure shift has been most marked at the 'cheaper end' of the housing market, which traditionally has been dominated by small tenemental properties in poorer condition because of their age. As a result, contacting owners through tenants and/or agents can prove to be a challenge, as is then securing agreement to proceed with repair works and insisting their share is deposited in advance.

The critical issue here is not getting a majority decision made, though that can still be quite a challenge, but getting all owners to contribute to the cost. So, although a binding majority decision has emerged through the 2004 legislation, the practicalities of actually getting all owners to fund the works in advance still proves a major stumbling block, as this, in effect, demands a unanimous decision. As the case study examples ably illustrate, this is the real impediment to actually getting works carried out.

The Scottish Law Commission, in coming forward with its proposals, did not consider the need to have a formal company composed of the owners to manage the block. As they observed: "*the degree of formality and regulation involved are out of scale with the relatively humble functions performed by the association*" (SLC, 2003, n1 para 6.8). This view now needs reconsidered, given that the relatively humble function, in many instances, presents a major challenge for many owners.

Development Management Scheme

The Title Conditions (Scotland) Act, 2003 provides for a more sophisticated management scheme, primarily for use in larger developments. So although it could be used for a single tenement, it is more likely to be utilised for a group of tenements, or houses, to some extent mirroring the Planned Unit Development, or Strata Titles models that apply in US State or Australia State legal jurisdictions respectively (Bailey and Robertson, 1997b). It was also primarily designed to be put in place when a new development is being constructed, rather than applied to a property with an existing title, given its adoption in that context would demand unanimous approval of all parties, both owners and lenders, and therefore involve individual conveyancing changes, again by all parties.

The Development Management Scheme, given it constitutes a body corporate which is a business association (albeit not for profit), is thus a UK reserved matter and is set out within a separate Statutory Instrument, the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 (SI 2009/729). As the date suggests, it was passed some six years after the Title Conditions (Scotland) Act, 2003. That said, the scheme itself is based on the draft provided in Schedule 3 of the draft Bill, set out in the Scottish Law Commission Report on Real Burdens (SLC, 2000).

Under this scheme, the development is run by a manager employed directly by the constituted owners' association. The association, being a body corporate, thus has juristic personality. The scheme details the rules that have to be followed by the owners' association, in respect of

budgeting, service charges, meetings, maintenance, reporting and other matters. It can be applied with, or without variation, to a development by a deed of application, and disapplied by a deed of disapplication.

Where it applies, a Tenement Management Scheme cannot. The major difference between the two schemes is that the Development Management Scheme has a formal legal standing, and as such demands adherence to the procedures and reporting conventions, set down in the statutory instrument. The association is termed a *sui generis body corporate* for the sole purpose of managing the development for the benefit of its members. More importantly, it ensures that there is a person who is charged with the duty of management, who acts as the agent of the association, and who carries out such day-to-day tasks as routine maintenance in consultation with the owners. In contrast with the Tenement Management Scheme, where these responsibilities are assigned to all the owners, the Development Management Scheme concentrates the management function on a single person, who in practice will usually be a professional manager or factor.

The Tenement Management Scheme is legally a far looser entity, or should that be a concept? It was felt that this looser arrangement would be a more appropriate way of organising management within existing tenement buildings, as owners have the opportunity to adapt and use it as they see fit. While this was considered a strength, in that a more formal approach might have been more difficult to implement and use, and thus added a further set of problems, others see the potential for informality and variation to be just as much a problem. The Development Management Scheme is set in place prior to the owners taking up ownership, so they should know and accept what they are moving into. However, English experience of leasehold and its various management arrangements would suggest that is not always the case (Bailey and Robertson, 1997b). Having a manager appointed by the developer in advance of owners moving in is also fraught with problems, especially in the initial 'snagging stages' given the potential for the manager to have divided loyalties, as has proved to be the case in Australia, New Zealand and the USA.

Given its late enactment, and the conservatism shown by both developers and their solicitors in using something new, there are still very few examples currently of Development Management Schemes in operation, although latest figures from Registers of Scotland show an upwards trend. This mirrors a similar outcome with the introduction of Commonhold in England and Wales (Xu, 2010).

The hope of the HITF that the Law of the Tenement reforms would put in place a 'backstop', namely, a management system, based on a standardised owners' association model, that would help make undertaking common maintenance and repair more straightforward, appears misplaced. Perhaps it also reveals an inadequate understanding of the individualistic principles underpinning Scots property law. Further, while the Law of the Tenement offers a framework for undertaking common repairs, this can only happen if the titles are either silent or inoperable, but more critically, if all owners agree to undertake the required works. While the common law now allows for a majority decision, if an individual owner chooses not to make a financial contribution then, in effect, the principle of unanimity *de facto* still functions. Finally, it is possible to resolve such a situation, but the solution, namely taking your neighbour to the Simple Procedure Court (previously Small Claims Court) hearing is never going to be an approach that carries much support, even when the physical structure of your home is threatened by their inaction, or intransigence.

FACTORING AND PROPERTY MANAGEMENT ISSUES

Given how central the home is to peoples' lives and for their wellbeing, ensuring any property is well managed and maintained is of critical importance. While maintaining an individual property always has its challenges, within a multi-owned structure, given the building's scale and technical complexity, these challenges can become substantial. Add in the dramatic changes in property ownership occurring within these structures, initially through the growth of home-ownership and then, as one consequence of the recent Financial Crisis, an unprecedented expansion in private renting, then ensuring decisions about managing and maintaining of the buildings fabric can first be made, and then acted upon, can become significantly harder.

While in the past factoring worked solely for landlords, often using a secondary deed, to ensure a standardised management and maintenance regime of the then tenemental stock, such historic systems have come under increasing and significant strain. Ownership within the tenements has changed over time, and some title provisions have become outdated, and thus inoperable. At the same time, new modern apartments, often incorporating cutting edge technologies, have made the factoring task ever more challenging. While having a well drafted modern title deed can set in place robust decision-making bodies and well considered management and maintenance arrangements, such outcomes are certainly not universal given the inadequacies evident in the drafting of some deeds. And of course, with all management tasks, it is people who in the end make them work or not.

All professional factors need, as a core competence, a solid knowledge and understanding of building technology, embracing the various elements that constitute these at times complex structures, paying particular attention to the common parts and their on-going management, maintenance and repair requirements. Health and safety, is also always a critical concern here, involving residents, contractors and property professionals alike. This issue has recently gained in significance, as a consequence of the Grenfell Tower tragedy.

Factoring is a commercial undertaking, so there is also a need to be well-versed in financial and legal matters, including how to act on instruction and instruct contractors, but also how to account for all such activities in writing, as well as in terms of expenditure, income, profit, debt and loss. Central throughout is ensuring a sympathetic and clear consumer focus, embracing best practice in communications, transparency, confidence building, liability and trust. As part of that, ethics and behaviour knowledge are also critical, as this allows for a better understanding of issues and just how different and varied perspectives can emerge around them. In this context, it is also critical in understanding and being able to act in relation to conflicts of interest as well as actual conflict situations.

That said, while some factor's state that their mode of operation is still primarily determined by the provisions set out in the individual property's deed, most offer a service which is not strictly governed by the deeds. Rather it is a factoring service that is being purchased by owners, on a block basis. As such, and this is not always fully appreciated, while the parameters set down within the title define a legal position, the factoring contract often operates beyond that. What is core here is that factors operate within the Law of Agency. In relation to pursuing repairs, they therefore cannot act without the owners deciding upon a course of action, and then making sure the resources are in place to undertake the specified works.

This often causes misunderstandings, in that property owners expect factors to act in relation to a specific matter, whereas they often need a clear instruction and a financial commitment by all the owners effected. Complaints about factors within Scotland have, to a degree, become something of

a cultural phenomenon and, in some cases, they may well be justified. But given what has been said to date, it is clear that organising repairs and maintenance in multi-owned blocks has always been a challenge, and if anything, that has become more challenging in recent years. Factoring itself, perhaps in consequence of the complex, challenging and contentious environment, has in recent years found itself subject to much scrutiny. Initially this was primarily focused on competition between factors, in large part, in response to concerns expressed by Right-to-Buy owners who found themselves tied through title into local authority or housing association management and maintenance arrangements in perpetuity. In exploring this issue, the notion of service standards emerged, and there has been legislative change that sets down a basic standard across the sector, imposing legal expectations on all registered factors, whether working in the private, public or voluntary sectors.

Title Conditions (Scotland) Act 2003

The Title Conditions (Scotland) Act, 2003 contains various provisions relating to property management services designed to strengthen the position of owners in relation to appointing and dismissing factors. In particular, Section 28 of the 2003 Act provides that, where the title deed does not make alternative provision, a simple majority of property owners in a development can dismiss a factor, and then appoint a new factor on the terms they choose to specify. Again, any title deed provision takes precedence.

In a block of ten flats, where there are no set rules within the title, the agreement of six owners is enough to secure the removal of a factor. If the title deed imposes a higher voting threshold than a simple majority, section 64 of the 2003 Act provides that owners of two-thirds of the properties can dismiss a manager and appoint a new person to be a manager, regardless of any required threshold.

In a newly built development the developer may reserve the right, by virtue of a 'manager burden' in the title condition, to appoint a factor, sometimes for an indefinite period. The rationale for this is that the developer will have a legitimate interest in the management of the development where they continue to own properties in the development and are still in the process of selling them. However, section 63 of the 2003 Act limits the time during which a developer can retain this right, even where the title deed states that the developer can appoint a factor in perpetuity. The duration of the manager burden differs according to the type of housing.

This follows the Hanover Housing Association case in Langside, Glasgow (Scottish Courts, 2002). In this case the owners, who had bought into the private sheltered housing complex, subsequently objected to the cost and provision of that very service, which was covered within their management fee, and the fact that they were unable to collectively dismiss the manager, who in this case was the developer Hanover Housing Association. The association, in effect, held a 'golden share' which allowed them to provide management services in perpetuity.

Section 33 of the 2003 Act also makes provision for the variation and discharge of a community burden. A community burden is a mutually enforceable burden, imposed under a common scheme on four or more units. Community burdens may make provision for the appointment and dismissal of a factor, the powers and duties of a factor and the nomination of a person to be the first manager. The procedure under section 33 requires a solicitor to draw up a new deed, which is then signed by the majority of owners. In contrast to the approach in section 28, the deed must be intimated to those owners who did not agree with the proposed change. These owners are then permitted eight weeks to raise any objections with the Lands Tribunal for Scotland.

Competition concerns about property managers

These legal changes, and the persistence of complaints about Right-to-Buy factoring arrangements (Walsh, 1999), resulted in the Office of Fair Trading (OFT) (2009) undertaking an investigation into a perceived lack of effective competition within this market, the difficulties with switching, and whether the complexity of the legal situation meant that there was a need for an effective independent complaints and redress mechanism which could be easily accessed by owners of shared property. Although this investigation was an examination of competition within the factoring market, it took the view that in order for that market to work effectively, there needed to be a framework which laid down the minimum requirements for ensuring best practice. This would then allow any consumer complaints to be assessed against these standards. The OFT then recommended that all property managers should:

- set out in writing the details of the services they will provide and the relevant delivery standards
- as a matter of course, provide a detailed financial breakdown and description of the services provided by and such supporting documentation as is appropriate, such as invoices were appropriate)
- provide pro-active explanations of how and why particular contractors have been appointed, demonstrating that the services being procured are charged at a competitive market rate
- automatically return floats to owners, at the point of settlement of final bill, without consumers needing to request the return of the float
- have and operate a complaints procedure and pro-actively make details of it available to consumers
- at a minimum, follow [then] Financial Services Authority guidelines on disclosure of commission on insurance, whether FSA authorised or not
- in addition, there should be a mechanism to allow the audit of payments to contractors, either on a random basis or reactively in response to complaints, to reassure consumers that no improper payments are involved
- encourage property owners to form an organised body (either a formal residents' association or limited company)

Of these eight recommendations, seven related solely to factors and only one was directed at owners. Interestingly, each of the factor recommendations were, at that time, working practices approved and expected of all factors who were members of the Property Managers Association Scotland, by virtue of its code of practice, though perhaps not by non-members, generally smaller companies, or local authorities and housing associations. However, subsequently all these expectations found themselves being fed into Patricia Ferguson MSP's Private Members Bill, which became the Property Factors (Scotland) Act, 2011.

Property Factors (Scotland) Act 2011

Under the Property Factors (Scotland) Act, 2011 all those who, in the course of that persons business, operate a factoring service are required to be registered and meet the now statutory code of practice, which sets out the minimum practice standards expected of all registered property factors, as of October 2012. A disputes resolution mechanism was also established, so that owners can seek redress where they feel the standards have been breached or not met. This was initially through the Homeowner Housing Panel, part of the PRHP, but is now administered by the First Tier Tribunal, Housing and Property Chamber.

Glasgow Factoring Commission

The recent findings of the Glasgow Factoring Commission (2014) again revealed the complexity of organising common repairs in multi-owned stock, and the challenges faced by property managers working within this environment. As a direct result of evidence considered by the Commission their report focused on three elements:

1. The legal framework within which factoring, property maintenance repair and individual and collective property rights sit
2. Issues about enforcement of statute
3. The human and financial resources available to tackle both building repair and behavioural problems

Thus, the focus was on improving the quality of information, the need for better enforcement powers, new legislative reforms and owners' rights. Issues about the quality of service delivered by factors was touched on, but was not the core consideration in this work. While it was argued that there needed to be more effort expended on re-building confidence in property management providers, through delivering a more customer focused service, encouraging greater openness, transparency and regular feedback from consumers, the Commission also felt there had been significant under-investment on the part of owners over many years, resulting in a further unnecessary deterioration of their properties. Overall, they took the view that there was a significant and widespread lack of understanding on the part of owners as to the importance of undertaking regular programmed property maintenance and management.

They expressed concern that there was currently no obligation, on the part of owners, to carry out regular common property condition checks, and as a result, no requirement to effect comprehensive maintenance plans. While this was already established practice in respect of commissioning, implementing and applying comprehensive property surveys by a number of housing association and private sector factoring operations, they felt such mechanisms were needed to encourage a more comprehensive implementation of routine common property checks.

The Commission also took the view that there is a problem of balancing individual rights with the need to protect common property fabric. This was because, in their view, preventative action would result in significant savings both for current and future owners, and would reduce the number of factors 'walking away' from blocks where the scale of repair problems and non-payment creates an intractable problem. It also took the view that the legal framework associated with factoring and common property maintenance was still very complex and thus difficult for the lay person to comprehend. They voiced concern that there was still no single comprehensive guide, written in plain English, which explains the relationship between the different Acts relating to property maintenance and property management.

The Commission also voiced concern that there has been no comprehensive review, in recent times, of the nature of title deeds and apportionment of common maintenance shares to reflect the contemporary situation. Critically, they took the view that individuals who refuse to pay their fair share of reasonable common repairs, charges and insurance premiums constituted a significant problem, representing perhaps the biggest single threat to the stability of the factoring and property maintenance systems.

They were also concerned that, despite recent legislative changes, there was still no listing of factored properties. The Scottish Government's Property Factoring website was not designed to provide such information, at a specified geographical level. This, they felt, makes it difficult to

identify properties which have no property factor. Further, factor-less owners also have very little information on who potential factors might be.

They also voiced concern, on the part of a number of owners in recently built multi-unit developments, who have encountered additional property management charges. These tend to relate to the lack of in-built tailored sinking fund schemes, as well as a lack of any nationally regulated system which assures contractual buy-in to such long-term maintenance plans. They also took the view that the current dispute resolution arrangements through the Tribunal the Simple Procedure Court (previously the Small Claims) and Sheriff Courts are also, in themselves, complex for owners to navigate and can be a traumatic experience for complainers.

In concluding, the Commission stated that there are a number of emerging issues which appeared to be very difficult to resolve, simply through co-operation between stakeholder organisations, and which would require intervention at a national level. These they felt tended to arise from the legal framework relating to home ownership obligations in Scotland.

Missing the focus

Given the agenda laid out by the Glasgow Factoring Commission it is peculiar that the 'official' focus fails to engage with this, but rather still appears to be primarily concerned with the factoring legacy of the Right-to-Buy. The Justice Committee of the Scottish Parliament (2013) 8th Report, undertook an inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act, 2003 by considering the manager burdens set in place by both housing associations and local authorities, the appointment and dismissal of a factor, switching factors, land owning maintenance companies, removing or varying real burdens and removing or varying community burdens.

Again, the focus in this instance was primarily on local authority Right-to-Buy factoring matters which, as noted earlier, were a major issue given the title deeds on such sales insisted either the local authority or housing association automatically became the factor. These owners were then liable for management fees and the cost of maintaining not only their property but also the landscaping, often a feature of many housing schemes. Owner concerns about such matters had been enhanced given that as a result of stock transfers many were now being pursued for these charges, whereas in the past they had often been wrapped up in the operating cost of their previous landlord, whether the SSHA, a New Town Corporation or local authority. The focus also illustrates that property maintenance and ownership rights are always an area of great contention.

Scottish Housing Regulator (2016) has also dipped into this issue by offering advice on good practice for both local authority and housing association factoring services. Sadly, the focus here was narrowly confined to restatements of the obvious. For instance, social landlords who provide a factoring service must ensure that they meet the requirements of the Property Factors (Scotland) Act, 2011, the Code of Conduct for Property Factors and the standards and outcomes of the Scottish Social Housing Charter. Given each of these constitutes a legal requirement, under the said Act surely this should have been taken as read. Further, it goes on to state factors should have a clear and transparent approach to setting and then, subsequently, increasing their management fees so that all costs are accurately identified, apportioned and recovered. Again, the Code of Conduct contains such a requirement. The same goes for the suggestion factors need to have in place a robust process to assess and demonstrate that owners are receiving a 'value-for-money' for the services purchased, encouraging the provision of good quality information to owners on the factoring service, and ensuring owners receive detailed information on any charges and that they undertake meaningful and regular consultation so they better understand owners needs and priorities. The managerial

challenges to factors of non-payment and non-participation in their planned maintenance and common repair works, and its implications for them meeting the SHQS for their tenants was not addressed.

Finally, it is worth noting that there has as yet, not been any research undertaken to assess the impact of these various legislative changes on factoring practices. However, there is a cultural issue surrounding factoring that is highly critical. Data from the First Tier Tribunal, Housing and Property Chamber details the number and outcomes of complaints against registered private factors pursued under the Property Factoring Act, through their procedures. In short, there are very few, and when considered on a proportional basis to the numbers of properties actually being managed, the scale is negligible. Such complaints are even smaller where the factor is found to have breached either the statutory code or the factors duties, or both.

Table 3: First-Tier Tribunal Hearings for ‘Private Sector’ Property Factors with portfolio in excess of 1,000 units, 2017-18

REGISTERED FACTOR	NO. OF PROPERTY FACTOR REGISTERED UNITS	2017/18 FTT CASES	COMPLIED DECISION	DECISION AGAINST	% against PORTFOLIO
Hacking & Paterson MS	69,588	6	3	3	0.0001
Ross & Liddell	28,416	8	6	2	0.03
Speirs Gumley	23,559	6	4	2	0.03
Greenbelt	22,883	2	1	1	0.004
James Gibb	22,327	13	3	10	0.06
Newton Property Management	16,102	7	3	4	0.04
LPM	14,283	6	4	2	0.04
Redpath Bruce	11,752	4	1	3	0.03
Firstport	10,669	6	2	4	0.1
Charles White	10,652	9	0	9	0.1
Trinity Factoring Services	7,372	1	0	1	0.01
The Property Management Co	6,883	4	0	4	0.06
Macfie & Co	4,191	4	1	3	0.1
SG Property Management	3,648	0	0	0	0
Morison Walker	3,490	3	1	2	0.09
D&I Scott	2,940	0	0	0	0
JB&G Forsyth	2,385	0	0	0	0
Cumming Turner & Watt	2,367	4	0	4	0.2
Walker Sandford	2,304	4	1	3	0.2
Miller Property Management	1,706	1	0	1	0
Donald Ross Residential Factoring	1,084	0	0	0	0

Clearly, this evidence has limitations, given its likely that only serious complaints are pursued all the way to the Tribunal. Arguably, the factoring industry has found itself being akin to a ‘punch bag’, with many people queuing up to have a swing. However, such criticism can appear unfair and unjust given the challenges and complexity of the world in which they have to operate. Professional

factoring and property management is part of the solution to this problem and not, as some suggest, the cause of the problem. That said, given what has been outlined in this section, moving to a service which is a more customer focused, across the board, is to be welcomed, but being able to operate within a structure that enhances and promotes rather than militates against on-going management and maintenance would also be a great help.

LOCAL AUTHORITY ENFORCEMENT POWERS

Local authorities have a number of discretionary powers under housing, building control and environmental health provisions to deal with the problems that eventually arise when buildings are not properly maintained, and become a matter of public concern. The important point here is the term discretionary, which allows local authorities to decide whether to act, rather than being obliged to do so. Building control powers focus primarily on dangerous buildings and involve closing powers and the instigation of compulsory repairs. Dangerous building and defective building notices come under the Building (Scotland) Act, 2003, whereas works notices fall under the Housing (Scotland) Act, 2006. These all require owners to carry out remedial work, within a specified period. The issuing of such notices requires to appear on the Property Enquiry Certificate, which a prospective buyers' solicitor should always request from the local authority and, in theory, would make the property harder to sell. Surprisingly, work notices are used by very few local authorities, essentially Glasgow and Highland. In 2017-19 there were around 362 work notices served, and 311 of these were in Glasgow.

Where owners fail to undertake the specified works, then the local authority has the power to take remedial action 'in default', and charge the owners for the cost of undertaking such works, as well as an administrative fee. As these are defined as a 'scheme cost' then they are apportioned on that basis. If an owner then fails to pay for the works the local authority has the power to secure the outstanding cost against the actual property, by means of a 'charging order'. Charging orders are, in effect, loans, and as such accrue a specified chargeable interest charge. This typically encourages owners to find the means to extinguish the debt before the order is actually laid. It is also the case that the charge requires to be recorded as a priority charge on the owner's title.

Some local authorities choose to use the Statutory Nuisance powers under Part III of the Environmental Protection Act, 1990 to address: "*any premises in such a state as to be prejudicial to health or a nuisance as a means to address building defects*". Local authorities have a duty to make periodic inspections of their area, or act in response to a complaint from the public. Under Section 80 the local authority serves the owners with an abatement notice to cease the nuisance. Owners can appeal the notice to the Sheriff Court within 21 days, otherwise it becomes a crime to fail, without reasonable excuse, to comply with the notice, punishable by a fine, which rises by ten percent for every further day on which the nuisance continues. Where the notice is not complied with, the local authority may take reasonable action to abate the nuisance and recover the associated expenses from the occupier, if necessary by instalments, or again by making a charge on the property.

A few local authorities also make use of maintenance order powers, under the Housing (Scotland) Act, 2006 which were designed specifically for tenements. Through analysing 'scheme of assistance' statistics it would appear that only 28 maintenance orders were made between 2014-15 and 2017-18), and these have been almost exclusive to North Lanarkshire and Glasgow. The explanation for this lack of use is that the powers are considered 'cumbersome', thus labour intensive from a local authority point of view. If a local authority puts in place a maintenance plan for a tenement, given it lasts for five years, the authority will need to know that it has the staff and resources available to service that plan over that period.

The overall emphasis is to intervene only to the extent necessary to protect public safety, given owners are still held responsible for their buildings and persons in and around their buildings. This might not involve a repair, but perhaps the actual removal of say a chimney head, or spalling masonry. It is therefore primarily reactive, rather than pro-active work. By its nature, it can also be very resource intensive, often peaking at times of poor or severe weather (Green, 2018). As such it

can suddenly draw in a large part of available financial and staffing resources, for several months or even years. It therefore can, and does impact detrimentally on any planned program of preventative work, which seeks to encourage intervention before a building deteriorates into a dangerous condition (Green, 2018). That said, such interventions do need to be undertaken. As illustration, from December 2016 to December 2017, Fife Council dealt with a total of 129 reports of dangerous buildings. The comparable figure for Edinburgh over the same period was 170, averaging out at 14 instances per month.

As was detailed earlier, the Housing (Scotland) Act, 2006 introduced a major change to the previous repair and maintenance culture by placing responsibility for ensuring a property is properly maintained firmly onto the owners themselves, rather than viewing it, in part, as a local authority responsibility. With the previous policy focus being on addressing slum housing conditions, local authorities had an obligation to survey for the presence of BTS housing and then take appropriate action to eradicate such conditions. The prime statutory mechanism employed was the Housing Action Area, as set down in the Housing (Scotland) Act, 1974. Under these provisions owners were required to bring the housing up to the tolerable standard, by either by improving it, with automatic entitlement to enhanced grant assistance, or by having the property demolished, or by adopting a combination of both approaches.

With the slum housing problem largely addressed, the focus then moved to encouraging owners to meet their repairing and maintenance responsibilities. Experience to date, throughout Scotland, shows that more than a decade on there is still a great deal of work needed to embed this major culture change. Significant numbers of owners and, in particular private landlords, are still failing to engage with this revised practice.

Although owners are primarily responsible for the repair and maintenance of their homes under their title deeds, there was seen still to be some need to support owners in undertaking such works. As a result, while the 2006 Act abolished the previous private sector improvement and repair system, it also set down a requirement for all local authorities to set in place a 'Scheme of Assistance' (Green, 2018). Although owners have the prime responsibility to look after their own property, local authorities are expected to offer support to owners, as set out in their 'Scheme of Assistance'. Support can take the form of advice and guidance, practical help or grants and/or loans. However, it is for the local authority to determine exactly what kinds of assistance were made available, on the basis of their particular local priorities and budgets. Accompanying Scottish Government guidance explicitly discourages the use of grants. Further, under section 73(1)(a) of the 2006 Act, it states assistance must be provided when a work notice is served, but that does not need to be financial assistance. The 2006 Act and its regulations also provides that a mandatory grant applies to the provision of standard amenities for a disabled person, and to the provision of adaptations for disabled people, where that is deemed essential, hence the skewing of 'Scheme of Assistance' budgets in that direction, as was noted earlier. It had also been intended that there would be financial support from a National Lending Unit, but this failed to materialise, in large part, because the country was thrown into a protracted period of sustained public expenditure cuts, following the Austerity agenda introduced by the UK Government in 2010, in response to the 2007 Global Financial Crisis.

Local authorities are thus still subject to a range of duties and powers, under the various pieces of housing, building and public safety legislation, so are still expected to address BTS housing along with any defective and dangerous buildings issues that arise. Discharging these duties and exercising these powers often involves requiring maintenance and safety work to be carried out and, typically, arising where an owner cannot persuade others to agree to undertaking such works. If the local authority, once contacted, is satisfied the work is required, after undertaking a survey, it then can

issue a statutory notice to all the owners. If these owners then fail to meet their repairing obligations, the local authority may opt to undertake statutory enforcement action that then requires them to undertake the works. When works are carried out by the local authority 'in default' of a notice, then all the owners are re-charged for the work and associated administrative costs.

Crucially, however, such preventative work is dependent not just on the legislative powers but on the allocated budget for such work and on staff capacity to pursue and then undertake the work. Also under the peculiar capital funding system now operating, both Glasgow and Edinburgh have grant awarding powers, whereas local authorities in the rest of the country require to make applications to the Scottish Government. This was the legacy of the stock transfer agenda, when there was an expectation that both Edinburgh and Glasgow would have no direct housing stock management powers, and thus merited grant funding enabling facilities. In the event, the Edinburgh council house stock transfer fell through, but the capital funding power was by then in place.

City of Edinburgh Council

Edinburgh made extensive use of the powers conferred on the authority to tackle BTS housing, primarily by co-ordinating the use of enhanced improvement grants to owners within HAAs declared by a dedicated Housing Renovation Unit (Robertson and Bailey, 1996). Edinburgh had the second largest Non-Housing Revenue Account budget after Glasgow, the public monies being used to pay for improvement and repair grants throughout the 1980s and 1990s. This resulted in a marked reduction in BTS housing, with the City then moving onto a strategy in which they effectively became the 'factor of last resort'. While in the West of Scotland there had long been a tradition of property factors, who organised and managed smaller landlord holdings that characterised the tenement stock, in Edinburgh, with its larger landlord holdings, this was not a feature. As a result, when private flats in Edinburgh were sold into owner-occupation, from the late 1950s onwards, there were no legacy property managers to organise maintenance works, or repairs. Where owners could not organise themselves, or agree to what was required, the Council was called on to step in, and carry out such remedial works in default.

The City of Edinburgh Council still uses its own legislation for this purpose, by issuing statutory notices under Part VI of The City of Edinburgh District Council Order Confirmation Act, 1991. Between 1991 and 2011 work was co-ordinated by the Council's Property Conservation Service. Demand for this default service was high, averaging 300 enforcement notices a year. In 2010 for example, £18.4m of common works was carried out by the Council in default.

However, following a Police Scotland fraud investigation into allegations that Council staff were commissioning works in collusion with the local builders carrying out these works, the Property Conservation Service was closed in 2011. Although no criminality was found, a number of staff were subject to disciplinary action. However, the financial repercussions and reputational damage suffered by the Council as a result of this serious management failure were substantial.

Closing the Property Conservation Service proved extremely complex, and took five years to complete. Related consultancy fees from accountants amounted to £8.3m. A legacy of bad debt amounting to £8m remained, unbilled projects totalling £30m, outstanding contractors' claims of £2m, and 990 outstanding customer complaints on overcharging for building works and poor project management all of which generated much negative media attention.

This mismanagement of common repairs created many problems as it impacted negatively on house sales, given the need to have retentions in place to cover any outstanding works, the protracted process of cancelling disputed notices, as well as properly accounting for owner payments to address outstanding notices. When this long-standing administrative system fell apart, it created many consequences and costs. It had been a service that property owners throughout the city had

relied heavily upon, because it offered a way to get common repairs carried out, by allowing, in effect, the Council to take charge.

As a result of this debacle, a total of 33 lessons were learned, and these were then used to design an entirely new service, the Edinburgh Shared Repair Service. It sought to drive a major culture change in Edinburgh, namely that of empowering owners to take responsibility for their repairs, rather than relying on the Council to sort matters out. Further, it also sought to restore confidence in the Council through delivering a well-designed service. Whereas in the past engagement with owners was found to be somewhat lacking, this is no longer intended to be the case given the emphasis on offering professional advice. The timely billing of owners for their costs has been achieved through adopting tight accountancy procedures. Any complaints that arise now go through the Council's official complaints procedures. Managing the Council's financial and reputational risks, severely dented by past events, demanded tight regular performance scrutiny and caseload control. Overall governance of Edinburgh Shared Repair Service relies on reporting to a decision-making panel and a board of senior Council officers, as well as reporting regular updates to the Finance and Resources Committee of elected members.

Four core services are now offered: advice and information, covering any repair situation; intervention, where if owners cannot agree a course of action, 'missing share' powers are utilised (see below); enforcement action, but then only as a last resort; and, finally, emergency repairs, in order to make buildings safe in dangerous, or emergency situations.

In assisting property owners to progress common repairs, Edinburgh Shared Repair Service sets itself four objectives: to help maintain the fabric of the city by supporting, encouraging and enabling owners to take responsibility for planning and organising repairs and maintenance, which is achieved through offering Advice and Guidance; to intervene when public health and safety is at risk due to unsafe buildings, via the use of the Emergency Service; to intervene when owners have exhausted all other reasonable means of agreeing and undertaking a repair through the use of Enforcement and 'missing share' powers. The legislation employed is the Tenements (Scotland) Act, 2004 and the Housing (Scotland) Act, 2006, in relation to advice, the Housing (Scotland) Act, 2006 which provides local authority 'missing shares' powers, the Local Government (Scotland) Act, 2003 utilising the powers to advance wellbeing, the City of Edinburgh District Council Order Confirmation Act, 1991 for works to be carried out and charged for in default, which are similar to the provisions of the Building (Scotland) Act, 2003 in relation to dangerous and defective building notices and again the Housing (Scotland) Act, 2006 for work notices.

The Service was launched in April 2017 and by August 2018 the owners of 132 tenements had sought assistance with their common repairs. Shared repairs have been carried out in 90 cases, whereby the owners were able to progress their own repairs, without any enforcement action, with the total value of enforced repairs amounting to £0.50m. Enforced action has only occurred in 11% of all cases, with 70% of these being successfully closed so far. Successful closure of cases without enforcement is not achieved without the support of case officers and, on occasions, the threat of intervention. Debt recovery is also successful in that 85% of all debt so far has been collected and speed of payments shows 85% of those requires to pay, paid within three-months of receiving bills. Inhibitions orders are pursued for those debtors not in payment plans.

With a new system now in place, which is administratively quite different to previous flawed practices, it has become evident that the actual scale of works is far lower, at £1.6m, than the £18.4m in default works undertaken in 2010. This is a concern, as the mass improvement of that stock occurred some 40 years ago is now itself in need of renewal. Evidence of this is provided by the number of stone repair works now needed to address poor quality cement repairs that are now causing saturation and spawling in the masonry, especially sandstone facings and mullions.

Edinburgh Stairs Partnership

Edinburgh also sought to improve grassroots action on tenement maintenance by promoting Stair Committees of tenement owners during the 1990s. In part, this initiative, tied into a particular narrative that had gained great currency at that time, namely that owners were largely ignorant of the property's physical condition, and so needed help, support and advice as one way to improve repair and maintenance matters (Leather et al, 2001: Leather, 2000). The Stairs Partnership sought to offer such advice.

Recent research has further explored such notions of owner ignorance in relation to disrepair within their block and in their individual flat, and revealed that the problem is not any lack of knowledge on the part of owners about the condition of the property, but rather an embarrassment about their inability, largely because of financial constraints, to properly address it. Serpa (2011), through reworking the Scottish House Condition Survey, showed that although people might feign ignorance about the state of repair of their building, when asked a direct question on the matter, they responded in a way which revealed that they clearly understood the disrepair and maintenance issues. She went on to show that this initial reluctance to admit such understanding was tied up with notions of failure, in having to admit their home was inadequate and poorly maintained. The core cause of disrepair was that owners were unable to contribute to the costs of repairs, and adopted short-term thinking, taking the view that saving to move up the housing ladder was the priority. This conclusion clearly dates the work, as it was undertaken prior to the financial crisis at a time when tenement flats were core to the cheaper end of the housing market. Post crisis, we have seen a major tenure transformation in these older tenemental areas, moving from low-cost home ownership into private renting, and as a result, property maintenance, never a high priority, has further declined given the investment versus rental returns focus adopted by many landlords. Recent SHCS results show a marked decline in already poor housing conditions, in part because many of these properties are already old, and lacking in amenities, but also because they are still now not getting basic maintenance.

Glasgow City Council

As will already be evident, over the last 50 years, Glasgow has invested a disproportionate amount of time, energy and capital in seeking to address both BTS housing and then trying to resolve major common repair issues through the use of improvement and repair grants. The city's scale of involvement has long appeared disproportionate when compared with all other Scottish local authorities (Robertson and Bailey, 1996). The only other local authority which operates at scale in this area is Edinburgh.

Since the advent of the 2006 reforms, Glasgow's level of activity still reflects that difference, although the overall scale of investment is markedly lower than was achieved previously, as is the case for all other local authorities. In response to this changed situation, Glasgow City Council has pioneered the use of 'missing share' powers, and made use of other available powers to try to clear individual log-jams in getting works started. Through adopting this approach, it has also found that the threat of their use, given the wider implications of having a charging order imposed, has encouraged many reluctant owners to pay and this, in turn, has generated additional investment in common repairs.

Currently, Glasgow has just over 76,000 properties that were constructed prior to 1919, the vast majority of which, around 70,000 are tenement flats (GCC, 2018). In a recent committee report officials noted concerns about rapidly deteriorating housing conditions in the tenemental districts of Govanhill, Ibrox, Cessnock, East Pollokshields, Strathbungo, all in the city's southside, and Haghill and Dennistoun immediately to the east. What is interesting about these neighbourhoods is that they were not subject to the previous HAA provisions, pursued throughout the 1970s and 1980s, so

in large part missed out on comprehensive improvement works. It is also the case that these very same neighbourhoods have been the focus of recent private rented sector investment, in large part because these were cheap places to buy into given their poor condition (GCC, 2018).

In this recent report, the Council notes the current challenges in taking forward common repairs: owners lack of knowledge and understanding of their responsibilities; affordability issues with owners being either unwilling, or unable to pay for repairs; the organising of works which is not helped by outdated title deeds, whose provisions and apportionment rules often create barriers to repair, allowing some individuals for whatever reason to abdicate their responsibilities; the unprecedented recent growth of the private rented sector, increasing the number of owners unwilling to properly maintain their stock. They also note that none of this is helped by the lack of maintenance plans and/or block building insurance cover. The report also raises concerns about the availability of resources and whether some of the work being pursued is in fact 'value-for-money'. Finally, there is also a mention of the fact that the legislation, as currently set out, presents a high degree of risk to local authorities, in that if they decide to take on the works, and then seek to recoup the costs and their administrative time, getting reimbursed is still a challenge.

Around £5m-£6m per annum has been earmarked for pre-1919 tenement repairs in recent years, but that budget is constantly challenged by the scale of severe problems emerging over the past few years, with a growing number of tenement properties having to be evacuated, have emergency stabilisation works carried out, or being classed as dangerous buildings. Many require extensive repair works, costing in excess of £500,000 to return them to a good state of repair. Govanhill has seen a number of these high cost schemes, but it should be pointed out that most of the blocks involved there constitute a belated HAA programme, given the use of compulsory purchase powers, and then comprehensive improvement works to tenement blocks previously owned by landlords unwilling to bring them up to standard. Many of these blocks had had been within the original HAA programme 40 years ago, but works were not pursued then due to a lack of cash following cutbacks in the housing association budgets from 1996.

Currently, repair and maintenance strategies are being developed in Ibrox, Cessnock and East Pollokshields. As part of this, although Glasgow's Affordable Housing Supply Programme primarily focusses on delivering new build housing, a budget of £5m is currently assigned to support an acquisition strategy, whereby local housing associations are assisted to acquire flats within targeted closes, so that effective property management practices can be put in place to help protect this housing supply well into the future. Govan Housing Association plan to acquire flats in over 30 tenement blocks in Ibrox and Cessnock, while Southside Housing Association has already acquired 50 flats across East Pollokshields.

In addition, as the works carried out on the tenement stock during that last renovation period, are now well beyond their envisaged '30-year life', there are a growing number of repairs needed on poorly executed cement stone repairs, failing window replacements and on roof lead work, as a result of the use of Nurolight as a cheaper, but inferior, alternative to lead. Looking to the future, there are also new issues for this older stock, namely is it able to meet the new thermal efficiency standards?

In response to all of this, Glasgow City Council is currently developing a comprehensive database covering all pre-1919 properties across the city. This will be informed by a stock condition survey, that will also help to refocus work programmes. A short-life working group has been formed comprising of commercial property factors and property owners to determine and quantify the extent of disrepair within the pre-1919 tenement stock, and to report back on their findings to by December 2019.

Missing Shares Powers

As was noted earlier, local authorities have what are termed 'missing share' powers under two separate provisions, namely Section 4a of the 2004 Act and section 50 of the 2006 Act. These powers were enhanced by the Housing (Scotland) Act, 2014 which included provision for Scottish Ministers to make regulations to give RSLs a discretionary power to pay and recover 'missing shares'. Following consultation with local authorities and registered social landlords these new powers were confirmed in April 2018.

Section 4A of the Tenements (Scotland) Act, 2004 (inserted by section 85(1)(b) of the Housing (Scotland) Act, 2014), provides a discretionary power for a local authority to pay an owner's share of scheme costs, the 'missing share', where the owner is unable, or unwilling to do so, or cannot be identified or found. The power to pay 'missing shares' applies to costs required under a tenemental burden, under the title deed, and costs arising from a majority decision under the Tenement Management Scheme (Scottish Government, 2015).

A 'missing share' can cover costs arising from maintenance, with maintenance defined by the Tenement Management Scheme under Schedule 1 of the Tenements (Scotland) Act 2004, as: *"repairs and replacement, the installation of insulation, cleaning, painting and other routine works, gardening, the day to day running of a tenement and the reinstatement of a part (but not most) of the tenement building, but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance"*. This is similar to the definition of maintenance under the 2006 Act, except that it also includes 'the installation of insulation' which was added by the Climate Change (Scotland) Act, 2009 (Scottish Government, 2015).

The 'missing share' in this instance can be paid into a bank account created to fund the works, or to a property manager who is taking forward the project. The local authority has the right to recover the costs of paying the 'missing share' from the owner, including both the cost of the 'missing share' and any administrative expenses connected to it. The local authority can also issue a repayment charge against the property to recover the expenses, but under these provisions not an interest charge on the 'missing share'.

The guidance also recommends that although local authorities may want to provide advice and guidance about the 'missing share' powers in this chapter it is for owners to make decisions about maintenance and the apportionment of associated costs, under the Tenement Management Scheme. As a consequence, the local authority's role is essentially limited to responding to requests from owners to pay the 'missing share'. Further, it is at the local authority's discretion whether a 'missing share' should be paid in any circumstances. Local authorities are also encouraged to consider just how 'missing shares' fit into their 'Scheme of Assistance' provisions (Scottish Government, 2015).

Under the 2006 Act, local authorities also have new powers to pay 'missing shares' directly into a maintenance account, as defined by the Title Conditions (Scotland) Act, 2003 and the Tenements (Scotland) Act, 2004. The power to pay 'missing shares' into a maintenance account is quite separate from the power to pay a 'missing share' towards work under the Tenement Management Scheme, which is covered above. Paragraphs 5.4 to 5.9 set down the provisions by which a local authority can pay a 'missing share' into a maintenance account. These provisions ensure the decision-making procedure is correct, the works are necessary and clearly specified, that the timeframe is provided, what the respective shares are, and whose names are on the bank account. The actual 'missing share' can only be paid where the owner is unable, or unwilling to pay, or it is unreasonable to ask them to do so, or the owner cannot be identified or found by reasonable inquiry.

The critical issue being addressed here, by all three Acts, is to ensure that the money required to take forward the required works is available to allow them to proceed. Clearly, owners do have the option of covering the cost of a 'missing share' themselves, and pursuing the non-paying owner through the Courts to recover these costs, but that, as has been noted earlier, is considered problematic in large part because the procedures for lay people are considered complex (Glasgow Factoring Commission, 2014). Hence, this backstop which allows local authorities to support owners who recognise the value of regular property maintenance.

However, they are tightly prescribed, and discretionary. The local authority or housing association pursuing such an action then takes on the risk of recovering payment for the debt. And it is perhaps this reality, that helps to explain why, again, in examining the 'Scheme of Assistance' statistics it appears that only Glasgow and Aberdeen have made use of 'missing share' provisions. There is also a preference on the part of local authorities to use the 2006 Act provisions, as they are able to charge interest on the outstanding debt, whereas this is not possible under the 2014 Act. Given the experience of Edinburgh as 'factor of last resort', the risks are not inconsiderable. Perhaps this explains why these provisions place the owners in the driving seat, and not the local authority. But if they are not being employed, then as a measure to stop further deterioration they may prove quite limited. They are certainly not, at this point in time, the means to ensure a level of activity commensurate with the scale of the disrepair in multi-owned property. Their importance in initiating common repair work should not be underestimated. The City of Edinburgh Council have used 'missing share' powers since 2017, enabling £800k of common repair work to be undertaken on 19 tenement blocks, from owners with a financial commitment of only £56k (to end Sept 2018). Such action has thus reduced the possible enforcement action on these tenements and reduced the financial risk of trying to recover £800k of potential debt.

ROLE OF BUILDING PRESERVATION AND CITY HERITAGE TRUSTS

Conservation and building trusts focus on the preservation of Scotland's historic buildings, whether, public, private, civic or commercial. Their focus is not therefore primarily on domestic buildings. The recommendation to establish a heritage trust model, covering each of Scotland's cities emerged from the Scottish Executive's (2002) Cities Review and was based on the perceived success of this model elsewhere and, in particular, the work of Edinburgh World Heritage Trust. City Heritage Trusts were then established in Aberdeen, Dundee, Inverness and Stirling from February 2003, and subsequently in Glasgow and Perth. There are, in addition, a large number of other heritage bodies involved in the preservation and conservation of historic buildings as well as landscapes throughout the country¹.

The Stirling City Heritage Trust began operations in December 2004. It defines itself as an independent organisation that aims to work in partnership with like-minded people in order to promote and encourage the protection and preservation of the architectural, cultural and landscape heritage of Stirling. It works in partnership with the Scottish Government and the local authority, and receives a core grant from Historic Environment Scotland of £250,000 per year and a partnership grant from Stirling Council of £25,000 per year.

The Trust has piloted a 'Monumentenwacht' scheme for Scotland, known as the Traditional Buildings Health Check (TBHC). This is based on a European inspection service model, for listed buildings, which has operated across the Netherlands for 40 years, and in Flanders since 1990s, as well as in a number of other locations in Europe. Under the scheme, the property owners are part funded and supported to commission an independent external inspection of their property, and then helped to repair any defects identified and undertake a regular programme of maintenance.

The Stirling Health Check Scheme was designed, delivered and managed by the Stirling City Heritage Trust. The pilot, funded by Historic Environment Scotland and the Construction Industry Training Board Scotland, ran for a five-year period, from 2013-18. Designed to be pro-active, the Health Check helped owners to get their property into a condition that they could then maintain. It was a membership-based service, that provided impartial and expert advice on the maintenance and repair of the external fabric of traditionally constructed buildings. Members payed an annual fee of £45 to join the project and if they wanted an inspection undertaken on their property there was an additional £150 payment. Not everyone within the block had to be a member, though there had to be at least one member. For the inspection fee, the member received an external fabric condition report, which was detailed and illustrated, setting out a list of priority tasks that should be undertaken over the subsequent 12 months. The Trust was also in a position to offer a small repair grant of up to £5,000 per building.

The Trust has no powers other than persuasion and raising the awareness and knowledge of owners, so basically the owners have to be willing to repair. It has also not involved the local authority in the Health Check scheme, and no grant monies have been sought, although Stirling Council is a member. The Trust, some time ago, worked with the council to grant aid the repair of buildings subject to repair notices and it still from time to time discusses potential dangerous buildings with the Council's Building Standards officials, but this is not part its core service.

The Trust also gained experience of working on a street basis, with commercial properties, in King Street, previously the core locus of shopping in Stirling, prior to the development of the Thistle

¹ For a listing of historic buildings preservation and conservation trusts see <http://www.heritagetrustnetwork.org.uk/about-us/areas/scotland/>

Centre. Again, Stirling Council was also not involved practically in the execution of the King Street works, though it initially funded a Façade Enhancement Scheme, chiefly involving King Street shopfronts and then part funding the grants. One of the Trust's findings, in reviewing the King Street Funding Initiative, was that the project proved very challenging for a small organisation, without statutory powers. If such a project were to be repeated, they would want to work with the local authority on both strategy, and on pragmatic assistance, such as the use of the Repairing Standard for assessing private landlord properties, and would seek to pursue the option of using 'missing share' powers on selected properties, as a pilot where Trust were offering grant. None of this is being pursued at present because there is currently there is no funding available.

It is worth noting that Historic Environment Scotland (HES) has also been keen to support such projects given that they generate specialist work for a range of traditional building skills, such as slating and stone masonry. The Stirling pilot ended in March 2018 and is currently being evaluated by HES in relation to possible expansion, although the Trust is still operating the service as a core activity.

Between 2005 and 2012 the Trust has provided over 270 grants, which drew in match funding of approximately 65% from the property owners. Overall, that has resulted in £5.15 million invested in Stirling's historic built environment. Between 2012 and 2018 the Trust, as previously noted, also focused on the King Street Funding Initiative, a project targeted at priority buildings within the historic commercial heart of the city, through undertaking seven comprehensive building repair projects. Over the last six years the Trust has spent £1m on these six buildings, a figure which relates solely to capital works and does not account for the actual development time involved, the cost of which has been borne by the Trust and Stirling Council.

While other Building Trusts are actively engaged in historic building preservation work, Stirling through its use of the Traditional Buildings Health Check scheme has been able to demonstrate how an inspection and report can assist owners in bringing their property up to standard whereby on-going repair and maintenance can proceed. The scheme shows how a survey can then lead to an organised repair plan for owners, so has much to say about the processes involved from planning repairs to their execution and the planning and persuasion involved in such work. It has also illustrated the value, but also the costs associated in helping home owners in this way.

Overall, trusts have played a core role in addressing the deterioration of important historic buildings, and in the case of Stirling developed a pro-active owner-facing tool. Edinburgh World Heritage Trust, is currently considering the long-term impact of its work. It is about to undertake a study to check whether its requirement for receiving grant, namely to undertake regular planned maintenance, has been followed through. It is worth noting, that throughout the 1980s and 1990s Glasgow District Council had a similar requirement when offering grant, but there is no evidence this was acted upon by home-owners taking up the grant offer (Robertson and Bailey, 1996). Overall, however, it is important to appreciate that the prime focus here is on historic buildings, and not on the standard flatted housing stock that exist throughout Scotland. Much of the focus here, in this report, is on the traditional four-storey sandstone tenement and, in the main, located within the county's two largest cities, Edinburgh and Glasgow.

CONCLUSIONS AND (possible*) RECOMMENDATIONS

Current reform offerings

As noted earlier, this report details the tendency in public policy to be content with incremental legislative reforms, which can be seen to address some part of the common repair problem, but equally a reluctance to address the issue in a broader, and more strategic and comprehensive way. Policy-makers and politicians appear to prefer to pursue a 'quick fix', or to pluck the 'low hanging fruit', which will allow them to demonstrate to the wider public they are not only alert to, but have acted upon concerns about the issue. Having long pursued this approach, they have been reluctant to consider a more strategic approach to reform, grounded in a proper understanding of the range, challenges and complexity of the issues involved. This report represents the start of such an approach. Its provisional findings will now be systematically debated and discussed with key stakeholders and interested parties, so that a final strategy can be developed. This final element will be concluded by April 2019.

In order to set the context, it is worth looking at the range of potential reforms that have emerged over the last five years to encourage property maintenance and repairs on multi-owned property. These again reflect the tendency to opt for one-off quick fix solutions, in preference to more strategic thinking, a mode of working which has characterised policy-making and approaches to reform pursued by the Scottish Parliament (Christie Commission, 2011).

- Undertake regular quinquennial building condition surveys, as set out by RICS.
[The evidence from the work carried out in Stirling suggests that this would provide useful information to owners, but more thought will be needed as to how such an arrangement would be achieved, and following the survey report, what then? This will constitute an important part of any solution, but it is only but one part.]
- Provide an impartial building inspection service, with the aim of encouraging pro-active maintenance by property owners.
[Again, the evidence suggests the information would be useful to owners, but who exactly would provide this service, how would it be paid for, and again what then?]
- Ensure better condition reporting in Home Reports, and provide a valuation that better reflects conditions.
[This is not really possible because surveyors fear potential legal action in respect of the survey findings reported, should omissions or faults emerge, so thus opt to say little. Equally, solicitors do not want sales falling through because of revelations about outstanding repair or maintenance matters, so are similarly inclined to reticence. Unprofessional yes, but then whose interests do these parties serve, as opposed to who do they get paid by, the lender financially underpinning the transaction or the actual property purchasers? Finally, valuations reflect demand, not property condition, so two properties in the same block, in quite different condition, can secure similar valuations. The issue here is simple, a misunderstanding of how market mechanisms within the housing market actually function.]
- Improve the means of finding absent or other property owners.
[It has long been assumed by many that this was now possible, given that it was a core ambition originally of the HITF, hence the original drive for setting in place the landlord registration system. Although it is a national scheme, it is individually administered by each local authority, so data access and compatibility issues arise. It is also worth bearing in mind that if a landlord fails to register as a landlord they are liable for a £50,000 fine. However, tracing absent owners can still be problematic. Currently, the City of Edinburgh Council is in

discussion with the Information Commissioner about allowing those living within a block to access property ownership data currently held by the local authority for this purpose.]

- Encourage the creation of home owners' associations.
The case here is that a properly constituted body would then be able to make decisions in the best interests of all owners and the building, and would get people to move away from *ad hoc* arrangements to sort problems when there is a crisis.
[There is guidance within the Tenements Act framework, dating from 2004, that suggests such an arrangement is not needed, as the management and maintenance of multi-owned flats is not an onerous task. Having a decision-making body would require work, and those drafting the legislation were concerned that owners might simply choose not to establish one. Unfortunately, there is no data as to the number of such bodies, and whether the 2004 legislation has encouraged their establishment. Having the Development Management Scheme as an option for new buildings is helpful, but as it is not a legal requirement, then it is not clear whether such a provision changes anything.]
- Introduce mandatory Sinking Funds.
The case made in parallel work to this report is that having a sinking fund in place ensures when spending is required some or all of the cash is already in place when spending is required.
[The question arising here is who holds and thus controls the cash? If there is a sinking fund, then there needs to be an owners' association and a bank account attached. Given that such funds can amass significant amounts of money they generally require some form of governance arrangement and a functioning bank account, so typically they need to tie back to owners' associations. The rules on sinking funds in France reflect past problems with both corrupt practice and the outright theft of such accounts. Christmas savings funds tend to display similar fiscal weaknesses. Finally, there are those who consider such arrangements to be forced saving, and thus a challenge to their personal freedom.]
- Review of existing discretionary statutory powers available to local authorities in relation to building disrepair issues.
[Local authority enforcement powers are proving to be an instrument of uncertain effectiveness, given that intervention outwith emergencies is now determined by budget, staffing and/or policy constraints. It is these considerations, rather than the condition of the building, which now determine local authorities' perspectives and actions. There is also an issue in that the disabled adaptations budget dominates priorities.]
- Encourage the return of Scottish Government funded Capital Grants, with a realistic annual budget.
[Access to improvement and repair grants was long a core feature of property owning culture, given they were a feature for almost 50 years. It led to property owners assuming that the local authority would always bail them out if serious repairs issues arose. The case study examples provided below show this not to be the case. But is the return of grant funding actually on anyone's agenda?]
- Undertake a review of title deed provisions.
[We have a fair idea of what is likely to reveal given the background material provided by the Law of Tenement reforms. Despite, and perhaps made that bit more challenging by the 2004 reforms it would reveal something of a mixed bag, given past poor practice on title drafting by solicitors and the impact of time on the workability of these provisions. There are still

major challenges evident in making decisions and then, crucially, in securing payment for undertaking the works.]

- Introduce a legal requirement for mandatory block insurance policies.
[The provisions in the Tenements (Scotland) Act, 2004 are something of a fudge in relation to this issue. At the time, it was argued, at the time, that making block insurance policies mandatory would encourage owners' associations to form, but this was not taken forward, perhaps because the management guidance for existing tenements argued that having an owners' association was not necessary for more day-to-day management issues within a block. We remain unsighted as to the extent of block insurance cover, and it is unlikely that many people have asked to check their neighbours' actual insurance cover.]
- Introduce a compulsory management system for all flats, which could be either professionally factored, or self-factored.
[Under this approach, an empowered factor would determine what work should be undertaken, and the owners would be expected to go along with this. This has merit for property managers, in that they can ensure proper management of the building, but it would introduce a challenge to ownership rights, as the Hanover Housing Association (Scottish Courts, 2002) cases illustrate so clearly. It was this case which led to the 2003 reforms which allowed for the appointment and dismissal of factors, on the basis of a majority vote.]
- Encourage changes that help empower property managers
[As above]
- Encourage the further development of more 'equity-release' schemes to help older property owners pay for works.
[Equity release has been gaining ground recently, especially with the recent relaxation of rules governing pension pots, but it is not at all clear whether it has helped with common property maintenance.]
- Introduce legislative changes that help to improve debt recovery from non-paying owners.
[As the Glasgow Factoring Commission ably detailed, owners who have attempted to use the Simple Procedure Court (previously Small Claims Court) to recoup outstanding contributions to repair works do not consider this to be a straightforward procedure. There may also be an option for owners to use a Notice of Potential Liability (NOPL) rather than go to Court however this need case law to help clarify the owners powers in respect of this provision under the Tenements (Scotland) Act, 2004. However, would reform here encourage owners to take an action against their neighbours to recoup such monies?]
- Resolve 'grey areas' in relation to what constitutes 'scheme property', such as the case of dormers.
[The Scottish Law Commission shied away from this back in 2004, but we now have some understanding of the consequences that would flow from this. Who exactly has responsibility, given that the roof in respect of the common law is joint, but where there is now a dormer, there is no longer the void roof space, but rather it is now a room in someone's property. Consent to use that space from all the other owners would have had to be formally agreed, but who is responsible for the dormer/roof detailing repairs and maintenance? Unfortunately, the Tenement Act opted not to clarify the matter.]

Each of these suggestions now needs to be critiqued by those who have direct day-to-day knowledge and experience of the challenges of repair and maintenance in order to assess their value

as possible solutions. That will be tackled in the second stage of this work. This will also try to tie some of the elements together as a package, but a collection of elements still does not constitute a strategy.

John Gilbert has worked as an architect in this field for over 40 years. In that time, he has undertaken a massive body of building renovation work, both in HAAs and on common repair projects, while also pioneering support for self-factoring (Gilbert and Flint, 1988), and publishing widely to enhance owners' knowledge of common repairs matters (Gilbert and Flint, 1993), most recently through creating the website 'Under One Roof'² which provides detailed drawing, images and text on a range of common repair matters, offering suggestions as to how owners can best address them. He is of the opinion that the laws and practices relating to the repair and maintenance on common ownership buildings are simply not 'fit for purpose' (Gilbert, 2016). He offers the following three suggestions to improve this situation

- Require a minimum quality standard for any property, either occupied or vacant, and whether or not the result of the disrepair. Where there is disrepair, warning notices should be issued with failure to act on the notice resulting in the work being paid for by the Council and all costs recovered from the owners, even if this meant they were required to sell their property to cover these costs.
- Require all owners of properties in common ownership to have their names, addresses and contact details recorded in a publicly managed and accessible database. All owners who have a share of the property would also be able to access the names and details of other owners at their own address. Absent owners should be required either to be accessible, or to be represented by an authorised agent.
- The sale of any property should include a copy of a full common survey report, in addition to the current home report, carried out by a professionally registered surveyor, architect or engineer. That the survey report should be no older than five years, and the report would also be required to be held on a publicly managed database. This would encourage owners to organise quinquennial inspections of their property.

In essence, these proposals would put in place an agreed national housing quality standard, which is universal and not vary according to tenure, as is the case currently. Insisting on undertaking a property survey every five years, would provide a regular check against that standard. All those with an ownership interest in the property would be readily contactable, to help set in process a means to address any failings. They also provide a means to ensure that existing and potential owners possess knowledge about the condition of the building.

However, they do not cover the need to have in place a management system within which agreement can be reached on how best to go about addressing any failings highlighted by the survey, and then the means to put in place the finance required to commission any required works. How owners exercise control over the works is also not addressed. Finally, although the proposals recognise the value of enforcement, which might be necessary when some owners refuse to go along with any agreed majority decisions, or contribute to the costs, they are not a fail-safe. The current lack of available funding for local authorities in this regard, makes the potential risks to which they could be exposed, act as a brake on active intervention. Edinburgh's previous default repair arrangements, the 'factor of last resort', illustrates the potential scale of the financial and administrative problems that could arise.

² The **Under One Roof** website can be found at: <http://www.underoneroof.scot/>

These are clearly not simple problems to resolve, and perhaps there will never be an ideal solution. There may be a value in trying to stop thinking like that, for if it were a simple matter to resolve we would have worked out a solution by now. This report offers solid evidence that looking for simple solutions has its downsides. For the last 20 years, we have pursued just such an approach through enacting the majority of recommendations that emerged from the HITF. But clearly, that approach has not worked and, through the process, the core strategic focus has been lost. It is worth remembering that the HITF was seeking to ensure common repair works were undertaken by property owners. So how do we ensure flat owners are able properly to maintain their housing, and that recalcitrant individuals are not able to threaten the legitimate property interests of the majority of owners?

There is an observation, noted in Roman Law: *'Communio est mater rixarum'*, meaning 'co-ownership is the mother of disputes'. This reflects not only the age of the problem that we seek to address, but also the critical importance of a long-standing tension within the Scottish property law in respect of co-ownership, between the rights of the individual and any entity formed by these owners collectively. Co-ownership demands unanimity, so under Scots property law that has actively been avoided, so that within a flatted property most elements of the building are assigned to individual owners. Under co-ownership, no matter the actual size of the share held by an individual share, each owner owns the property as a whole. This means that usually each co-owner must be consulted as regards all dealings in respect of the property. In accordance with the unanimity rule, each co-owner has a right to veto, and this can, and often does, lead to deadlocks. For these reasons, co-ownership is regarded as a restriction of ordinary ownership. Although Scots law consciously and explicitly seeks to avoid creating co-ownership for this very reason, it is still effectively caught within its bind. This is not in terms of actual decision-making, as the common law now allows for a majority, and not unanimity in most cases, but in terms of payment, as if the one owner refuses to participate, then in effect, unanimity is there.

The core challenge here are not new: *"Experience also taught that the nature, circumstances and inclinations of men being very different, and one man needing more than another, common ownership could bring nothing but discontent and dissention"* (Hugo Grotius, 1695, II 3, 2). Three hundred years on we are still having to contend with this very same issue, and no doubt will always have to. But finding a system that narrows down options for the benefit of the majority would represent a great advance. As the world expert on common property legal matters, Professor van der Merwe, has concluded a 'properly structured organisation' is a necessary requirement for any apartment ownership schemes.

"The community of apartment owners cannot function effectively without a properly structured organisation to handle the many problems and everyday details in keeping the scheme functioning smoothly and efficiently. The inevitable chaos caused by the lack of a central management body is strikingly illustrated by the problems experienced by the earlier types of apartment ownership schemes . . . All modern statutes recognise the need of effective management and either compel all apartment owners to participate in the management of the scheme or organise them in a management body for this purpose".

(Source: Van der Merwe, 1994, p.234)

While Scotland is not unique in trying to address these matters, and has sought effective measures for a long time, given the preponderance of flatted accommodation in its housing stock, it still appears to consider itself to be so, in terms of property law. Scotland should not be still persisting with an early form of apartment ownership system. It is very evident that we are still in the throes of: *'experiencing the inevitable chaos caused by the lack of a central management body'*.

In developing such a strategy, this first involves agreeing the objective, such as ensuring all accommodation across Scotland, regardless of tenure should meet a specified habitability standard within a decade. Operationalising this would involve setting a universal housing quality standard, undertaking a survey to check all properties against that standard, and then set out a time-specific and costed plan to address any failings. To take these matters forward locally there might need to be within private flatted stock a decision-making body, an owners' association, with the capacity to contact all owners, or their agents, charged with planning out the actions required to bring their block up to standard and from that agree the overall cost of any works and then the individual contributions. In this regard, there could be some value in having in place a sinking fund, to allow for routine regular maintenance, as well as contribute to any emergencies and plan out possible future improvements. Within such a context there might also be real value in having professional factoring expertise, to help facilitate the required decision-making and manage both the works and the payment of contractors. The property purchase process might also need to be enhanced by such an arrangement, given that this additional information could be made available so that those buying are fully aware of what exactly they are getting into. There would also be value in having a default arrangement, whereby the public interest in the property takes precedence over that of that of the owners, so that the agreed standard is met. It is here that compulsory improvement powers might need to be further refined to facilitate this course of action. If not, then if the property fails to meet the standard then it requires to be closed as it then deemed to be detrimental to the wellbeing of anyone who lives there. All of the above is still speculation, but offers the working basis for phase two, the consultation on this work and these proposals.

PRACTICAL REALITIES IN TRYING TO PURSUE COMMON REPAIRS

To appreciate the importance attached to this work the following cases illustrate the challenges currently being thrown up by limitations of the present arrangements. Most owners within most flats do try to carry out essential repairs, although they tend to be short-term in nature given that securing agreement with all owners to finance such repairs tends to be fraught with a wide variety of difficulties and challenges, as detailed within this report. Increasingly, flats are not repaired because of the failure to secure owner agreement, an inability to afford the repairs, or practical difficulties in having the work carried out, especially since statutory notices are now less frequently used. While owners are not generally unaware of disrepair issues, they might not fully appreciate the extent of works needed to resolve what they perceive to be a minor issue. It is also the case that delays in acting, for whatever reason, tend to result in what was an initially a small matter, demanding limited expenditure, becoming a major issue requiring considerable expenditure to resolve.

McLennan Street, Mount Florida, Glasgow

Solum immediately below one of the first-floor flats has been washed out and joists needed replaced, the suspected result of a blocked internal roof drainage pipe the owners were not fully aware of and exacerbated by external works that raised the paving level above that of the ventilation areas. Seven out of the eight owners have actively participated in decision-making and are in full agreement that the issue should be addressed, as a matter of urgency. Action has been delayed by the original agreement around scope for tendering process, divergent quotes, disputes over what constitutes common and private works, including the original proposals for a full refurbishment of the effected flat involving new décor, fitted bathroom and kitchen. The latter continued for 10 months after the point of majority agreement to act, with one owner disputing the terms outlined in the Deed and Tenement Management Scheme. Three-years on from the initial discovery of the issue there is still no action on the ground. The common close is now overgrown with damp spores, and the owners are currently awaiting a Council decision to bridge with a 'missing share' intervention.

Camphill Gate, Glasgow

Camphill Gate is a B listed, five-storey tenement, comprising of 24 flats and 14 businesses. Built in 1906 this landmark building has several unique features, the most impressive of which is a communal roof garden serving the three glazed cupola stair wells. Over the last thirty years, the building has been subject to limited maintenance and many poor-quality *ad hoc* repairs. Some of these relate back to poorly specified improvement work carried out under a common repair scheme in the 1980s, in particular, inferior and wrongly sized replacement rainwater goods.

A full condition survey report of the building highlighted significant major failures and deterioration throughout, that requires urgent remedial action. This is estimated at around £1.2m. Although positive discussions have been held with the GCC and GCHT, regarding contributory grant funding, after a year of discussions, 25 of the 35 owners have signed up, but the other 10, in the main commercial owners, are proving a challenge.

Kilmarnock Road, Shawlands, Glasgow

Skylight needing repaired or replaced within a factored block. While there is a majority to undertake the work, within a block consisting of two shops and eight owners, seven of which are landlords, not all are willing to contribute to the costs. Subsequently, there was a ceiling plaster collapse in the

close, resulting in the skylight being repaired. Now there is a similar discussion regarding re-plastering the close ceiling and decorating the close.

Pollokshaws, Glasgow

A prominent tenement block within a conservation area was found to have serious structural defects on one side of the building which required all residents to be vacated in 2016. Despite the Council offering grant to help address this problem this has not been taken up by the owners, because of their unwillingness to contribute their share of the estimated £700k costs, and the entire property remains defective, empty and boarded.

Southside, Glasgow

The tenement block has been declared a dangerous building and following a survey paid for by the Council, the cost of addressing the structural instability was estimated at £800k. This means that each owner needs to find a £50k contribution. It is still not clear whether all the owners are able to cover this cost, and that partly relates to underinsurance.

Haghill, Glasgow

A fire within a top floor flat the tenement made the block structurally unstable, with all residents having to vacate. As the block was not factored, there was no common insurance policy in place. Of the eight owners, only one had appropriate insurance cover. The Law of the Tenement states insurance should be in place, but does not insist that this should be a single block insurance policy. Individual cover could suffice, and owners can ask to see their neighbours' individual policies. Clearly, in this case such requests were not undertaken. Demolition was considered, but this would have meant all owners would have to cover that cost, and those not insured would require to pay for that work, and also for their outstanding mortgage liabilities, if there was one, on what would then be a non-existent flat. Demolition was also considered problematic as it would affect the two neighbouring blocks. As a result, the Council has undertaken structural works to retain the building, but as yet has not been able to initiate repairs so that owners can move back into the flats. Repairs work in this instance is estimated to be costing the Council between £500k and £600k.

Southside, Glasgow

Traditional C19th century sandstone tenement with serious structural problems which suffered a partial collapse. As a result, the owners, residents, shop proprietors and businesses were forced to vacate the building for two years, and some have yet to return. Owners have thus been unable to sell, let out or trade, and the value of their respective properties has fallen. As a result, there has been litigation between several of the parties including owners, tenants, business owners, factors and the local authority. Glasgow City Council required to step in, at considerable cost to them.

Clyde Riverside, Glasgow

This modern apartment block, comprising several hundred units, has experienced significant issues related to its design. The estimated replacement/repair costs for individual owners are unaffordable. Considerable local authority resource has had to be put in place for over a year, and it is anticipated that this will require to continue for some time yet. Further, given the seriousness of the situation considerable Scottish Fire and Rescue resource is also ongoing. Currently, all the property within the development has little or no value, and the rental returns anticipated by many owners have fallen considerably. There is a risk that the block insurer might withdraw buildings and liability cover, deeming the development uninsurable. There is also the potential for the property factor to withdraw, leaving the building with no functioning management structure.

King Street, Stirling

A recently undertaken home report stated the roof was in good order, but the subsequent block survey undertaken as part of the Stirling pilot showed this to be far from the case. There were, in fact, three separate elements that made up the roof, each of which was in need of remedial work. Further, some design detailing was required design to stop material building up, which then impeded the functioning of the roofs rainwater guttering and downpipes.

Gorgie, Edinburgh

This corner tenement property, built in 1899, consists of 16 residential flats and two commercial premises. The property is entirely in private ownership. Following a report of stonework falling from the property in July 2011, the Council assessed the risk to public safety. A crash deck emergency scaffold was then erected, following the issuing of a statutory notice, with the owners notified that they would be liable for all costs incurred by the Council to make their building safe.

In March 2012, the owners asked the Council to issue a further statutory notice to allow the Council to undertake all necessary repair works, following their commissioning of an architect to carry out an inspection and provided a survey report. At that time, the Council policy was not to issue statutory notices, following the recent closure of the Property Conservation Service and the request was rejected. Then, in July 2014, the Council held a meeting with the owners and their architect to review the situation. In the intervening period, the owners had employed a contractor to remove considerable amounts of loose masonry in an attempt to make the building safe. However, as a group they were still unable to get agreement from all the owners to arrange for the necessary repairs to be carried out and again they requested that the Council intervene.

In December that year the Council agreed to issue a statutory notice, for safety reasons. As the crash deck had been in place for three years, the scaffolding hire costs were also escalating, so there was a further incentive to execute these repairs, in accordance with the report received from the architect. By this time, large stone blocks were in danger of falling, loose masonry had already fallen off and there was now serious water ingress into the top floor flats.

It was not until July 2015 that the project was progressed by the Council. In November 2015, a new statutory notice was issued, to reflect the correct scope of works in accordance with the design team's recommendations, and the fact this was the first project to be undertaken by the Council's new service. The full building survey and report prepared by ESRS estimated the costs at approximately £380,000. The successful tenderer was awarded the contract in December 2015 and the owners were notified the total estimated cost was £370,000, which included a contingency and the Council's project management fee. The project went on site in March 2016 and was completed by October. The work involved creating a new flat roof, new cupola, renewing 338 sandstone units, re-pointing 100m² of rubble wall, carrying out repairs to 30m² of stonework using lithomex, taking down and re-building four chimney stacks and renewing all rainwater goods

The Council took the view that the statutory notice route was a last resort given that it has to accept a series of risks when enforcing this type of work, these being a financial risk, a bad debt risk, a construction industry scope risk, capability risk and also a reputational risk. At the same time, it was only the Council which had the power to break the log-jam created by non-participating owners. Given that it took in total six years and two months to get a final successful resolution, there were considerable extra costs incurred in dealing with the further serious deterioration, but also in funding repeat surveys, costings and related public and private administration.

Broxburn, West Lothian

This traditional three-storey building, fronting the main thoroughfare, comprises eight flats and four shops. Access to the flats is via an external staircase and landings located to the rear of the property. Due to a lack of maintenance, over the long-term, serious water ingress via the roof had occurred, resulting in water penetrating right through the building and is now evident within the ground floor commercial premises. Further, the rear stair and balconies are defective, though as yet not dangerous.

The local authority served Defective Building Notices on all owners back in 2008. The building was subsequently surveyed and a scheme of works prepared at an estimated cost of £240,000. Being unwilling to take the financial risk of funding works in default, the local authority approached the owners and asked them to commit half the scheme cost up front, to reduce the financial risk. Although some were willing to do so, others were not, so only some patch repairs have been carried out. Water, however, continues to penetrate into the building, whilst the external stair and landings still slowly deteriorate. Without intervention, some of the properties will soon be declared BTS, either because of the water penetration, or through the access staircase or landings becoming unsafe. In addition, there is a serious risk of wet and subsequent dry rot breaking out. When the flats are closed for human habitation, the rate of deterioration will undoubtedly accelerate. If the building is eventually lost, a large gap site will emerge in a prominent position and it is likely structural support to adjoining traditionally built properties will also be required. The insurance position of all owners to cover such costs is unclear.

Temperance Hotel, Kilmarnock

The Temperance Hotel is a prominent red sandstone property built in the 1890s, which was later converted into eight residential flats above three commercial properties. The Council, in pursuing the then Kilmarnock Townscape Heritage Initiative in 2014, concluded that the building would benefit from some grant assistance to support needed repair works. Despite encouragement, the owners failed to come forward and make an application primarily because of difficulties tracing an absentee owner, despite adverts being placed in the local press, and others who refused point blank to participate. One commercial owner was adamant that the titles conferred no responsibility for the maintenance and repair for any other part of the property except the external walls and floor.

One owner, who owned the majority of flats in the building, then managed to track down the missing owner and purchased their property, thus giving them a majority within the block. So, whilst a majority now favoured applying for a grant, under the provisions of the Tenement (Scotland) Act, 2014 this could only cover addressing essential repairs and would not support the reinstatement of architectural details core to the heritage funding approach at that time. With the timescales for this grant funding by then running out, monies were allocated to other projects where the owners were keen to participate.

In 2016, East Ayrshire Council set up a Grant Scheme for Vacant and Derelict Buildings. Despite failing to access the heritage grants, the owners had continued to maintain contact with the Council in an effort to find a way forward. However, with fewer funds now available, essentially all that could be addressed were repairs, rather than a refurbishment of the building.

A formal engagement process with the owners was again started, but by then ownership within the building had altered significantly. Although the three-ground floor commercial properties were still occupied, the majority owner's business was in difficulty, and two properties had been auctioned. Environmental Health had served Statutory Notices on first and second storey flats and these were

now vacant and locked up. Consequently, undertaking the survey work to the building proved impossible without first employing industrial cleaners to carry out a full decontamination of these properties.

Funds were obtained to carry out basic repairs to the roof, windows and stonework, in order to make the building 'wind and watertight'. However, these were well beyond what most owners could afford, or were prepared to pay. Additionally, the lack of engagement with a number of owners ensured there would be a shortfall, which the participating owners would then have to find. Further, were the repairs to the external envelope successfully achieved, there are still significant repairs required to secure the buildings internal structure.

Clune Park, Inverclyde

The Clune Park area consists of 430 flats in 45 four-storey tenement buildings. The majority of the flats are small, with 69 bedsits, 310 one-bedroom flats and 51 two-bedroom flats. The area has one of the highest housing densities within Inverclyde. Inverclyde Council has accorded it the highest priority for investment, in order to tackle both the physical and social issues that have led to the serious degradation of the housing stock.

There are now no resident owners within the estate, and less than 50 of the flats are tenanted, resulting in an occupancy rate of just 10% across the estate. The remaining properties are either unoccupied, or not fit for habitation. As a result, Clune Park has the highest rate of BTS housing in Inverclyde and the highest void rates. The regeneration plan, simply involves demolishing all 45 buildings. Although approved in May 2011, this has progressed only slowly.

Campbeltown, Argyll

Within Campbeltown, there is an Area Property Action Group comprising local authority officers from various services, most notably planning and building standards who have a remit to help deliver priority building repairs. To try to and address disrepair issues in the town, Housing Services have been active in helping to form owners' associations. The Campbeltown Tenement Maintenance Guide has proved a useful tool to initially help owners to get together and progress their particular project. Owners' associations can then access a Tenement Condition Survey grants, up to a maximum of £250 per unit. Such associations therefore need to have a fully functioning committee and a joint bank account. Once the independent housing quality report has been produced the owners can then decide on their next move. In some cases, this has led to owner-funded repair schemes incorporating the broad mix of owner interests within such blocks. If any grant funding is involved, the owners' association needs to establish a Tenement Management Scheme and undertake regular planned maintenance. As part of this drive, the Council is also taking the opportunity to promote maintenance by organising joint gutter clearing on tenements to reduce costs, given that on occasions rope access specialists are needed.

Glenrothes, Fife

Due to a lack of action by owners, on-going serious deterioration of the buildings and increasing anti-social behaviour complaints, Fife Council served a Closing Order in 2011 on what were by then 48 BTS flats within two blocks. These were subsequently converted to a Demolition Order for both blocks, and again following failure by owners to take on board their responsibilities, the local authority arranged for the demolitions to be carried out. This was completed in March 2013.

For clarity, it is important to highlight the range and extent of work required in pursuing such a project. This work required to bring this seriously deteriorated post-war ex-New Town property to this conclusion involved:

- Inspection work, involving all 48 properties, with the main issue here being the deterioration of the flat roof and water ingress downward and throughout the buildings, which at first did not affect all properties;
- Legal requirements and process;
- Administration which involved liaising with owner/tenants, arranging for compensation payments as required and having regard to the alternative housing options likely to be available for anyone who needed to move from a house, due to action by the local authority;
- Procurement work,
- Dealing with public services,
- Project management and associated financial work,
- Work involved in the local authority's entitlement to recover the costs of the demolition, incurred by the public purse, and its entitlement to place charging orders on the title of any property where the allocated debt for those properties has not been settled, or a repayment agreement not put in place
- Work related to ensuring a future for the cleared site
- Ensuring that everyone who needed to be kept informed was kept informed, including dealing with media.
- On top of everything else, one of the main property owners was also murdered.

This project had an immense impact on staffing and financial resources across different teams within Fife Council, but particularly the Private Housing Standards Team of the wider Building Standards and Public Safety Team. Time and resources are still being expended five-years later.

All the above examples illustrate the practical challenges that the preceding text seeks to address. The legal and administrative arrangements established by legislation, title deeds and local authority procedures all play out in different ways, in each of these cases. Similarly, owner poverty, intransigence or avoidance and, in a few cases, ignorance, also contribute. Sadly, in many of these cases, had regular maintenance been undertaken, the catastrophic outcomes detailed in some of these cases would not have arisen. Now, due to long-term deterioration, exacerbated by the neglect of basic regular maintenance, and also the limitations of powers of intervention, has resulted in need for major repair works that have a very substantial capital cost and serious repercussions not only for the owners, tenants and commercial premises, but the local authority and the wider society.

The challenge presented by this report is how do we change this unacceptable situation and the associated poor housing conditions and imminent loss of much-needed housing stock? Is the Scottish Government's laudable ambition of providing 50,000 new 'affordable' houses not seriously undermined by the deterioration and, in many cases, the unnecessary loss of so much existing stock?

REFERENCES

- Adams, I (1978) **The Making of Urban Scotland**. London: Croom Helm.
- Anna Evans Consultancy (2016) **Registered Social Landlords Missing Share Consultation: Report to the Scottish Government**. Edinburgh: AEC. Available at: <https://beta.gov.scot/publications/registered-social-landlord-missing-share-consultation/>
- Bailey, N and Robertson, D (1997a) 'Housing renewal, urban policy and gentrification'. *Urban Studies*, 34, 4, 561-578.
- Bailey, N and Robertson, D (1997b) **Management of Flats in Multiple Ownership: Learning from other countries**. Bristol: The Policy Press.
- Christie Commission (2011) Commission on the Future Delivery of Public Services (Christie Commission). Edinburgh: Scottish Government. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2011/06/commission-future-delivery-public-services/documents/0118638-pdf/0118638-pdf/govscot%3Adocument>
- European Commission (2010) Energy performance Certificates. Brussels: European Commission. Available at: <https://ec.europa.eu/energy/en/content/introduction-11>
- Gilbert, J (2016) 'The tenement health check – time for new policy?', Blog post, 17th August. Glasgow: John Gilbert Architects. Available at: <http://www.johngilbert.co.uk/?p=16280>
- Gilbert, J and Flint, A (1993) **The Tenement Handbook: A Practical Guide to Living in A Tenement**. Edinburgh: RIAS.
- Gilbert, J and Flint, A (1988) **A Stitch in Time: A Guide to Self-Factoring**. Glasgow: Glasgow District Council.
- Glasgow City Council (2018) 'Condition of Pre-1919 Tenement Stock', **Interim Report to the Neighbourhoods, Housing and Public Realm Committee**, 20th November. Glasgow: GCC.
- Glasgow Factoring Commission (2014) **Glasgow Factoring Commission, Final Report: Addressing the Challenges for the management, Maintenance and repair of Residential Properties in Glasgow**. Glasgow: Glasgow City Council.
- Green, B (2018) **Fife Council's current use of Statutory Powers to address Disrepair in Common Property**, Presentation to the Scottish Parliament's Cross-Party Group on Architecture and the Built Environment, 6th March. Edinburgh: Scottish Parliament.
- Gretton, G and Steven, A (2017) **Property, Trust and Succession**. London: Bloomsbury Professional.
- Housing Improvement Task Force (2003) **Stewardship and Responsibility: A Policy Framework for Private Housing in Scotland, Final Report and Recommendations of the Housing Improvement Task Force**. Edinburgh: Scottish Executive.
- Leather, P (2000) **Crumbling Castles: Helping Owners to Repair and Maintain their Homes**. York: Joseph Rowntree Foundation. Available at: <https://www.jrf.org.uk/report/crumbling-castles-helping-owners-repair-and-maintain-their-homes>

- Leather, P Littlewood, M and Munro, M (2001) **Make do and mend: explaining home-owners' approaches to repair and maintenance**. Bristol: The Policy Press.
- Maintain our Heritage (2004) **Putting It Off: How lack of maintenance fails our heritage – Summary of a report on the research programme on the maintenance of historic buildings led by Maintain our Heritage**. Bath: Maintain our Heritage.
- Office of Fair Trading (2009) **Property Managers in Scotland: A market study**. London: OFT. Available at: http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/scottish
- Rennie, R (1994) 'An outline of the Tenements (Scotland) Bill and how far it will innovate on the common law', *The Journal of the Law Society of Scotland*, 1st March. Available at: <http://www.journalonline.co.uk/Magazine/49-3/1000394.aspx>
- Reid, G and Gretton, G (2010) **Conveyancing 2009**. Edinburgh: Avizandum.
- Robertson, D (2006) 'Cultural expectations of homeownership. Explaining changing legal definitions of flat 'ownership' within Britain', *Housing Studies*, 21, 1, 35-52.
- Robertson, D (2002) **Arrangements for Common Repairs: A literature review**. Edinburgh: Communities Scotland. Available at: https://dspace.stir.ac.uk/bitstream/1893/21532/1/Robertson_Communities%20Scotland_2002.pdf
- Robertson, D (1992) 'Scottish improvement policy, 1945-75. Coming to terms with the tenement'. *Urban Studies*, 29, 7, 1115-36.
- Robertson, D and Bailey, N (1996) Review of the impact of Housing Action Areas, **Research Report, 47**. Edinburgh: Scottish Homes.
- Robertson, D and Rosenberry, K (2001) **Home ownership with responsibility: Practical governance remedies for Britain's flat owners**. York: Joseph Rowntree Foundation.
- Russell, F and Welsh, J (1998) **Factors in common: how local authorities manage common repairs to property in mixed ownership in Scotland**. Glasgow: Scottish Consumer Council.
- Scottish Courts (2002) **Opinion of Lord Wheatley in the cause Hanover (Scotland) Housing Association Limited, Petitioner; For Judicial Review of a decision of Michael Sandford, Arbitrator**. Edinburgh: Scottish Courts. Available at: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=179d87a6-8980-69d2-b500-ff0000d74aa7>
- Scottish Consumer Council (1984) **Under One Roof: A Guide for Flat Owners in Scotland**. Edinburgh: HMSO. Available at: <http://webarchive.nationalarchives.gov.uk/20090724140955/http://scotcons.demonweb.co.uk/publications/reports/documents/UnderOneRoof.AguideforflatOwenersinScotland.1984.pdf>

- Scottish Executive (2005) **Management and Maintenance of Common: Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 for Housing Professionals**. Edinburgh: Scottish Executive. Available at: <http://www.gov.scot/Publications/2005/11/2194749/47514>
- Scottish Executive (2002) **Better Cities, New Challenges: A Review of Scotland's Cities**. Edinburgh: Scottish Executive. Available at: <https://www.gov.scot/Resource/Doc/47021/0027033.pdf>
- Scottish Executive (2001) **We are all responsible: An owner's guide to the management and maintenance of common property**. Edinburgh: Scottish Executive.
- Scottish Government (2018a) **Housing Beyond 2021: Scottish Government Discussion Paper**. Edinburgh: Scottish Government.
- Scottish Government (2018b) **Scheme of Assistance Tables**. Edinburgh: Scottish Government. Available at: <https://www.gov.scot/Topics/Statistics/Browse/Housing-Regeneration/HSfS/SoA>
- Scottish Government (2017) **Scottish Housing Condition Survey: 2016**. Edinburgh: Scottish Government. Available at: <https://beta.gov.scot/publications/scottish-house-condition-survey-2016-key-findings/>
- Scottish Government (2015) **Implementing the Housing (Scotland) Act 2006, Parts 1 and 2: Advisory and Statutory Guidance for Local Authorities: Volume 3: Maintenance**. Edinburgh: Scottish Government. Available at: <https://www2.gov.scot/Publications/2015/07/7697/6>
- Scottish Government (2011) **Scottish Housing Condition Survey: 2010**. Edinburgh: Scottish Government. Available at: <https://www.gov.scot/Publications/2011/11/23172215/0>
- Scottish Housing Regular (2016) **Factoring Services in Scotland: A Thematic Inquiry**. Glasgow: SHR. Available at: <https://www.scottishhousingregulator.gov.uk/publications/factoring-services-scotland-thematic-inquiry-may-2016>
- Scottish Law Commission (2000) **Report on Real Burdens** (Scot Law Com No 181). Edinburgh: SLC. Available at: <https://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf>
- Scottish Law Commission (1990) **Law of the Tenement**, Discussion Paper 91. Edinburgh: SLC. Available at: <https://www.scotlawcom.gov.uk/files/8713/1711/2559/dp91.pdf>
- Scottish Law Commission (1998) **Report on the Law of the Tenement**. (Scot Law Com No 162). Edinburgh: Scottish Law Commission. Available at: <https://www.scotlawcom.gov.uk/files/4512/7989/7476/rep162.pdf>
- Scottish Law Commission, (1998), **Report on Real Burdens**. (Scot Law Com No 106). Edinburgh: Scottish Law Commission. Available at: https://www.scotlawcom.gov.uk/files/3312/7892/5856/dp106_real_burdens.pdf
- Scottish Parliament (2013) **Justice Committee 8th Report, 2013 (Session 4): Inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003**. Edinburgh: Scottish Parliament. Available at: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/64203.aspx>

- Serpa, R (2010) 'Exploring the constraints to undertaking home improvements', Thesis submitted for the Degree of MSc in Housing, University of Stirling, Stirling.
- Sim, D (1995) **The Scottish House Factor: A Study in Housing Management**. Stirling: University of Stirling.
- Steven, A and Wortley, S (2018) **Avizandum Statutes on Scots Property Law and Succession Law 2018-19**. Edinburgh: Avizandum Publishing.
- Van der Merwe, C (1994) 'Apartment ownership', in Van der Merwe, C Yiannopoulos, A and Raff, M (eds.) **International Encyclopaedia of Comparative Law, Volume VI: Property and Trust**. Lancaster: Tübingen Dordrecht.
- Welsh, J (1999) **In A Fix: The Views and Experiences of Owner-Occupiers in Scotland Sharing Common Repairs Responsibilities with the Council**. Glasgow: Scottish Consumer Council.
- Xu, L (2010) 'Managing and maintaining flatted buildings: Some Anglo-Scottish comparisons', *Edinburgh Law Review*, 14, 236-258.