

Missing Shares

Scottish Government advisory guidance for Registered Social Landlords on the recovery of missing shares for common works under the Tenements (Scotland) Act 2004 and the Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018

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Contents

Purpose of this Guidance	page 2
Overview	2
Definitions	3
Legislation	3
Registered Social Landlords as Owners	4
Common Parts	4
Common Works	5
Majority Decisions on Common Works	6
Annulling or Appealing Majority Decisions on Common Works	7
Share of Costs	8
Missing Shares	9
Is it Appropriate for a Registered Social Landlord to pay a Missing Share?	10
Repayment Charges	11
The Amount of a Repayment Charge	12
Registering a Repayment Charge	13
Repaying a Repayment Charge	14
Early Repayment	14
Discharging a Repayment Charge	15
Appeals Against Repayment Charges	15
Missing Shares and Local Authorities	16
Annex A: Form of Repayment Charge	17
Annex B: Form of Discharge of Repayment Charge	18

Purpose of this Guidance

1. This guidance has been prepared by the Scottish Government for Registered Social Landlords (“RSLs”) to assist in the use of powers to recover missing shares for common work.
2. This advisory guidance is non-statutory. RSLs are not required to have regard to it. It does not offer a legal interpretation of Acts and Regulations, and RSLs should seek their own legal advice to ensure they are fulfilling the requirements of the Act.

Overview

3. Where an RSL owns part of a residential building, they have an interest in works on parts of the building that are the shared responsibility of all owners. As owners themselves they have rights to participate in decisions about common works. Decisions about common works are usually made by a majority of owners. Where the RSL is a majority owner or where they can form a majority with other owners, they are entitled to carry out common works and charge each owner for their share of the costs. Legislation made by the Scottish Parliament in 2018 introduces new powers that allow RSLs, in these circumstances, to register a repayment charge against the property of an owner who is unwilling or unable to pay for their share of the common works. In this guidance this is referred to as the “missing share power”. The charge is registered in the appropriate land register, and usually will mean that the sale of the property will not take place until the debt is repaid as the new owner will not want to take responsibility for the repayment. This power is intended to help RSLs to carry out common works by making it easier to recover costs from other owners.

Definitions

4. The following definitions are used in this guidance:-

Registered Social Landlord or an RSL

An RSL is a landlord registered with the Scottish Housing Regulator under section 20 of the Housing Scotland Act 2010;

Regulation

Regulations are set out in the Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018; and

Tenement Management Scheme or the TMS

The TMS is a general scheme for majority decisions on common works set out in schedule 1 of the Tenements (Scotland) Act 2004. The TMS only applies if there is no process set out for decisions on common parts in the title deeds, or if they are unclear.

Legislation

5. The Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018 (SSI 2018/301) came into force on 27 October 2018. These regulations introduce a new power for RSLs to recover a missing share by means of a repayment charge. This legislation can be found online at <http://www.legislation.gov.uk/ssi/2018/301/contents/made>.
6. These Regulations are intended to support the existing powers of RSLs, as owners, to enforce a majority decision to carry out common works under the Tenements (Scotland) Act 2004. This refers to decisions made in accordance with procedures in title deeds or, where the title deeds are unclear, in accordance with the TMS set out in schedule 1 of the 2004 Act. This legislation can be found online at <http://www.legislation.gov.uk/asp/2004/11/contents>. There is general guidance on the rights and responsibilities of owners in respect of common works in **Common Repair, Common Sense - A guide to the management of tenements in Scotland**, which is available online at <http://www.gov.scot/Topics/Justice/law/17975/CommonRepair-CommonSense>. Impartial advice on repairs and maintenance of tenements is available on the website, **Under One Roof**, at <http://www.underoneroof.scot/>.

Registered Social Landlords as Owners

7. In some cases an RSL may own one or more properties in a tenement. If an RSL owns a majority of flats, and the tenement management scheme applies, they can make decisions on repairs and maintenance which are binding on all owners. The missing share power can be used to cover the cost of any owner who is unwilling or unable to contribute to the cost of the work.
8. The same principles will apply where the RSL does not own a majority of flats but has made a majority decision together with other owners in the tenement.

Common Parts

9. This guidance refers to work on parts of the building that are the shared responsibility of all owners. These are common parts and are described in the TMS as “scheme property”.
10. Scheme property includes:
 - any part of the tenement that the title deeds¹ say is the common property of two or more owners, for example the close or stair,
 - any other parts of the tenement that the title deeds¹ say must be maintained by two or more owners, for example the gutters and downpipes,
 - the ground on which the tenement is built,
 - the foundations,
 - the external walls,
 - the roof, including the rafters and any structure supporting the roof,
 - the part of a gable wall that is part of the tenement building, and
 - any wall, beam or column that is load-bearing.

See **TMS, rule 1.2**

11. The following are not scheme property but are the property of individual owners:
 - parts such as doors and windows, skylights, vents or other openings that serve only one flat,
 - any chimney stack or flue that serves only one flat, and
 - any extension that serves only one flat.

See **TMS, rule 1.3**

¹ This is subject to the title deeds of different properties being consistent with each other, see paragraph 15 below.

Common Works

12. The TMS is intended to encourage owners to work together to carry out work on common parts. It provides rules for majority decisions when title deeds are unclear.
13. Subject to title deeds, decisions on maintenance can be made by a majority of owners.

See **TMS, rule 2.5**

14. For the purposes of works carried out under title deeds, maintenance is defined as: (a) repair or replacement; and (b) such demolition, alteration or improvement as is reasonably incidental to maintenance.

See **Title Conditions (Scotland) Act 2003, section 122**

15. The TMS applies if title deeds are silent , or are inconsistent. For example, title deeds may not say how decisions should be taken, or may not describe all the common parts, or they may allocate shares of costs that do not add up to 100%. the TMS covers decisions about works to common parts, including:

- maintenance (see paragraph 16);
- setting up a maintenance account;
- inspection to determine whether maintenance is needed;
- delegation of maintenance to a property factor or manager; and
- installation of a common door entry system.

See **TMS, rules 3.1 and 3.2, and Regulation 2(2)(b)**

16. Maintenance under the TMS is defined as follows –

“maintenance” includes 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.

See **TMS, rule 1.5**

17. Maintenance does not include improvements, unless the improvement is part of the maintenance work. A majority decision could not be used to install some kinds of energy efficiency improvements, such as district heating systems. However, RSLs may wish to note that the definition of maintenance in TMS rule 1.5 was amended to include the installation of insulation. This does not apply to the definition of maintenance used for decisions made under title deeds.

See **Climate Change (Scotland) Act 2009, section 69**

Majority Decisions on Common Works

18. Any decision made in accordance with title deeds is binding on all owners.

See **Title Conditions (Scotland) Act 2003, section 30**

19. Under the TMS, decisions can be made by a majority of owners. The majority decision is binding on all owners. Any owner can enforce a majority decision.

See **TMS, rule 8.3**

20. Majority decisions by owners under the TMS must be made either by a meeting of all owners or by consulting all owners. If a meeting is held, all owners must be given at least 48 hours' notice of the meeting. Each owner gets one vote for each flat that they own in the building, providing that they are liable for a share of the cost of work in relation to that flat. When a decision is made it should be notified to all owners as soon as possible, unless it is made at a meeting which they attended.

See **TMS, rule 2**

21. A majority is a majority of the allocated votes, so if any owner does not use their vote it has to be treated as a vote against the decision.

See **TMS, rule 2.5**

22. Notice of meetings and decisions must be given in writing to each owner or each owner's agent. Notice can be sent by post, email or hand-delivered. Reasonable effort should be made to identify owners but, if an owner cannot be identified, it is sufficient to post or hand-deliver the notice to their flat addressed to "the owner". It is important to carry out the decision-making process properly and to give owners due notice of decisions because they have rights to challenge decisions in Court and decisions should not be implemented until the time limits for appeals have expired.

See **TMS, rule 9**

Annuling or Appealing Majority Decisions on Common Works

23. If one owner would be liable for 75% or more of the cost of the work agreed by a majority of other owners, they can annul the decision by giving notice within 21 days.

See **TMS, rules 2.10-11**

24. An owner who did not agree to the majority decision has a right of appeal to the Sheriff. Someone who becomes a new owner after a decision has been made also has a right to appeal to the Sheriff. An appeal must be made within 28 days. The time limit starts from the date of the meeting if the owner attended, or the date on which they were given notice. If notice was posted, it starts from the day of posting. If an appeal to the Sheriff is unsuccessful, the owner then has 14 days to appeal to the Court of Session on a point of law.

See **Tenements (Scotland) Act 2004, section 5**

25. Unless work needs to be carried out urgently, work agreed by a non-unanimous majority decision should not be carried out until the time limit for an appeal has expired.

See **Tenements (Scotland) Act 2004, section 5(10)-(11)**

26. An owner cannot complain to the Scottish Public Services Ombudsman about a majority decision to carry out work to maintain or repair common parts, even if this decision is made by an RSL acting as the majority owner in the building. This is because the Ombudsman must not investigate any matter where the person aggrieved has a right of appeal to the Court.

See **Scottish Public Services Ombudsman Act 2002, section 7(8)**

Share of Costs

27. Where title deeds set out rules for apportioning costs, these rules should be followed.
28. Where the TMS applies, the costs of maintenance and repair of common property are normally shared equally between owners. An RSL that owns more than one property in a building will be responsible for one share for each property.

See **TMS, rules 1.2(a) and 4.2(a)**

29. However, if the floor area of the largest flat is more than 1½ times bigger than the floor area of the smallest flat, each owner's share is equal to the floor area of their flat divided by the total floor area of all the flats.

See **TMS, rule 4.3**

Missing Shares

30. The TMS allows majority decisions to be made on work to repair or maintain common parts and for the allocation of each owner's share of the cost of the work. In practice some owners may be unwilling or unable to pay for their share of the work. This may include an owner who voted in favour of the work going ahead. A share of the cost of the work that is not paid is referred to as a "missing share". A missing share may stop work going ahead even if a majority of owners have agreed to it.
31. An RSL has the right to enforce a majority decision on work to repair or maintain common parts if they are affected by the failure to carry out that work. In practice, that may mean that an RSL has to pay the missing share on behalf of the owner who has not paid it, and then seek to recover that cost. An RSL can enforce a missing share paid by themselves, and also one that has been paid by other owners if it has their written consent.

See **TMS, rules 8.3-4**

32. If an RSL pays a missing share, it can create a repayment charge against the property for which the missing share was paid. A repayment charge makes it difficult to sell the property, or to use the property as security for a loan, without repaying the RSL.
33. Owners remain liable to repay missing shares even if they cease to be owners. If a property is sold with a repayment charge, the new owner is also liable for repaying the missing share.

See **Regulation 10(3)**

34. Before paying a missing share, the RSL must notify the owner whose share it intends to pay. The notification must be given in writing to each owner or each owner's agent. It can be sent by post, emailed or hand-delivered. Reasonable effort should be made to identify owners but, if an owner cannot be identified, it is sufficient to post or hand-deliver the notice to their flat addressed to "the owner".

See **Regulation 3, and TMS, rule 9**

35. There is no right of appeal against the decision to pay or recover a missing share. An owner who disagrees with a decision to carry out work should exercise their right of appeal against that decision as outlined in paragraph 24 above. The RSL should not pay a missing share before this period for an appeal has expired.

Is it Appropriate for an Registered Social Landlord to pay a Missing Share?

36. No owner is obliged to pay a missing share on behalf of another owner. The payment of a missing share by an RSL as an owner is at the RSL's discretion. The RSL should consider the following points:

Is it appropriate to use tenants' money to pay for work that is the responsibility of owner occupiers? It may be in tenants' best interest for the work to go ahead.

Is it permissible to use tenants' money to pay for work that is the responsibility of owner occupiers? Is it allowed under the RSL's constitution or covenants with lenders?

Is it proportionate, is it the best way to address a problem? There may be a fix that addresses the impact of disrepair even if it does not resolve the underlying problem.

Is it affordable, can the owner afford to repay the missing share? What about equity? The owner will have to pay administration costs and the costs of registering and discharging the charge on top of the amount due for their missing share. But note that a repayment charge takes priority over most existing securities (see paragraph 49).

Is it the best way to enforce a debt? Liability for a missing share arises from a majority decision and can be enforced in other ways. It may be more effective to consider civil recovery, register a notice of potential liability for debt, or offer a payment plan. RSLs should bear in mind that interest cannot be added to a repayment charge.

How much liability should the RSL bear? Should other owners bear some or all of the cost of the missing share? This may be relevant if the RSL is a minority owner.

Is the Local Authority willing to assist? Local authorities also have missing share powers, in addition to a wider range of discretionary powers to enforce works and assist owners (see paragraphs 59-60).

Repayment Charges

37. The RSL can create a repayment charge to recover a missing share.

See **Tenements (Scotland) Act 2004, section 4A(5), and Regulation 2**

38. A repayment charge can only be made if the RSL is an owner of a flat in the building and has paid a missing share. It cannot be used to collect a contribution in advance of paying for works.

See **Regulation 2(2)(a)**

39. The Regulations give an RSL the power to make a repayment charge to recover a missing share from the owner of a flat in a tenement. The definition of “flat” includes non-residential premises.

See **Regulation 1(2), and Tenements (Scotland) Act 2004, section 29(1)**

40. A “tenement” means a building containing at least 2 flats which are designed to be owned separately, and which are divided from each other horizontally.

See **Regulation 1(2), and Tenements (Scotland) Act 2004, section 26**

41. A repayment charge will specify:

- the repayable amount and the property to which it applies,
- that the repayable amount is charged to that property, and
- that it is repayable in 5 to 30 annual instalments.

See **Regulation 5**

42. The RSL must register the repayment charge in the appropriate land register.

See **Regulation 9(1)**

The Amount of a Repayment Charge

43. The repayment charge will usually be for the amount of the missing share plus any associated administrative expenses, but not interest. An RSL will need to consider what costs it includes in the administrative expenses. But these expenses must be connected with paying the missing share. Administrative expenses include the costs of registering a charge or discharge in the appropriate land register.

See **Regulations 4(1)(a) and 11**

44. RSLs cannot charge interest on a repayment charge for a missing share. This is consistent with the restriction on local authorities' power to charge interest on a repayment charges for missing shares.

See **Housing (Scotland) Act 2006, section 172(6B)**

45. The RSL can decide to set the repayment charge for a lower amount than the full amount of the missing share. This might be appropriate if the RSL considers that the owner's circumstances mean that the full amount of the share is unaffordable and that it is reasonable for other owners, including the RSL to contribute a higher share.

See **Regulation 4(1)(b)**

46. The RSL cannot create a repayment charge for more than £10,000. This rule protects owners by setting a maximum amount that can be recovered by a charge against property.

See **Regulation 4(2)**

Registering a Repayment Charge

47. Repayment charges must be registered in the appropriate land register. Scottish Ministers have specified the form for a repayment charge. RSLs must use this form when registering a repayment charge. The form is reproduced as Annex A to this guidance.

See Regulations 7 and 9(1)

48. There is a cost for registering repayment charges. As at October 2018, the registration fee is £60 for each document. The same cost applies to registering the discharge of a repayment charge. These costs can be included in the amount recoverable under the repayment charge.
49. The registration of the repayment charge by an RSL is proof that there is a charge against that property. A registered repayment charge has priority over:
- all future burdens and incumbrances on the same property, and
 - all existing burdens and incumbrances on the same property except charges created or arising under –
 - any provision of the Public Health (Scotland) Act 1897 or any Act amending that Act;
 - any local Act authorising a charge for recovery of expenses incurred by a local authority;
 - schedule 9 of the Housing (Scotland) Act 1987 (a charging order served by a local authority);
 - section 172 of the Housing (Scotland) Act 2006 Act (a repayment charge served by a local authority); or
 - any Act authorising advances of public money.

See Regulation 12

50. An RSL can enforce a registered repayment charge against any person named as proprietor of the charged property. But this does not apply to:
- a third party who acquires right to the charged living accommodation (whether title has been completed or not) in good faith and for value before the repayment charge is registered; or
 - any person deriving title from such third party.

See Regulation 12(3)-(4)

Repaying a Repayment Charge

51. The RSL should decide what period is allowed for repaying the repayment charge. This must be between 5 and 30 years. The RSL should give the owner opportunity to discuss their ability to repay. The RSL should also take account of the total amount that is owed under the charge. The RSL should not determine the repayment period without considering what evidence is available to inform the decision in a particular case. The RSL should not, for example, make a policy decision on a fixed repayment period which would apply automatically in every case. The RSL must notify the owner of its decision

See **Regulation 5(1)**

52. The RSL can make arrangements for an owner to repay in monthly instalments. The RSL must notify the owner of its decision.

See **Regulation 5(2)**

53. An RSL can pursue missed instalments as a civil debt. An RSL should pursue its claim at regular intervals. If it does not do so it may lose its entitlement to recover the individual instalments, although the overall charge will be secure.

Early Repayment

54. The person who owns the property, or any other person who has an interest in it, may pay the repayment charge off early. In this case the person and the RSL should agree the sum for the person to pay. If they cannot come to an agreement on this, the sum due can be determined by an arbiter appointed by the Scottish Arbitration Centre. For more information about this, see <https://scottisharbitrationcentre.org/>.

See **Regulation 6, and Arbitration (Scotland) Act 2010**

Discharging a Repayment Charge

55. An RSL must register a discharge of the repayment charge in the appropriate land register, when it has received the last instalment owing under the charge. This must also be done where an RSL has agreed to an early repayment or to accept repayment of a lower amount. Registering the discharge serves as evidence that the repayment charge has been repaid. Scottish Ministers have specified the form for discharge of a repayment charge. RSLs must use this form when issuing the discharge of a repayment charge. The form is reproduced as Annex B to this guidance.

See **Regulations 8, 9(2) and 10(5)**

56. There is a fee to register the discharge of the repayment charge, see paragraph 48 above.

Appeals Against Repayment Charges

57. There is no right of appeal against the decision to recover a missing share by means of a repayment charge.
58. An owner, or anyone else aggrieved by the RSL's decision does have a right of appeal to the Sheriff against the following decisions:
- A decision about recovering less than the full amount of the missing share,
 - A decision on the number of years over which the repayment charge is repayable, or
 - A decision that the instalments are repayable monthly rather than annually

See **Regulation 12**

Missing Shares and Local Authorities

59. Local authorities have discretionary powers to pay missing shares on behalf of owners who are unwilling or unable to pay their share of works to repair and maintain common parts. Local authorities can do this even if they are not owners of a flat in a tenement. Local authorities can also create a repayment charge to recover the costs of a missing share. There is no upper limit to the amount that a local authority can recover using a repayment charge. In some cases an RSL may wish to liaise with their local authority, and the local authority may be willing to take on the payment and recovery of the missing share. Before intervening, the local authority will want to ensure that the process for a decision under the TMS has been properly made, and that dissenting owners have had due opportunity to exercise their right to appeal to the Sheriff. Local authorities will also want to be satisfied that work is necessary and the costs are appropriate/proportionate.

See Tenements (Scotland) Act 2004, section 4A, and Housing (Scotland) Act 2006, section 172

60. It may be appropriate for a local authority to act if an RSL is prevented, for some reason, from paying a missing share, or if the amount of the share is likely to exceed £10,000. The local authority has a strategic responsibility for the condition of housing in its area and has a wide range of discretionary powers for requiring owners to carry out work and, where appropriate, to providing financial or practical assistance to home owners.

See Housing (Scotland) Act 2001, section 89, and Housing (Scotland) Act 2006, section 71

Annex A

Form of Repayment Charge

The Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018

We ¹.....,
in exercise of the power conferred on us by regulation 2 of the Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018, CHARGE the subjects described in the schedule with a repayable amount of ² sterling, payable in ³ equal annual instalments of ⁴....., the first instalment being payable on ⁵.....in 20.... and subsequent instalments on the same date in every succeeding calendar year. IN WITNESS WHEREOF ⁶

SCHEDULE

DESCRIPTION OF SUBJECTS ⁷

Notes for guidance

- 1 Insert the name and address of the registered social landlord.
- 2 Insert in words the repayment amount.
- 3 Insert the number of annual instalments being no fewer than 5 and no more than 30.
- 4 Insert the amount of the annual instalment.
- 5 Insert a date after the making of the charge for the first instalment to be paid.
- 6 The deed should be executed here and at the end of the Schedule.
- 7 Insert a full description of the subjects by reference to the postal address and, as appropriate, either
 - (a) a competent conveyancing description to enable recording in the General Register of Sasines, or
 - (b) the registered title number to enable registration in the Land Register.

Annex B

Form of Discharge of Repayment Charge

The Registered Social Landlords (Repayment Charges) (Scotland) Regulations 2018

We ¹.....,
DISCHARGE the Repayment Charge made by us on ²..... over the
subjects ³ and [either] ⁴ registered in the Land Register under Title
Number ⁵..... on ⁶ [or] ⁴ recorded in the Division of the General
Register of Sasines for the County of ⁷ on ⁸ IN WITNESS
WHEREOF ⁹

Notes for guidance

- 1 Insert the name and address of the registered social landlord.
- 2 Insert in the date of execution of the original Repayment Charge.
- 3 Insert postal address of subjects.
- 4 Delete as appropriate.
- 5 Insert Title Number in Land Register.
- 6 Insert date of registration of Repayment Charge.
- 7 Insert name of County in the General Register of Sasines.
- 8 Insert date of recording of Repayment Charge in the General Register of Sasines.
- 9 The deed should be executed here.