This is a pre-copyedited, author-produced version of a case note accepted for publication in Scots Law Times. The definitive published version [2011] *Scots Law Times (News)* 17-18 is available online on Westlaw UK.

Law of the Tenement: Misunderstood and individualistic as ever

Lu Xu
Lecturer in Property Law, University of East Anglia

The recent case of *Hunter v. Tindale* in Edinburgh Sheriff Court (unreported, 18th October 2010) is a rare example where the Tenements (Scotland) Act 2004 was called in to deal with a real life dispute almost six years after the Act's commencement in November 2004. In that light the case is a slight disappointment for anyone hoping for evidence of fundamental progresses to be made by the landmark legislation in terms of a better legal structure for maintenance of tenements. It seems that a lot more need to be done to change the individualistic understanding of tenement buildings in Scottish law, and society.

The facts of the case are reasonably straightforward, even if the physical layouts of the building take a bit of explanation. Numbers 121 to 125 Constitution Street, Edinburgh form one tenement building. Number 123 is assigned to a pend in between the two main parts of the building, with an archway above it connecting those two. The pend leads into a courtyard at the rear of the building, providing access to a workshop. This workshop also forms part of the basement of 125 Constitution Street. It is factually disputed whether number 125 has access to the courtyard and the pend other than through this workshop.

Part of the pediment of the archway over the pend, where it joins the wall of number 121, needed to be repaired. The owners of all the flats in the tenement agreed to pay a share of the cost of repair, except for the owner of the pend, who became the defender. It is not clear from the narration of the facts by the sheriff whether the defender also owned the workshop. However, for reasons explained below, this point is immaterial except for working out the exact proportion of liability of owners.

The case was settled on the definition of "close" in the Tenements (Scotland) Act 2004. According to section 29(1), a close is a "a connected passage, stairs and landings within a tenement building which together constitute a common access to two or more of the flats". The judge emphasised the word "together" in his dictum and concluded that because there were no stairs or landings alongside the passage, the pend could not be a "close" under the Act. Therefore, the sheriff decided that the owner of the pend could not be liable to contribute towards the repair work to the tenement.

It is worth noting that this case proceeded under the small claims procedure and neither side used a solicitor for it. This may largely explain why the case was hardly thoroughly argued within the context of the 2004 Act. Still it is inexplicable why the parties as well as the judge focused solely on the interpretation of the pend as a close and became oblivious to the main rationale of the statutory reform.

Being a close is just one means by which a passage way will form part of the tenement, and therefore liable for repair costs. It is not the only way. In terms of boundary and divisions, the Tenements (Scotland) Act 2004 operates by the concept of "sectors". A

sector is defined as a flat, any close or lift, or any other three dimensional space not comprehended by a flat, close or lift (section 29). The three dimensional space underneath the archway, as confined in all directions by the ground, walls of numbers 121 and 125, and the archway itself, is clearly sufficient as a sector in the tenement. Why does this "sector" have to be a "close" in order to be part of the tenement at all?

The parties and the sheriff might have been influenced by a handful of sections in the 2004 to afford undue importance to the concept of a close in the case. For example, section 3 (1) and (2) include as pertinent to any flat a close which affords means of access to. However, subsection (4) of the same section also include as pertinent other parts, such as *inter alia* a path, outside stair or fire escape, to any flat or flats it serves. More likely to be influential is section 2 (5) which was mentioned by the judge as part of the unsuccessful argument for the pursuer. It provides that a close extends to and includes the roof over, and the solum under, the close. In other words, if that part of the pend is a close, the roof of the archway directly above the passage is also part of the close. Logically, the defender, being the owner of the passage, surely cannot escape liability to contribute thereon.

This, however, is another significant misunderstanding of the law. A key idea of the reform, in the words of Professor Reid who engineered it, is that it "severs the connection between ownership and maintenance"(Reid and Barr, *The Tenements (Scotland) Bill 2004*, *Revolution in Land Law* Series, University of Edinburgh, September 2004, p.9). Or, as explained by the Scottish Law Commission in its 1998 Report, "[a]ll property which is scheme property is commonly maintained, but not all scheme property is owned in common" (Scot Law Com No 162, paragraph 7.7). That "part of the pediment of the archway" that enjoins the walls of number 121, which requires repairs in the case, would have no problem qualifying for scheme property under paragraph 1.2(c) of Schedule 1, either as part of the roof, the external walls, or any wall, beam or column that is load bearing. Once it is accepted as scheme property, then everyone in the scheme will have to pay for it, regardless of their ownership of any individual flat or part.

In other words, the parties in *Hunter* were fighting the wrong war. Instead of trying to extend the pend upwards to include the pediment by trying to label it as a close, the pursuer needed merely to establish the three dimensional space underneath the archway as a sector in the tenement building, and the pediment as part of the "scheme property".

It may of course be argued that this space and the courtyard behind it is not part of the tenement building at all. It would be astonishing and exciting if such a claim is to be successful, as this would open up doors for tenement buildings to be physically located over non-tenement *solum*. If that is the case, there will indeed be the possibility of an "airspace condominium", or a "flying freehold", in other words, landownership without land in its narrow sense.

However, this is a highly unlikely to be accepted by a Scottish court, for good reasons. Thanks to the service provided by certain online search engine, one can easily take a very good look at a picture of the front of the property in this case. It would be against common sense for anyone to suggest or agree that the pend in the middle of the building enclosed with an impressive locked gate is not part of the bigger tenement building. Furthermore, if it is found that the pend does not form part of the tenement

building, it would have been pointless to argue about the issue of a close as the parties did in the case anyway. The fact that the parties argued about this issue in front of the sheriff seems to suggest that both of them accepted that this space is part of the tenement building. The only quarrel was whether the ownership of this part carried with it the responsibility to maintain other parts of the building. In this regard the Tenements (Scotland) Act 2004 provided the clearest answer via the concept of "scheme property" mentioned above. Unfortunately both parties and the sheriff seemed to have missed this crucial piece of legislative innovation and were all too happy to rely on the traditional understanding of the relationship between ownership and responsibility despite the statute.

The observation that this short case is filled with many oversights and misunderstanding of the law may not overly concern anyone given its "small claims" and unrepresented nature. However, the underlying problem is nevertheless clear and alarming to those interested in the law of the tenement in Scotland. Scots law in this regard is still conspicuous for its individualistic approach (as commented by, for example, Professor van der Merwe in (2004) SLT (News) 211). Most people are more than happy to think of tenement buildings as houses which happen to be built on top of another, rather than an architecturally interdependent structure. It seems that the first individual owner of the pend (everything involved this dispute was previously owned by the same person at one stage and sold off to different persons later on) never contemplated the fact that this archway directly above his passage had anything to do with him, not until it collapses and kills pedestrians below at least. The fact that the court is willing to excuse the owners of passageway right underneath the middle section of a tenement building from any involvement in the maintenance of the building is only adding to undesirable effects of such an individualistic mentality.

The annual government review of Scottish housing conditions continues to produce alarming statistics about dwellings in urgent disrepair or disrepair to critical elements. Tenements traditionally fare worse than houses for obvious reasons of having to get more people agreeing to repairs, and to pay. Judging by the only two reported cases involving fundamental issues under the Tenements (Scotland) Act 2004, the situation may not improve significantly despite legislative intervention because of this individualistic approach. (For discussion of the other case, *PS Properties (2) Ltd v. Callaway Homes Ltd* [2007] CSOH 162, see for example L Xu (2010) *Edin LR* 236, at 247.) It appears that a lot more needs to be done in order to change the Scottish law and society's subconscious impression of a tenement building as a series of houses stacked up together by chance.