

Edinburgh Conveyancers Forum (ECF)

Guidance Note on Statutory Notices and the release of Retained Funds

Background:

Conveyancing solicitors in Edinburgh will be aware of the history of common repairs and Statutory Notices in tenements and shared buildings in Edinburgh. In short, the City of Edinburgh Council (CEC) made frequent use of the Statutory Notice procedure by which Notices were served on the owners of a shared building which required them to carry out common repairs. If the owners did not carry out the work CEC would step in to arrange the repair and bill the owners individually.

The standard method of dealing with such Notices in a conveyancing transaction was that the seller would remain responsible for any Notice issued prior to the date of conclusion of the contract. If the work had not been started or was not completed then, in most cases, a retention was made by the purchasing solicitor which was released to the selling solicitor once the work had been completed and paid for. This procedure was set out in the Standard Clauses forming part of the contract.

The system broke down around 2011 for reasons that are well known, since when Notices have only been served by CEC in emergencies. In the vast majority of cases CEC has ceased to arrange for repairs to be carried out which left many unimplemented Notices. This left solicitors with the problem of holding retained funds with no immediate prospect of releasing them.

Change in Conveyancing Practice:

It was recognised that the practice of the seller remaining responsible for a common repair that may never be undertaken was not workable and the general practice is now that the purchaser will take responsibility for Notices that have been served but not implemented.

Change in Council Policy:

CEC took the decision to cancel some Statutory Notices and many old Notices were cancelled in 2016. In terms of the Standard Clauses funds were usually retained to cover the work being undertaken under the Statutory Notice. With the removal of the Notice the purpose of the retention fell. An Opinion was obtained by the ECF from Professor Brymer and a copy of his Opinion dated 11 March 2016 is available on the ECF website. In summary, his Opinion is that in the absence of the Statutory Notice, the funds must be returned to the seller as they form part of the purchase price.

Suggested Action:

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The recommendation of the ECF is that the Opinion from Professor Brymer should be followed and retained funds must therefore be released to the selling solicitor. The onus is on the solicitor who acted for the purchaser who, in nearly all cases, will hold the funds, and will therefore be able to identify the relevant transactions. We do not consider that the agreement of the purchaser to release the funds is required. The solicitor who acted for the seller is entitled to rely upon the arrangement made with the purchasing solicitor in the contract and insist upon the release of the retention. You may wish to advise the purchasing client of the steps to be taken and a letter is attached that can be adopted/adapted. The intention of the letter is to advise the purchaser rather than to seek their agreement.

It is likely that some purchasers may feel aggrieved in that they will consider that the money was set aside to repair the building and should still be used for that purpose. Unless the contract was altered from the provisions contained in the Standard Clauses, then we do not believe there is any basis on which the purchaser can prevent the release of the funds unless there was some manifest error made by CEC.

Summary:

The view of the ECF is that there is no basis to withhold funds from the seller and this is supported by the Opinion from Professor Brymer. In each case the contract should be checked. Where the Standard Clauses have not been altered then our advice stands. Our recommendation is that where you hold funds on behalf of the purchaser of a property you should check whether the Notice has been cancelled and, if it has been cancelled, advise your client that the funds are to be released to the solicitor acting for the seller.