Harper Macleod LLP

Note by Professor Robert Rennie/

Edinburgh Conveyancers Forum and Glasgow Conveyancers Forum/

relative to/

NOTICE OF POTENTIAL LIABILITY FOR COSTS

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1.0 Introduction

When the Scottish Law Commission issued their report on the law of tenements with a draft Bill, there were no provisions relating to notices in what became the Act. These provisions were introduced as the Bill was going through the Scottish Parliament because of a fear that a purchaser could be saddled with arrears of common charges. In most tenemental titles, the obligation to maintain or pay for maintenance of common subjects was a real burden which transmitted against singular successors irrespective of knowledge. It is however fair to say that the practice of solicitors has always been to seek evidence that there were no outstanding common charges. This of course would have been easier where there were factors who could provide the necessary evidence.

2.0 The Statutory Provision

Prior to 28 November 2004, the common law was to be found in the law relating to real burdens. If there was an obligation to maintain common property in a tenement created as a real burden then liability transmitted to successive

proprietors whether they knew about outstanding costs or not. Thus amounts due for common charges could be collected from purchasers. The common law was effectively enacted in the Tenements (Scotland) Act 2004. [1]

2.1 Section 12(1) states that any owner who is liable for any relevant cost shall not, by virtue of ceasing to be an owner cease to be liable. Section 12(2) provides that where a person becomes an owner that person is severally liable with any former owner for any relevant arrears. Section 12(3) provides that the new owner is liable only if a notice of potential liability for costs was registered at least fourteen days before the acquisition date. Section 13 provides that a notice of potential liability can be registered by the owner of the flat or the owner of any other flat or any factor or manager. Section 13(3) provides that the notice expires in three years unless renewed. Section 13(5) provides that the Keeper is not required to investigate or determine the accuracy of the information in the notice. Section 15 provides that the obligation to pay in terms of a Section 12 notice (i.e. the obligation on the succeeding owner) prescribes in five years. The five year prescription will also apply to the same sum in respect of the former owner.

2.2 I think it is fair to say that the purpose of the extra provisions in Sections 12 and 13 was to protect people from the effect of the existing law. However, Section 12 Notices have been used to a great extent by factors who struggle sometimes to recover common charges from individual proprietors. One can have some sympathy with factors who have this difficulty. However, as represented to me, in some cases, factors treat the registration of a notice as equivalent to an all monies security which will cover not only outstanding common charges as at the date of registration of the notice but any future common charges which arise

[1] *Tenements (Scotland) Act 2004 S 12*

within the three year life of the notice. Problems have also arisen in relation to what is actually intended to be covered by the notice in the first place.

2.3 Section 12 begins by referring to "any relevant costs." Section 12(3) provides that the new owner shall be liable for relevant costs relating to maintenance of work other than local authority work carried out before the acquisition date if a notice has been registered. Accordingly, the provisions only relate to relevant costs in respect of maintenance or work. The form of notice is set out in Schedule 2. The form of notice refers to maintenance or work carried out "or to be carried out" in relation to the property. There is a space for a description of the maintenance or work concerned. The phrase "relevant costs" is defined [2] as the share of any costs for which the owner is liable by virtue of the management scheme or by virtue of the Act. Accordingly, a relevant cost could be imposed in a Deed of Conditions or by virtue of the tenement management scheme.

3.0 Is a Notice a Charge?

One of the difficulties with hasty amendments to legislation is that they are designed to deal with a mischief but are not necessarily fully thought through. In relation to other debts in respect of which charging orders can be registered [3] the legislation contains appropriate provisions stating that the charging order shall have effect as if it were a standard security. There is no such provision here in relation to notices of potential liability for costs. There is no suggestion therefore that if the new owner who is liable by virtue of the notice fails to pay up the party registering the notice can "call it up" and attempt to sell the flat; the only remedy would be a personal action for payment. Admittedly if the property was being

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[2] *Tenements (Scotland) Act 2004 S11(9)*

[3] *Such as Nursing Home charges, costs due to local authorities for carrying out work under notices, etc.*

sold in the future and the notice was still on the Register a purchaser would insist on it being cleared but that is simply to avoid the liability passing on.

3.1 The purpose of the Notice is merely publicity; it is to warn the purchaser that there are arrears of common charges which will transmit in terms of the previous common law and the 2004 legalisation. Accordingly, by definition, it can only relate to charges which have been incurred as relevant costs for maintenance or work purposes. The words "to be carried out" must in my view relate to defined works already agreed to be carried out and do not cover everything that might be done. The new owner would be liable in the normal way for work carried out after taking entry.

4.0 Discharge – Current Practice

Clearly there should have been statutory provision for the discharge of a notice once the debt outstanding as at the date of the notice has been paid. The only provision contained in the 2004 Act which makes reference to the Keeper is Section 13(5) which provides that the Keeper is not required to investigate or determine whether the information contained in any notice is accurate. Accordingly, the only role the Keeper has is to register the notice. Once the three year prescriptive period is up of course the Keeper can safely remove the notice. The Keeper is helpful to the extent of placing a note on the Register that indicates repayment has been made.

5.0 Opinion

I have been asked a number of questions in relation to the operation of the notice system and the practice of factors in that regard. I answer the questions as follows:-

1. **Would it be appropriate for a selling agent to provide and a purchasing agent to request sight of a quick copy of such notices in order to check their specific terms? In this regard it is noted that any reference within a title sheet provides no information as to the description of the maintenance or work to which the notice relates.**

In so far as a purchasing solicitor is concerned, I think all that is required is a letter from the party who registered the notice (usually the factor) to the effect that the sums due in terms of that notice have been satisfied. As far as the seller is concerned, the position will depend on whether or not the seller accepts that the sums demanded by the factor are due irrespective of when they became due. The difficulty which may arise is where the seller disputes some of the post notice common charges but still requires a letter from the factors confirming that the sums actually covered by the notice have been paid. I doubt that it would be helpful to suggest that purchasers should ask to see a quick copy of the notice with a view to accepting the position that whatever was due at the time of the notice had been paid and therefore despite the fact that the factors were not prepared to grant a letter everything was well. I would have thought that this would only prompt the factor to register a further notice in respect of post the first notice charges.

2. **Do you consider factors or managing agents are entitled in terms of both or either of the 2003 or 2004 Act to make a demand for all outstanding costs at the point of completion of sale or do you believe that such demands are restricted to sums outstanding or at least reasonably foreseeable at the time of registration?**

I am quite clear that the notice can only cover sums outstanding at the time the notice is registered. The Section cannot be interpreted in any other way. It must be borne in mind that the provisions relating to notice are consequent upon the provisions of Section 12(1) which states clearly that a successor/owner is liable for relevant costs. These must be actual costs. As I have undernoted the words in the statutory form relating to work to be carried out can only relate to specific defined work agreed to be carried out. I appreciate that Deeds of Conditions may provide for floats and other deposits but that is a separate issue.

3. **What, if any, level of detail or breakdown of sums claimed by factors should be sought by agents in order to determine that liability? By way of example, a member recently had the case that on obtaining a detailed breakdown sums being sought included costs for the preparation of a Discharge of Inhibition and registration of same notwithstanding that no such document was necessary due to the sale being carried out by a trustee in sequestration. In addition, in the same case the factors waived the cost of the registration of the notice in the first instance.**

Unfortunately, there is no guidance given in the 2004 Act as to the level of detail required. The difficulty with the statutory form of notice is that it refers to:-

"Description of the maintenance or work to which the notice relates."

The form of notice merely refers to the requirement to describe the maintenance or work in general terms. Unfortunately, there is nothing in the statutory form to suggest that a cost figure should be inserted. In my opinion however, the costs must refer to the maintenance or work. I do not think that the notice would cover legal expense of registration or costs of recovery. Again, I should state that the individual deeds may define common charges more widely but the statutory provisions only relate to maintenance or work costs.

4. **Allowing for the fact that no formal discharge is appropriate, would you recommend or suggest any particular style of "letter of satisfaction" or similar evidence that all sums due in respect of such notice has been properly made? Can you advise as to what appropriate practice should be for agents to implement in order to ensure that an appropriate letter or document is made available following settlement and, if so, within what suggested timescale?**

I would favour a general wording in a satisfaction letter to the following effect:-

"We [insert name of party lodging notice] *do hereby confirm that all sums due in respect of the notice of potential liability for costs registered by us on* [insert date] *in relation to* [insert address of flat with registered title number] *have been fully satisfied."*

In relation to the timing of delivery of a satisfaction letter, I think that I should point out that a letter of obligation to deliver a satisfaction letter would not be a classic letter of obligation within the current definition. That of course does not mean that the selling solicitor would not be bound by it but it would affect the selling solicitor's cover under the master policy. I would have thought that a period of one month would be appropriate.

The Opinion of

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