OPINION

on behalf of

Edinburgh Conveyancers Forum

in relation to

the liability of purchasers of property

for invoices in respect of statutory notices

Introduction

1. This Opinion is given in relation to a letter dated 1 November 2013 from Ross Mackay of HBJ Gateley, the Chair of the Edinburgh Conveyancers Forum.

2. By s 24 of the City of Edinburgh District Council Order Confirmation Act 1991 the City of Edinburgh Council ('the Council') is empowered to serve notices requiring the owner of a building to execute specified works for its repair. Where the building is a tenement, the obligation is placed on the owners of each flats: see s 27(1). In the event that the work is not carried out, s 26 empowers the Council to carry out the works itself and to recover the cost. This important provision deserves to be quoted in full:

> If any works required to be executed by any owner in pursuance of a notice under this Part of this Order are not executed within the period specified therein, the Council may serve notice upon such owner requiring him to show cause to the Council why such works should not be executed by the Council, and if such owner fails to show cause as aforesaid such works may be executed by the Council and the expense reasonably incurred in so doing shall be recoverable by the Council from such owner.

3. In the case of a tenement s 26 is to be read in the light of s 27(2) which provides for the liability for the cost of repair works to be shared equally by the owners of each flat but subject to the possibility of a right of relief.

4. In practice there is usually a substantial time gap between each of (i) the issuing of the original repairs notice under s 24 (ii) the carrying out of the work by the Council (iii) the issuing of an invoice to the owners under s 26, and (iv) payment of the invoice by the owners, whether on a voluntary basis or in response to enforcement by the Council. I am

asked to advise the Edinburgh Conveyancers Forum as to the liability of incoming owners in respect of work carried out by the Council but not yet paid for. In particular I am asked as to the liability of a purchaser who did not become owner until after stage (iii) (ie after the Council's invoice had been issued). I am also asked about the operation of negative prescription in relation to liability to the Council.

Liability of incoming owners to the Council

5. At p 13 of its leaflet, *About your Statutory Notice – an advisory guide*, the Council explains the liability of incoming owners as follows:

> When recovering the cost of works, the Council will hold the owner in possession of the property at the date the bill is issued as liable including owners under the right to buy scheme. This principle has been established by the courts because it can take a considerable time after the service of the original Notice to complete the work. Individual properties may have new owners by the time the Statutory Notice work has been completed and charged out.

6. The mention of 'the court' is presumably a reference to the only case to have considered the issue properly: *Purves v Edinburgh District Council* 1987 SC 151. In that case a property changed hands after the Council had carried out work listed in a repairs notice but, it seems, before an invoice was issued. The invoice was then issued to the purchaser. It was held by the First Division that the purchaser was liable, partly because a literal reading of the relevant statutory provision suggested as much and partly because this promoted 'the public interest in recovering public money spent on premises as soon as possible, by making the target of their claim for payment the owner of the premises which have enjoyed the benefit of the repairs carried out, at the time when the claim is made' (p 160).

7. *Purves*, however, concerned a notice issued under a provision which has since been repealed, s 87(1) of the Civic Government (Scotland) Act 1982, and the decision itself turned on the proper meaning of the recovery provision in that Act, s 99(4). Today, as already mentioned, Edinburgh Council usually issues notices under s 24 of the City of Edinburgh District Council Order Confirmation Act 1991. In respect of that Act *Purves* is not a reliable guide; nor, as we shall see, is it needed.

8. For present purposes the most relevant provision in the 1991 Act occurs, not in the part of the Act (Part VI) concerned with the repair of buildings, but much later, in s 57(2).

And the provision is disguised, both by the unhelpful heading of the section ('In default of owner, etc., Council may execute works, etc.') and also by the fact that, while the first subsection is indeed concerned with the Council's right to execute works and recover the cost, this is so only in cases 'where apart from this section no provision is made for the Council executing the work'. As such provision *is* made in respect of s 24 repairs notices (ie by s 26), the first subsection of s 57 thus does not apply to s 24 notices.

9. The second subsection, however, contains no such limitation. It provides as follows:

> (a) Where the Council have incurred, in respect of any work executed or caused to be executed by them, any expense which, under this Order, is recoverable by them from the owner or occupier of any lands or premises, such expense, together with interest thereon at such reasonable rate as they may determine from the date on which a demand for the expense is served, shall be recoverable by the Council from any of the following persons:—
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> (i) the person failing to comply with the notice or order requiring him to execute the work; or
> (ii) the owner or occupier, as the case may be, of such lands or premises at the date when the work was completed; or
> (iii) the owner or occupier, as the case may be, of such lands or premises at the date when a demand for payment of such expense is first made by the Council.
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> (b) Nothing in this subsection shall affect any right of relief competent to any person by whom the amount of such expense is paid, or from whom such expense is recovered by the Council, against any other person in respect of the amount of such expense paid by or recovered from him.

10. Section 57(2), it will be observed, applies to any expense (following work by the Council) 'which, under this Order, is recoverable by them from the owner or occupier of any lands or premises'. As is made clear by the phrase 'as the case may be' later in the subsection, 'owner' and 'occupier' are alternatives, so that s 57(2) applies to cases where the Council can recover from the owner (alone) or from the occupier (alone) or from both. Furthermore, 'premises' is defined in s 2 to include buildings. Armed with these explanations, it is easy to demonstrate the link between s 57(2) and s 26 (quoted at para 2 above). Section 26 allows the Council to recover the expense of carrying out repairs 'from such owner'; and 'such owner' refers back to the phrase 'any owner' at the start of the section, which in turn refers back to 'the owner of such building' in s 24(1). In other words, by allowing the Council to recover from the owner of a building, s 26 is an example of a

provision which falls within s 57(2). Where, therefore, the Council carries out repairs in respect of a notice served under s 24, it has a choice of debtor: recovery may be made from the person on whom the original notice was served, from the person who owned at the date when the work was completed, or from the person who owned when the invoice was first issued.

11. There is nothing new in this. Section 57(2) is a close copy of s 635(1) of the Edinburgh Corporation Order Confirmation Act 1967. The 1967 Act was repealed and replaced by the Civic Government (Scotland) Act 1982, so that between 1982 and 1991 the Council had to rely on the recovery provisions contained in the 1982 Act. Under those provisions, as interpreted by the *Purvis* case (discussed above), recovery was to be made from the person who was owner at the time when the invoice was issued. The 1991 Act now restores the choice which had been available under the 1967 Act, although this is a change in law rather than in practice because the Council's policy appears to be to seek recovery only from the person who was owner at the time of the invoice.

12. For present purposes, however, the importance of s 57(2) lies not in the three cases mentioned there but in the cases *not* mentioned. Viewed chronologically, the *last* person from whom the Council can recover is the owner at the time of the invoice. A person who becomes owner *after* the invoice is first issued is free of liability. So far as the Council is concerned, therefore, purchasers have nothing to fear from pre-existing invoices.

Liability of incoming owners to neighbours

13. Nonetheless, even in respect of pre-existing invoices, a purchaser of a tenement flat might sometimes have a degree of liability. But the liability would be to fellow owners in the tenement and not to the Council. This is because of the special, and regrettably complex, rule for tenement property described below.

14. The starting point is a provision already mentioned: s 27(2) of the 1991 Act. In making recovery from the owners of individual flats the Council is allowed to ignore the title deeds and seek the same amount from every owner. But, s 27(2) continues, 'nothing in this section shall affect any right competent to any owner of any part of such building, under the conditions of his title or otherwise, to recover from the owner of any other part the amount, or part thereof, paid by, or recovered from him'.

15. Insofar as a tenement's title deeds cover the repair in question, they will often likewise provide for equality of contribution. And where the title deeds are silent, the default position in rules 4.1(d) and 4.2 of the Tenement Management Scheme ('TMS') (set out in schedule 1 of the Tenements (Scotland) Act 2004) will also usually result in equality. Sometimes, however, this will not be so. Typically this will be because the titles impose liability on some basis other than equality, for example rateable value or feuduty; but even the default rules in the TMS may depart from equality of contribution, usually because the area of one flat is more than one and a half times that of another flat in the building (see TMS rule 4.2(b)(i)). If the titles or, failing the titles, the TMS distribute liability on some unequal basis, then the owner who has paid too little to the Council will be liable to make up the difference to those who paid too much. And, by s 12(2) of the Tenements (Scotland) Act 2004, that liability transmits to incoming owners, without limit. The reasons for this are highly technical and are described in the next paragraph.

16. Section s 12(2) provides that:

> Subject to subjection (3) below, where a person becomes an owner .. that person shall be severally liable with any former owner of the flat for any relevant costs for which the former owner is liable.

'Relevant costs' include costs for which an owner is liable under the 'management scheme which applies as respects the tenement' (s 11(9)(a)), a term which includes provisions in the titles and also the default rules in the TMS (s 27). So (i) where an invoice has been issued by the Council requiring the owner of each flat to pay an equal amount, and (ii) where, under the titles or TMS, liability for maintenance of the part in question is unequal, then (iii) an owner who has to pay to the Council more than is due under the titles (or TMS) can recover the excess from the current owner of any flat which, under the titles (or TMS) has a greater liability – even if that owner has acquired the flat since the invoice was issued by the Council. (Section 12(2) is subject to subsection (3), which, where it applies, restricts the liability of an incoming owner to cases where there has been registration of a notice of potential liability for costs; but subsection (3) does not apply to 'local authority work', defined in subsection (4) as 'work carried out by a local authority by virtue of any enactment').

17. Relatively speaking, cases like this will be unusual. Titles (and especially the TMS) tend to provide for equality of contribution; and even where they do not, it will be a rare

owner who will seek from his neighbours – and particularly from a new neighbour – payment of the excess which he had to pay to the Council. Further, even if this were to occur, the incoming owner (ie the purchaser) is given a right of recovery from the outgoing owner (ie the seller) or indeed (if different) from the person who was owner at the time when the original statutory notice was issued (ss 11(4) and 12(5)).

18. Thus far I have dealt only with tenements. But even with non-tenemental property there can sometimes be statutory notices in respect of repairs for which, under the real burdens in the titles, responsibility is shared. If so, then analogous rules to those described above for tenements apply: see s 10 of the Title Conditions (Scotland) Act 2003. So once again an incoming owner, having no liability to the Council in respect of a pre-existing invoice, might be liable to a neighbour who had paid the Council more than would have been due under the apportionment set out in the titles.

Other statutory provisions

19. As already, mentioned s 87 of the Civic Government (Scotland) Act 1982 – at one time used by Edinburgh Council for statutory notices – has now been repealed. So too has s 108 of the Housing (Scotland) Act 1987. (The letter of instruction mentions s 87 of the 1987 Act but this provision is not concerned with repairs.) In their place, local authorities are able to issue 'defective building notices' under s 28 of the Building (Scotland) Act 2003. If the notice is not complied with, the local authority is empowered by s 28(10)(b) to carry out the work and 'recover from the owner any expenses reasonably incurred by it in doing so' – a formulation which, following the *Purves* decision (above), seems to allow recovery from the person who is owner at the time that the invoice is issued. Parallel provisions for 'work notices' can be found in the Housing (Scotland) Act 2006 ss 30, 35 and 59(1), and there is also provision for the registration of a 'repayment charge' (ie a charging order) (s 192), which would affect purchasers even in respect of pre-existing invoices.

Extinction by negative prescription

20. The five-year negative prescription applies only in respect of the obligations listed in para 1 of schedule 1 of the Prescription and Limitation (Scotland) Act 1973: see s 6 of that Act. Obligations not appearing on that list prescribe after twenty years by virtue of s 7 of the Act.

21. None of the obligations listed in para 1 correspond to the statutory obligation to reimburse a local authority for expenditure incurred in carrying out repairs. It is true, of course, that pecuniary obligations often do come within the list and so fall within the five-year prescription. That is the case, for example, in respect of obligations to pay damages in delict, obligations arising from unjustified enrichment, and obligations due under a contract (see para 2(b), (d) and (g)). But statutory obligations of the kind imposed by s 26 of the City of Edinburgh District Council Order Confirmation Act 1991 cannot be brought within any of the headings in the list. (For a helpful discussion of statutory obligations, see para 6.35 of David Johnston's *Prescription and Limitation* (2nd edn, 2012).) And even if that were not so there would be an argument that they were excluded as being 'obligations relating to land': see 1973 Act sch 1 para 2(e), a provision which qualifies para 1.

I conclude, therefore, that the liability of an owner to reimburse the Council prescribes only after twenty years.

The Opinion of

Professor Kenneth Reid CBE FBA FRSE WS

19 November 2013

Please note that this academic Opinion is given in a personal capacity and on a without-liability basis.