Supplementary Opinion

Re

Harthill Offer/Standard Clauses

Opinion

of

Professors Brymer, Paisley, Reid and Rennie

re

1. Introduction

The following is a Supplementary Opinion of Professors Brymer, Paisley, Reid and Rennie (together herein referred to as "the Panel") to certain additional questions raised by the Glasgow Royal Faculty of Solicitors and Procurators and the Edinburgh Conveyancers' Forum (together referred to as "the Memorialists") in a Memorial dated 16 December 2008 ("the Memorial") a copy of which is annexed hereto. In addition, certain additional questions were posed of the Panel in a note dated 20 January 2009, a copy of which is also annexed hereto.

2. Opinion

2.1 Question 1 (Liability for Statutory Notices)

The view of the Panel is that the arguments in favour of Edinburgh's position with regard to this matter are more persuasive.

2.2 Question 2 (Listed Building Consents)

The view of the Panel on this matter is that a 20 year cut-off for Listed Building Consents is preferable.

2.3 Question 3 (Declarations of Trust in Dispositions)

The Panel is not in favour of trust clauses. Put bluntly, trust clauses in Dispositions have never really worked. The Deed of Conveyance containing such a Clause is arguably internally inconsistent. There is no clear trust purpose. In any event, it is the view of the Panel that the Clause is now also not necessary because of the bankruptcy legislation changes. See Section 17 of the Bankruptcy and Diligence Etc (Scotland) Act 2007.

For a full statement of the reasoning against trust clauses in Dispositions, see Reid & Gretton, Conveyancing 2004 pp78-85.

If, contrary to the view of the Panel, such clauses do work to create a trust, then it appears to the Panel to be the case that they seem to jeopardise the protection afforded to a purchaser by the off-side goals rule and seem also to open the door to a second grant having effect because

of the provisions of the Trusts (Scotland) Act 1921, s.2. They may also be possible limiting effects on the Keeper's indemnity. All in all, it is the view of the Panel that the trust clause device in Dispositions should be eradicated.

Date: 13 February 2009

HBJ Gateley Wareing

MEMO

To:	Stewart Brymer, Thorntons Law LLP
From:	Ross MacKay
Date:	16 December 2008
Re:	Harthill Offer/Standard Clauses - Memorial 2

I am pleased to report that we have now had the second drafting/revising session between the Glasgow and Edinburgh representatives dealing with the above project. The panel's comments given in their first memorial were of great assistance and have effectively been incorporated into the current working draft.

However the latest round of revisals have highlighted two further specific areas on which we would be grateful for comment or Opinion from the Professorial Panel.

These are as follows:-

1. Liability for Statutory Notices

I would refer you to what is the current Edinburgh Standard Clause 6 and its counterpart Glasgow Standard Clause 5. Whilst the clauses are very similar, there is one substantial point of difference between them, namely the date given for transfer of liability for Local Authority Repair Notices from seller to purchaser. In Edinburgh the watershed date is the date of conclusion of the missives whereas the date in Glasgow is the date of entry. It is believed these provisions reflect longstanding practice in each city.

It is believed that the distinction may reflect the situation that in Glasgow many tenemental properties are factored whereas in Edinburgh few traditional tenements are (with the co-proprietors relying on the Local Authority to perform such a role). There is little doubt that in Edinburgh the Local Authority has been active for many, many years in issuing Local Authority Repair Notices and Orders particularly as they have the ability to do so in terms of local subordinate legislation.

The Edinburgh position however is also based on the argument that a purchaser is expected to acquire a property "as seen". In the case of a tenemental property this includes the common fabric of such items as the roof, common passage and so forth. In addition, it has generally also been considered inequitable for a seller to avoid liability for a Statutory Notice which has been served during his or her period of ownership (the practical issue here as we presume the Professors are aware is that in terms of the relevant legislation Local Authorities have power to issue invoices for the actual repair costs on the owners at the time of preparing such invoices and not on the owners on whom the Notices were originally served.)

In addition, due to the pro-activity in Edinburgh of the Local Authority, there is a substantial practical concern that if the watershed became the date of entry, an unscrupulous buyer would find it relatively easy to approach the Local Authority to instigate Statutory Notice procedures in any gap period between conclusion of missives and date of entry. The end result would be that the buyer achieves a property in better condition than that originally inspected and/or surveyed by them.

It should also be noted that there is a growing practice at least in Edinburgh that the Local Authority takes the opportunity of having served a Notice to actually carry out additional and more extensive repair and improvement works to a tenement that go

substantially beyond the strict terms of the original Notice. There is in fact growing concern at the "windfall" benefit buyers can obtain in this regard.

We fully appreciate that this is not an area of legal interpretation but very much an area of longstanding practice. For this reason therefore comments will be appreciated.

2. Listed Building Consents

Both Edinburgh and Glasgow Standard Offers now adopt the view that Local Authority documentation for previous alterations are only looked for in respect of work carried out within the period 20 years preceding the date of entry. Reference is made to Edinburgh Standard Clause 8(a) and Glasgow Standard Clause 7(a).

The practice in Edinburgh however is that whilst this time limit is accepted for Building Control paperwork (that is Building Warrants and Certificates of Completion) that in connection with the need for possible Listed Building Consents under the relevant Planning legislation that no time limit is given. We refer to Edinburgh Standard Clause 8(c). In effect such consents are requested for works carried out since the date of listing of the property in question which in practice may be well outwith the 20-year period. The logic for this reflects the terms of the relevant legislation which does not give any time limit on the Local Authority for enforcing such consents (or rather lack of same). The Edinburgh concern is also reflected in the fact that a large proportion of the City is within either a Conservation Area or separately Listed.

The view has been expressed however that such concern for Listed Building Consents is illogical bearing in mind the 20-year period is accepted for other Local Authority Consents which strictly speaking are also not limited in time for enforcement.

The question therefore for the Professors is whether or not it is appropriate to accept a 20-year cut off point for such Listed Building Consents in the same manner as other Local Authority documentation.

It should be noted that the Glasgow Standard Clause 7(a) accepts the 20-year cut off point for such Consents.

I trust this brief Memo is sufficient for your purposes but if there is any point you wish to clarify or discuss further so far as local practice is concerned please don't hesitate to revert to me.

-----Original Message-----
From: Barbara Oliver [mailto:BOliver@hbj-gw.com]On Behalf Of Ross MacKay
Sent: 20 January 2009 14:19
To: Stewart Brymer
Subject: Harthill Standard Offer

Dear Stewart

I am pleased to confirm that the Glasgow and Edinburgh teams have now completed our initial efforts in combining the two Standard Offers into one.

To finalise the initial draft, it would be helpful if the Professors could revert to us on the two points which we raised in our last "Memorial" to you?

In addition, there is one final point on which we would seek your Opinion namely, the necessity or otherwise of having a clause providing the insertion of Declarations of Trust into Dispositions. The Glasgow offer contains such a provision whereas Edinburgh does not. The Edinburgh view has always been that such clauses are unnecessary and this reflects what was clear academic opinion concerning the lack of worth or efficacy of such clauses previously expressed in particular by Messrs Reid and Gretton. This also takes into account the reasoning behind Burnett's Trustee v Granger and also the recent changes to bankruptcy legislation. The Glasgow team I have to say do not feel strongly on this point but did feel that if the Professors can confirm the Edinburgh view this would assist them in persuading some of their colleagues as to the benefits of dropping this particular provision from the Standard Offer!

Once we hear back from you on these points we can then finalise the initial draft. I suspect thereafter we will seek one further joint meeting to review the draft (and perhaps also take that opportunity to review other current styles of standard clause - particularly Tayside and Aberdeen).

As always, if there are any queries, please get in touch but otherwise I look forward to hearing from you in due course.

With regards.

Yours sincerely

Ross Mackay
Partner

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