Opinion

re

Harthill Offer/Standard Clauses

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of

Professors Brymer, Paisley, Reid and Rennie

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1. Introduction

The following is the Opinion of Professors Brymer, Paisley, Reid and Rennie (together hereinreferred to as "the Panel") to questions raised by the Glasgow Royal Faculty of Solicitors and Procurators and the Edinburgh Conveyancers' Forum (together referred to as "the Memorialists") in a formal Memorial dated 25 August 2008 ("the Memorial") a copy of which is annexed hereto. The four questions on which the Opinion of the Panel has been sought are contained within the Memorial.

2. Opinion

2.1 Question 1 (Definition of "the Property")

(1) The Panel doubt whether "parts, privileges and pertinents" adds anything but do not feel strongly that the phrase needs to be excluded (though they would favour shortening it to "all other parts and pertinents").

(2) In most, if not all, cases the description of a property in an offer (despite increasing sight of titles and the availability of Land Certificates) may still be prepared without a detailed factual investigation on the part of a client or his/her solicitor as to the extent of the property. In short, there is always a certain level of uncertainty and lack of knowledge when an offer is put in. No solicitor acting for a purchaser regularly visits the site at the time of putting in an offer for residential property nor is there any obligation on him or her to do so. He or she may have photos of the property. On the other hand he or she may not. The solicitor is most likely to have a postal address and his client's description of the property. The general clauses discussed in the alternative both try to bring in a certain "catch all" provision to deal with the uncertainty and the unexpected. That is why they use the word "any" before the reference to a garage. By necessity, the seller is still likely to know more about the property than the purchaser. It is more likely that he or she will know the true facts. In the Panel's view, a certain balance should be struck. Although the clause may potentially be too extensive and general, it can always be amended by the seller's solicitor when he/she prepares the qualified acceptance. In other words, there must be a certain

tolerance to deal with the unknown and unexpected at the time of lodging an offer.

With that in mind, the Panel generally favours the Glasgow wording. The standard offer is not a Standard Missive. The whole point is that revisals can be made in a qualified acceptance. The Panel therefore agrees with the tradition of Halliday and Cusine & Rennie.

(3) The Panel does not feel that there is any need to talk about access in the description of a property in the offer. If, for the sake of argument, it turned out in terms of the title that there was no access by a public street or by way of a private servitude, then the title would be unmarketable in any event. Similarly, the Panel is not in favour of using general words like "necessary rights of access". Many existing rights of access are not "necessary" at all. They are purely desirable or beneficial or even useful. They may add material value to the property but they are not "necessary".

The word "existing" is probably what was intended. Not only can the word "necessary" allow the seller to refuse to convey a second existing access because it is not "necessary" but it could also allow a purchaser to demand a wholly new right of access which does not exist because such a new access is "necessary" and the property being sold suffers from a deficit of access rights etc. In any event, as the Memorialists have pointed out, the matter is covered elsewhere in the offer.

2.2 Question 2 (Awareness of Defects)

(1) Such "awareness" clauses are fairly widely used in practice. However, the Panel feel that it is questionable how enforceable they are. Indeed, the qualification will invariably be made along the lines of "So far as the seller is aware (but no warranty is given in this respect) there are no such facts etc...." This therefore makes the argument about such matters somewhat pointless.

(2) It is usually the case that clauses of this type are deleted and a statement being added in the qualification to the effect that the purchaser shall be deemed to have relied on his or her own survey – *caveat emptor*. The Panel is concerned as to how you actually pin down "awareness". If it can be proved that the seller boarded up dry rot then it may be straightforward. On the other hand, if dry rot fruits and there is red seed dust in the property would every seller know that that was a sign of dry rot?

(3) The Panel believe that this is something which the seller's independent survey (once introduced later this year) should identify. The risk of having such a clause is that it is almost bound to be qualified as aforesaid. However, a purchaser may erroneously think that he or she is absolutely protected should a defect arise. The Panel is therefore of the view that it is better to

have a clear cut situation where the purchaser knows that he or she has no guarantee as to the state of repair of the property.

The Panel can see the argument to the effect that it is best that there is disclosure and full information. However, a selling solicitor, if he is doing his/her job, will always get his/her client out of potential liability. Whether that position is capable of being sustained when a Single Survey has been exhibited is a matter on which the Panel has not been asked to comment. Accordingly the Panel would prefer to be realistic and let the purchasing client know that this is a matter to be enquired about by him/her at his/her own risk. In any other respect, the purchaser is being given a false sense of reassurance. The purchasing solicitor should make it clear to his/her client that there is no reassurance in the Missives in this regard so that the client will buy into the fact that he/she has a certain degree of responsibility.

The Panel accept that there may well be resistance in Edinburgh to deleting this provision which has been in use for a long time. As against that, however, the members of the Panel have never come across a case where anyone has tried to enforce such a clause which suggests that it is perhaps of little practical value. The clause may possibly have some deterrent effect in as much as it may induce a deluge of confession from the seller. It is certainly more effective in this regard than a casual question from the purchaser when looking round the house; and in practice it is unrealistic to expect purchasers to interrogate sellers on all the matters which the clause covers. In short, the deletion of the clause will remove some of the protection currently afforded to purchasers in Edinburgh but the Panel believe that the effect is likely to be marginal and, as explained above, most of this protection is illusory.

2.3 Question 3 (Guarantees/Specialist Reports)

(1) There are of course guarantees and guarantees. A specialist guarantee is not like an NHBC Guarantee; it is as strong as the party who actually gives it.

There are two situations which can arise here. In the first place, a surveyor for the purchaser (or indeed the independent surveyor) may discover some defect which would require specialist treatment. In such a case, it is obviously very important that any existing guarantee and the specification indicating what is guaranteed is made available.

On the other hand, there may be situations where the surveyor picks up no defect but there is still a guarantee for work which has been properly done, say 15 years ago with 5 years of the guarantee left to run. The Panel does not favour a clause which would allow a purchaser simply to pick technical holes in the guarantee and then rescind even although there was no suggestion that the work had not been done properly. The

Glasgow clause covers such a situation. If there is a guarantee, for say double glazing or dry rot, then it must be handed over. In the Opinion of the Panel, this is sufficient.

(2) If it is the former case where the surveyor has picked up a problem and the seller says that there is a guarantee, then the Panel believe that the Missives require to be tailored to suit that situation with an extra clause to the effect that it will be shown that the guarantee is enforceable and does cover the defect as disclosed by the surveyor.

(3) The Panel also believe that it is possible that there might be some limited circumstances where it would be appropriate to allow a right of rescission but in the present form, the clause is far too wide and creates considerable uncertainty. If a right to resile is to be retained, it would need to be much more carefully targeted. In other words, it would be necessary to decide what mischief, precisely, the provision is designed to solve and then to draft the clause so as to target that mischief alone.

2.4 Question 4 (Awareness of Developments)

(1) While accepting that there can often be benefits of such "awareness" provisions, the Panel is of the view that they can be potentially dangerous. Such provisions are widely used in practice but the Panel would question whether or not the implications have been fully considered.

(2) The Panel is generally not in favour of clauses which result in uncertainty and argument. The Edinburgh General Clause is a "catch all" clause. How would one be aware of an application for planning for an adjoining property however unless there had been neighbour notification or a notice in the local newspaper?

(3) There is more difficulty with the words "proposals" and "redevelopment plans". For example, if there have been suggestions that an area of ground in the vicinity of a property being sold is to be used for housing, is that a "proposal" or a "redevelopment plan" in some drawing office? Would the seller require to jeopardise the sale of his/her house by disclosing that there are proposals in this regard? In practice, such clauses tend to be qualified either by deleting them with reference to a Property Enquiry Certificate which is to be delivered in terms of the Missives or by stating that the seller has not received written notification of any such proposal. The latter is a more clear cut situation.

The Panel is mindful in this regard of a number of Opinions which have been given in professional negligence cases where a purchaser suddenly discovers that there is a development to take place say half a kilometre away from the property across a field in an adjoining field which, because he cannot sell his/her house

now, he/she feels ought to have been disclosed. The Panel is of the view that we must always bear in mind that if standard clauses become "standard" they also become the standard or the benchmark for negligence.

Date: 23 October 2008

HBJ Gateley Wareing

MEMO

To:	Stewart Brymer, Thorntons Law LLP
From:	Ross MacKay
Date:	25 August 2008
Re:	Harthill Offer/Standard Clauses – Memorial 1

I am pleased to report that we have had the first drafting session between the representatives from the Glasgow Royal Faculty and the Edinburgh Conveyancers Forum with a view to putting in place a formal draft of the new Standard Offer covering our respective areas. We are working on an alternative to "Harthill" but so far we are waiting on inspiration to strike!

However, the initial discussion has raised a few points which we would like to refer to the Professors for comment. I had initially indicated that we would want to try and avoid a "piecemeal" approach but we feel that an indication of how the Professors feel about the following points will in fact inform our subsequent discussions over the remaining Standard Clauses still to be discussed.

The points requiring comment and/or advice at this stage are as follows:-

1. Definition of "the Property" within the offer letter. At present Edinburgh states that Property means (insert postal address) and then goes on to state "together with any garden, garage, parking space and/or outbuildings". Glasgow repeats this wording and then goes on to state that there is included "all necessary rights of access and all rights exclusive, mutual and others pertaining thereto and the parts, privileges and pertinents thereof".

   The Edinburgh view is that this additional reference to rights and pertinents is unnecessary for the purposes of a Standard Offer. Reference to necessary rights of access is already covered by Edinburgh Standard Clause 16(e)/Glasgow Standard Clause 15(e). In addition there is uncertainty as to what exactly "parts, privileges and pertinents" may mean for the average modern property.

   The Edinburgh preference therefore is for the more limited wording while the Glasgow preference is for the more expansive wording. It has also been pointed out that Cusine & Rennie (*Missives* 2nd Ed. 4.08) suggest the usefulness of and Halliday (*Conveyancing Law & Practice* 2nd Edition 30.44) recommends a reference to pertinents as an *omnium gatherum* provision.

2. Awareness of Defects. May we refer you to Edinburgh Standard Clause 2 which asks the Seller to confirm that they are not aware of the property being affected by wet rot, dry rot etc as also other specified issues (common repairs, flooding, rent registration and landfill site).

The Glasgow Offer has no such provision. The Glasgow view is that such matters are for a Purchaser themselves to make specific enquiry about and a selling client should not be expected to make comment on these points.

The Edinburgh view is that with due awareness of the limitations of such a clause (particularly any evidential requirement) it is of merit in at least flagging up these points and hopefully flushing out further information from sellers on occasion.

From discussion it does appear that such a clause has been in use in the Edinburgh area for some time (certainly prior to the introduction of the Standard Offer) but has never had widespread acceptance in the Glasgow area. This could possibly be traced to the comments in Cusine & Rennie *Missives* 2nd Ed. At para. 4.82.

It is noted however that a number of other Standard Clauses eg Borders and Tayside do have some form of state of awareness provisions.

We would also add that it is appreciated that the introduction of the Property Questionnaire as part of the Home Report may also impact on practice in this regard going ahead but as that whole area is clearly unknown at present we feel it better to push on without waiting for practice to develop in that respect. (It is believed however that Law Society guidance will be to the effect that solicitors (as opposed to sellers) should not accept any liability for the information which may or may not be included in a PQ).

In effect therefore the Professors are asked to comment on whether or not it is appropriate for some form of 'state of awareness' clause similar in principle to Edinburgh Standard Clause 2 should be inserted in the new joint offer.

3. Provision of Guarantees/Specialist Reports. At present Glasgow Standard Clause 2(a) simply provides for delivery of "any guarantees in force" in respect of specialist treatment. Edinburgh Standard Clause 3(a) also provides for delivery (although places a 20 year time limit in this regard). Edinburgh however goes further by stating that in the event that such documentation is deemed to be "materially prejudicial to the property or the Purchaser's proposed use of same" the purchaser then has a right to resile subject to due notice etc.

   It has been noted that other Standard Offers may provide for delivery of valid and/or enforceable guarantees but do not provide for a right to resile. An argument has been made that any guarantee by virtue of being at least in force can never be deemed to be prejudicial. Against that a view has been expressed that a guarantee for tenement repairs may disclose an unsatisfactory position.

   Again the Professors' view is sought as to what would be the most equitable approach in this regard in connection with delivery of specialist documentation and/or linked to a right to withdraw.

4. Awareness of Developments. This in effect is linked to Edinburgh Standard Clause 2 in that Edinburgh Standard Clause 5(a) requests a statement from a seller that they are not aware of "proposals, applications or redevelopment plans".

   The Edinburgh view is that this is beneficial in that it will again provide in certain cases information regarding possible developments which have not yet reached formal planning application stage (or indeed proposals which may not result in a formal Neighbour Notice being served due to the technical criteria in that regard). The Glasgow view is similar to their position concerning Standard Clause 2. There does therefore appear to be a difference of opinion regarding the necessity of these awareness provisions as a matter of principle.

I trust the above is sufficient for present purposes and will allow you to canvass views from Professors Reid and Rennie as appropriate.

It is appreciated that the actual issues of legal principle are very limited in this regard and do strike primarily at issues of practice. The consensus view of course however is that a Standard Offer has to be in effect fair and reasonable to the average seller and buyer and is intended to reflect what is being termed "the settle for" position.

Obviously if there are any further queries on any specific point please don't hesitate to revert to me.